NORTH CAROLINA REPORTS
VOL. 235

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

FALL TERM, 1951

SPRING TERM, 1952

REPORTED BY

JOHN M. STRONG

RALEIGH
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PRINTERS TO THE SUPREME COURT
1952

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JUSTICES

OF THE

SUPREME COURT OF NORTH CAROLINA

FALL TERM, 1951—SPRING TERM, 1952

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ASSOCIATE JUSTICES:

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HARRY McMULLAN.

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OF THE

SUPERIOR COURTS OF NORTH CAROLINA

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

SPECIAL JUDGES

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

WESTERN DIVISION

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

SPECIAL JUDGES

GEORGE B. PATTON	Franklin.
A. R. CRISP	Lenoir.
HAROLD K. BENNETT[1]	Asheville.
SUSIE SHARP	Reidsville.

EMERGENCY JUDGES

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

[1]Resigned 29 February, 1952. W. K. McLean, Asheville, appointed 1 March, 1952.

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

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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[1]	Nineteenth	Asheville.
THADDEUS D. BRYSON, JR.	Twentieth	Bryson City.
R. J. SCOTT	Twenty-first	Danbury.

[1]Resigned 29 February, 1952. Lamar Gudger, Asheville, appointed 1 March, 1952.

SUPERIOR COURTS, SPRING TERM, 1952

(Revised through 10 December, 1951.)

The numbers in parentheses following the date of a term indicate the number of weeks the term may hold. Absence of parenthesis numbers indicates a one-week term.

EASTERN DIVISION

FIRST JUDICIAL DISTRICT
Judge Williams

Beaufort—Jan. 14*; Jan. 21; Feb. 18† (2); Mar. 17* (A); Apr. 7†; May 5† (2); June 23.
Camden—Mar. 10.
Chowan—Mar. 31; Apr. 28†.
Currituck—Mar. 3.
Dare—May 26.
Gates—Mar. 24.
Hyde—May 19.
Pasquotank—Jan. 7†; Feb. 11†; Feb. 18* (A) (2); May 5† (A) (2); June 2*; June 9† (2).
Perquimans—Jan. 28†; Feb. 4† (s); Apr. 14.
Tyrrell—Feb. 4†; Apr. 21.

SECOND JUDICIAL DISTRICT
Judge Frizzelle

Edgecombe—Jan. 21; Mar. 3; Mar. 31† (2); June 2 (2).
Martin—Mar. 17 (2); Apr. 14† (A) (2); June 16.
Nash—Jan. 28; Feb. 18† (2); Mar. 10; Apr. 28†; May 26.
Washington—Jan. 7 (2); Apr. 14†.
Wilson—Jan. 21† (s); Feb. 4†; Feb. 11*; May 5* (2); May 19†; June 23†.

THIRD JUDICIAL DISTRICT
Judge Stevens

Bertie—Feb. 11 (2); May 12 (2).
Halifax—Jan. 28 (2); Mar. 10† (2); Apr. 28; June 2†; June 9.
Hertford—Feb. 25; Apr. 14 (2).
Northampton—Mar. 31 (2).
Vance—Jan. 14*; Mar. 3*; Mar. 24†; June 16*; June 23†.
Warren—Jan. 7*; Jan. 21†; May 5†; May 26*.

FOURTH JUDICIAL DISTRICT
Judge Harris

Chatham—Jan. 14; Mar. 3†; Mar. 17†; May 12.
Harnett—Jan. 7*; Feb. 4† (2); Mar. 17* (A); Mar. 31†; May 5†; May 19*; June 9† (2).
Johnston—Jan. 7† (A) (2); Feb. 11 (A); Feb. 18†; Feb. 25; Mar. 3 (A); Mar. 10; Apr. 14 (A); Apr. 21† (2); June 23*.
Lee—Jan. 28† (A); Feb. 4 (A); Mar. 24*; Mar. 31†.
Wayne—Jan. 21; Jan. 28†; Mar. 3† (A) (2); Apr. 7; Apr. 14†; Apr. 21† (A); May. 26; June 2† (2).

FIFTH JUDICIAL DISTRICT
Judge Burney

Carteret—Mar. 10; June 9 (2).
Craven—Jan. 7; Jan. 28†; Feb. 4†; Feb. 11; Apr. 7; May 12†; June 2.
Greene—Feb. 25; Mar. 3; June 23.
Jones—Jan. 28 (s); Mar. 31.
Pamlico—Apr. 28 (2).
Pitt—Jan. 14†; Jan. 21; Feb. 18†; Mar. 17; Mar. 24; Apr. 14 (2); May 19†; May 26‡.

SIXTH JUDICIAL DISTRICT
Judge Nimocks

Duplin—Jan. 7† (2); Jan. 28*; Mar. 10† (2); Apr. 7; Apr. 14†.
Lenoir—Jan. 21*; Feb. 18†; Feb. 25†; Mar. 17; Apr. 21; May 12†; May 19†; June 9†; June 16†; June 23*.
Onslow—Jan. 14 (2); Mar. 3; May 26 (2).
Sampson—Feb. 4 (2); Mar. 24† (2); Apr. 28; May 5†.

SEVENTH JUDICIAL DISTRICT
Judge Carr

Franklin—Jan. 21† (2); Feb. 11*; Apr. 14*; Apr. 28† (2).
Wake—Jan. 7*; Jan. 14†; Jan. 21† (A) (2); Feb. 11* (s); Feb. 18† (2); Mar. 3* (2); Mar. 17† (2); Mar. 31*; Apr. 21†; Apr. 28† (A); May 5*; May 12† (3); June 2* (2); June 16† (2).

EIGHTH JUDICIAL DISTRICT
Judge Morris

Brunswick—Jan. 21; Feb. 11†; Apr. 7†; May 12.
Columbus—Jan. 7† (A); Jan. 28* (2); Feb. 18† (2); May 5*; June 16.
New Hanover—Jan. 14*; Feb. 11† (A); Feb. 25* (A); Mar. 3*; Mar. 10† (2); Apr. 14† (2); May 19*; May 26† (2); June 9*.
Pender—Jan. 7; Mar. 24† (2); Apr. 28.

NINTH JUDICIAL DISTRICT
Judge Bone

Bladen—Jan. 7; Mar. 17*; Mar. 24* (s); Apr. 28†.
Cumberland—Jan. 14*; Feb. 11† (2); Feb. 25* (s); Mar. 3* (A); Mar. 10*; Mar. 24† (2); Apr. 7* (s); Apr. 28*; May 5† (2); June 2*.
Hoke—Jan. 21; Apr. 21.
Robeson—Jan. 21† (A); Jan. 28* (2); Feb. 25† (2); Feb. 25† (2); Apr. 7* (2); Apr. 21† (A); May 5* (A) (2); May 19† (2); June 9†; June 16*.

TENTH JUDICIAL DISTRICT
Judge Parker

Alamance—Jan. 14† (A); Feb. 4* (A); Feb. 18† (s); Mar. 24† (A); Mar. 31†; Mar. 31†; Apr. 14* (A); May 19† (A); May 26†; June 9* (A).
Durham—Jan. 7*; Jan. 14† (2); Jan. 28; Feb. 11* (A); Feb. 18*; Feb. 25† (3); Mar. 17 (A); Mar. 24*; Mar. 31* (A); Apr. 7† (A) (2); Apr. 28 (A); Apr. 28† (2); May 12* (A); May 19*; May 26† (A); June 2†; June 9 (A); June 16* (A); June 23*.
Granville—Feb. 4 (2); Apr. 7.
Orange—Mar. 17. May 12†; June 9; June 16†.
Person—Feb. 4† (A); Apr. 21.

WESTERN DIVISION

ELEVENTH JUDICIAL DISTRICT
Judge Rousseau

Ashe—Apr. 14*; May 26† (2).
Alleghany—Jan. 28 (A); Apr. 28.
Forsyth—Jan. 7* (2); Jan. 21† (2); Feb. 4* (2); Feb. 11† (A); Feb. 18‡; Feb. 25; Mar. 3* (2); Mar. 10† (A); Mar. 17† (A); Mar. 17† (2); Mar. 31* (2); Apr. 14 (A); Apr. 21; Apr. 28 (A); May 12* (2); May 26† (A) (2); June 9* (2); June 16† (A) (2).

TWELFTH JUDICIAL DISTRICT
Judge Pless

Davidson—Jan. 28; Feb. 18† (2); Apr. 7† (A) (2); May 5; May 26† (A) (2); June 23.
Guilford, Greensboro Division—Jan. 7† (A); Jan. 7*; Jan. 14† (2); Feb. 4† (A); Feb. 4* (2); Mar. 3† (2); Mar. 3* (A); Mar. 17* (2); Mar. 31† (A) (2); Apr. 14† (2); Apr. 21*; Apr. 28† (A) (2); May 12* (A) (2); June 2† (2); June 9* (A) (2).
Guilford, High Point Division—Jan. 14* (A) (2); Jan. 28†; Feb. 18* (A) (2); Mar. 10* (A); Mar. 17† (A) (2); Mar. 31* (2); Apr. 28*; May 12† (2); May 26*; June 23†

THIRTEENTH JUDICIAL DISTRICT
Judge Nettles

Anson—Jan. 14*; Mar. 3†; Apr. 14 (2); June 9†.
Moore—Jan. 21*; Feb. 11†; Mar. 24†; May 19*; May 26†.
Richmond—Jan. 7*; Mar. 17†; Apr. 7*; June 16† (2).
Scotland—Mar. 10; Apr. 28†.
Stanly—Feb. 4†; Feb. 11† (A); Mar. 31; May 12†.
Union—Feb. 18 (2); May 5.

FOURTEENTH JUDICIAL DISTRICT
Judge Moore

Gaston—Jan. 14*; Jan. 21†; Mar. 10* (A); Mar. 24†; Apr. 21*; May 19† (A); June 2*.
Mecklenburg—Jan. 7*; Jan. 7† (A) (2); Jan. 21† (A) (2); Jan. 21* (A) (2); Feb. 4† (3); Feb. 4† (A); Feb. 18† (A) (2); Feb. 25*; Mar. 3† (2); Mar. 3† (A) (2); Mar. 17† (A) (2); Mar. 17* (A) (2); Mar. 31† (2); Mar. 31† (A) (2); Apr. 14†; Apr. 14* (A); Apr. 21† (A); Apr. 28† (2); Apr. 28† (A) (2); May 12*; May 12† (A) (2); May 19† (2); May 26† (A) (2); June 9*; June 9† (A) (2); June 16†; June 23* (2).

FIFTEENTH JUDICIAL DISTRICT
Judge Clement

Alexander—Feb. 4 (A); Apr. 14.
Cabarrus—Jan. 7 (2); Feb. 25†; Mar. 3† (A); Apr. 21 (2); June 9† (2).
Iredell—Jan. 28 (2); Mar. 10†; May 19 (2).
Montgomery—Jan. 21*; Apr. 7†; Apr. 14† (A).
Randolph—Jan. 28† (A) (2); Mar. 17† (2); Mar. 31*; June 23*.
Rowan—Feb. 11 (2); Mar. 3†; Mar. 10† (A); May 5 (2).

SIXTEENTH JUDICIAL DISTRICT
Judge Sink

Burke—Feb. 18; Mar. 10 (2); June 2 (2).
Caldwell—Jan. 7† (A); Feb. 25 (2); Apr. 28† (A) (2); May 19 (2); June 2† (A).
Catawba—Jan. 14† (2); Feb. 4 (2); Apr. 7 (2); May 5† (2).
Cleveland—Jan. 7; Feb. 4† (A) (s); Feb. 11† (A); Mar. 24 (2); May 19† (A) (2).
Lincoln—Jan. 21 (A); Jan. 28†; Apr. 28.
Watauga—Apr. 21*; June 9† (A) (2).

SEVENTEENTH JUDICIAL DISTRICT
Judge Phillips

Avery—Apr. 14 (2).
Davie—Jan. 28* (s); Mar. 24; May 26†.
Mitchell—Mar. 31.
Wilkes—Jan 14† (3); Mar. 3 (3); Apr. 28† (2); June 2 (2); June 16† (2).
Yadkin—Jan. 7; Feb. 4 (3); May 12.

EIGHTEENTH JUDICIAL DISTRICT
Judge Gwyn

Henderson—Jan. 7†; Mar. 3 (2); Apr. 28† (2); June 2†.
McDowell—Jan. 14* (A); Feb. 11† (2); June 9 (2).
Polk—Jan. 28 (2).
Rutherford—Feb. 25†; Apr. 21†; May 12 (2); June 23† (2).
Transylvania—Mar. 31 (2).
Yancey—Jan. 21†; Mar. 17 (2).

NINETEENTH JUDICIAL DISTRICT
Judge Bobbitt

Buncombe—Jan. 7†* (2); Jan. 21*†; Jan. 28; Feb. 4†* (2); Feb. 18*†; Feb. 18 (A) (2); Mar. 3†*; Mar. 17*†; Mar. 17 (A) (2); Mar. 31†* (2); Apr. 14*†; Apr. 21 (A); Apr. 28; May 5†* (2); May 19*†; May 19 (A) (2); June 2†* (2); June 16*†; June 16 (A) (2).
Madison—Feb. 25; Mar. 31 (A) (2); May 26; June 23.

TWENTIETH JUDICIAL DISTRICT
Judge Armstrong

Cherokee—Jan. 28†; Mar. 31 (2); June 23†.
Clay—Apr. 28.
Graham—Mar. 17 (2); June 2† (2).
Haywood—Jan. 7†; Feb. 4 (2); May 5† (2).
Jackson—Feb. 18 (2); May 19 (2).
Macon—Apr. 14 (2).
Swain—Mar. 3 (2).

TWENTY-FIRST JUDICIAL DISTRICT
Judge Rudisill

Caswell—Mar. 17*; Apr. 7† (A).
Rockingham—Jan. 21* (2); Mar. 3†; Mar. 10*; Apr. 14†; May 5† (2); May 19* (2); June 9† (2).
Stokes—Jan. 7*; Mar. 31*; Apr. 7†; June 23*.
Surry—Jan. 14; Feb. 11; Feb. 18 (2); Apr. 21; Apr. 28; June 2.

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*For criminal cases.
†For civil cases.
‡For jail and civil cases.
No designation for criminal and civil cases.
(A) 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., THOMAS F. ELLIS, Raleigh, N. C., Assistant United States Attorneys.
F. S. WORTHY, United States Marshal, Raleigh.
A. HAND JAMES, Clerk United States District Court, Raleigh.

MIDDLE DISTRICT

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

Durham, fourth Monday in September and 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, Assistant United States Attorney, Reidsville.
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.

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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1951

EVERETT SMITH, ADMINISTRATOR OF DONALD H. SMITH, v. C. F. HEFNER, R. M. GALLOWAY, SR., J. P. GIBBONS, JR., NORA L. HATCHER, MARY M. KING, AND WILLIAM A. PEGRAM, TRUSTEES OF THE HAMLET CITY SCHOOL ADMINISTRATIVE UNIT OF RICHMOND COUNTY; DR. R. B. GARRISON, E. B. GUNTER, H. M. KYSER, AND W. L. HALTIWANGER, TRUSTEES AND/OR COMMISSIONERS AND/OR COMMITTEE OF THE HAMLET MEMORIAL PARK COMMISSION; HAMLET RAILERS, INC.; JOHNNY WHITLOCK; AND SAM JOHNSON.

(Filed 1 February, 1952.)

1. State § 3—

Neither the State nor its political subdivisions which exercise statutory governmental functions may be sued unless authorized by statute.

2. Schools § 11b—

Trustees of a school administrative unit may not be sued in tort, there being no statutory authority therefor, G.S. 115-8, G.S. 115-56. *Semble:* An administrative school unit may not be held liable for torts committed by its employees or trustees.

3. Public Officers § 8—

In the performance of governmental duties involving the exercise of judgment and discretion, a public official is clothed with immunity for mere negligence, and may be held liable only if his act or failure to act is corrupt or malicious or if he acts beyond the scope of his duties.

4. Same—

While an employee, as distinguished from a public official, may be held liable individually for negligence in the performance of his duties, such negligence may not be imputed to the employer on the principle of *respondeat superior* when the employer is clothed with governmental immunity.

5. Schools § 5f—

Park commissioners and school trustees of a city administrative unit act within their authority in providing an athletic field for games and exhibitions, with grandstand and other seating facilities, since an athletic field is an essential part of the physical plant of a well integrated school unit, and they may also rent such field for the benefit of the unit when the primary use of the field is reserved for school purposes.

6. Schools § 4d: Public Officers § 8—

Park commissioners and school trustees of a city administrative unit may not be held individually liable for negligent injury to a patron at a baseball game occurring while the school athletic field was rented to a league baseball club, there being no allegations that their conduct was either corrupt or malicious, and it appearing that they were acting in the scope of their duties and were therefore clothed with governmental immunity.

APPEAL by plaintiff from *Clement, J.*, June Term, 1951, of RICHMOND.

Civil action by plaintiff to recover damages for the alleged wrongful death of his intestate caused by the fall of a stack of cement blocks piled near where he was sitting as a spectator at a league baseball game. The case was heard below on demurrers filed by some of the defendants for failure of the complaint to state facts sufficient to constitute a cause of action as to them.

The defendants, as named in the complaint and served with summons, are as follows: (1) "C. F. Hefner, R. M. Galloway, Sr., J. P. Gibbons, Jr., Nora L. Hatcher, Mary M. King, and William A. Pegram, Trustees of the Hamlet City School Administrative Unit of Richmond County,"—hereinafter referred to as School Trustees; (2) "Dr. R. B. Garrison, E. B. Gunter, H. M. Kyser, and W. L. Haltiwanger, Trustees and/or Commissioners and/or Committee of the Hamlet Memorial Park Commission,"—hereinafter referred to as Park Commissioners; (3) "Hamlet Railers, Inc.,"—hereinafter referred to as League Baseball Club; (4) "Johnny Whitlock"; and (5) "Sam Johnson."

The pertinent allegations of the complaint may be summarized as follows:

1. That the School Trustees hold title to the athletic field where the intestate was fatally injured; that in furtherance of a mutual desire to improve the facilities of the athletic field and for the purpose of better promoting games and sports therein, the Park Commissioners had joined with the School Trustees and the League Baseball Club in building a cement-block wall around the entire athletic field; and at the time of the injury sued on, in order further to develop the property and make it more usable for games and exhibitions, these defendants were engaged in erecting a cement-block grandstand within the walls of the park area, with the Park Commissioners being "in charge and management of the

construction thereof." That the grandstand was being built in order to facilitate the "charging of admission to such games and plays as were from time to time staged in said park, and for revenue purposes and to increase the revenue therefrom."

2. That on or about March 13, 1950, the Park Commissioners, in furtherance of the mutual "plan, scheme and enterprise" of developing the athletic field for games and exhibitions "for itself and the owners of the park lands, rented or leased" the athletic field to the League Baseball Club "for a monetary consideration and for profit and gain," to be used by the ball club in furnishing entertainment for which admission fees would be charged.

3. That "sometime prior to April 26, 1950 the defendants herein (School Trustees, Park Commissioners, and League Baseball Club), acting as a committee, trustees and commissioners as aforesaid, and in their individual capacity, employed the defendant, Johnny Whitlock, to build the grandstand against the cement wall, . . . and the same had been commenced, and was in the process of construction with the foundation laid, and . . . Johnny Whitlock was an employee, employed by the other defendants hereinbefore named";

4. "That Sam Johnson was the owner of a truck, and operated the same for hire, and the other defendants hereinbefore named, employed . . . Sam Johnson to haul and place on . . . lands, cement blocks to be used by the defendants in the construction of said grandstand in said park, and . . . Sam Johnson was employed by the defendants for such purpose, and at the times herein set out was an employee and servant of said defendants above named."

5. "That . . . Sam Johnson hauled a large number of cement blocks, and the defendants hereinbefore named showed him where to place them, and . . . Sam Johnson placed said cement blocks . . . where he was shown by the defendants aforesaid, or some of them who were acting for and on behalf of all of the defendants and all of the groups herein named as defendants, and the said defendants selected the place where said cement blocks should be stacked, on a hillside, adjacent to the cement wall theretofore erected around the . . . ball park, and directed . . . Sam Johnson to stack them on the incline, or hillside, adjacent to the . . . cement wall on the outside of said park."

6. That the place selected by the defendants, where they directed Sam Johnson to stack the cement blocks, was adjacent to or near the cement wall, on the outside of the park and directly opposite the space on the inside where the patrons and spectators sat in viewing games in the park.

7. That Sam Johnson, pursuant to the orders and directions of the defendants, stacked a large number of cement blocks on the hillside adjacent to and just outside of the cement wall, near where spectators sat on the inside of the wall in viewing games and exhibitions, and he, in

piling the cement blocks, stacked them in high piles near the wall, adjacent to and extending above the level of the wall, and in a careening position with the contour of the incline or hill.

8. "That the defendants, their agents and employees negligently and carelessly selected said place, and carelessly and negligently caused said cement blocks to be stacked at said place, on said incline and hillside, . . . leaning toward said wall in high stacks or piles, and carelessly and negligently left the same there for a considerable period," that they knew or "should have known at the time of the selection of the . . . place, and at the time of the stacking of said cement blocks on said hillside adjacent to said wall, and adjacent to the place where the guests, patrons and spectators visiting said ball park sat and used to see said games . . . it was dangerous and hazardous, and they knew, or should have known, that stacks or piles as high as they were, and in the way and manner said cement blocks were stacked or piled, . . . they were dangerous and would fall, and created a hazard and a dangerous place to the patrons, guests and spectators at said games, plays, or exhibitions."

9. That on the night of 26 April, 1950, the League Baseball Club played a game of baseball "in said park, and it was advertised and large crowds gathered and paid admissions to see the same, and at said time, said defendant, as well as the other defendants, well knew, or should have known, that said cement blocks were stacked in a dangerous way and manner . . . (as previously described) . . . and notwithstanding this knowledge, said defendant, as well as its co-defendants carelessly and negligently permitted and allowed the patrons, guests and spectators who had paid . . . admission fee(s) to see said game, to sit and use the space against or near said cement wall, on the outside of which, and leaning toward it were the high stacks and piles of cement blocks."

10. "That on the night of April 26, 1950 the plaintiff's intestate bought a ticket and went into said park to see said game, . . . and with the other spectators sat near the cement wall of said park, while directly outside and adjacent thereto, said . . . piles of cement blocks were stacked, and while he was thus engaged in looking at . . . said game, the . . . stack of cement blocks theretofore carelessly and negligently placed on the outside of said wall . . . fell against the . . . cement wall, crushing it to the ground and causing the cement wall and the stacks and piles of cement blocks to fall upon the plaintiff's intestate and badly crushed, bruised and mangled his body in such . . . manner that he was critically injured and died a short time thereafter."

11. That the intestate's death was caused solely by the negligent acts and conduct of the defendants (1) in selecting as the place to pile the cement blocks a dangerous site on a hillside adjacent to the place where the spectators sat; (2) in so stacking the blocks "in a careening position in high piles, . . . thus creating a dangerous and hazardous place"; (3)

in allowing the cement blocks to remain in such dangerous position; (4) in permitting spectators attending the games "to sit at, against, or near" the hazard thus created; and (5) in failing to provide the intestate a safe place at which to sit and view the game.

12. That by reason of the intestate's death, due to the defendants' negligence as alleged, "the plaintiff has been damaged . . . in the sum of $100,000," and "has instituted this action within one year from the date of the death of the plaintiff's intestate."

Demurrers to the complaint, for failure to state facts sufficient to constitute a cause of action, were filed (1) by the School Trustees, both as trustees and as individuals; and (2) by the members of the Park Commission, both in their representative capacities and as individuals.

At the hearing the trial judge sustained the demurrers of the School Trustees, both as trustees and as individuals. The judge also sustained the demurrer of the members of the Park Commission interposed in their individual capacities, but overruled the demurrer filed by them in their representative capacities.

From these adverse rulings, discharging the Park Commissioners as individuals and the School Trustees, both as trustees and as individuals, the plaintiff appealed to this Court, assigning errors.

George S. Steele and Gavin, Jackson & Gavin for plaintiff, appellant.
Bynum & Bynum for defendants, appellees.

JOHNSON, J. The statutory machinery for the operation of the public school system of this State is codified in Chapter 115 of the General Statutes of North Carolina.

G.S. 115-8 sets up two coordinate classes of local administrative units: (1) county units and (2) city administrative units. By the provisions of this statute each county of the State is designated a county administrative unit, the schools of which, except in city administrative units, are placed under the general supervision and control of a county board of education with a county superintendent as the administrative officer. The statute defines a city administrative unit as an area, within a county, comprising a school population of 1,000 or more, which has been or may be approved by the State Board of Education as such unit for the purposes of school administration. The statute also places the general administration and supervision of a city administrative unit under the control of a board of trustees or school commissioners with a city superintendent as the administrative officer.

G.S. 115-56 confers upon county boards of education, subject to paramount powers vested in the State Board of Education or other authorized agencies, general powers of control and supervision over the operation of the public schools in their respective counties, except in respect to city

administrative units which by the provisions of G.S. 115-352 as amended (1951 Cumulative Supplement) are required to be dealt with by the state school authorities in all matters of school administration independent of and in the same manner as are county administrative units. See also G.S. 115-352; G.S. 115-353; G.S. 115-77; G.S. 115-81; and G.S. 115-82.

By the provisions of G.S. 115-45 the board of education of each county is constituted a body corporate and made "capable of . . . prosecuting and defending suits for or against the corporation."

However, our examination of the statutory machinery governing the operation of the public school system of the State (G.S. 115-1 through G.S. 115-394 and the amendments thereto) reveals no reference to any statutory right to sue the trustees of a city administrative school unit.

It is an established principle of jurisprudence, resting on grounds of sound public policy, that a state may not be sued in its own courts or elsewhere unless by statute it has consented to be sued or has otherwise waived its immunity from suit. *Schloss v. Highway Commission,* 230 N.C. 489, 53 S.E. 2d 517; *Dalton v. Highway Commission,* 223 N.C. 406, 27 S.E. 2d 1; *Prudential Insurance Co. v. Powell,* 217 N.C. 495, 8 S.E. 2d 619; *Rotan v. State,* 195 N.C. 291, 141 S.E. 733; *Dredging Co. v. State,* 191 N.C. 243, 131 S.E. 665; *Carpenter v. Railway Co.,* 184 N.C. 400, 114 S.E. 693; 49 Am. Jur., States, Territories, and Dependencies, Sec. 91; Annotations: 42 A.L.R. 1464, 50 A.L.R. 1408.

By application of this principle, a subordinate division of the state, or agency exercising statutory governmental functions like a city administrative school unit, may be sued only when and as authorized by statute. *Kirby v. Board of Education,* 230 N.C. 619, 55 S.E. 2d 322; *Wallace v. Trustees,* 84 N.C. 164; *Smith v. School Trustees,* 141 N.C. 143 (mid. p. 153), 53 S.E. 524; *Burgin v. Smith,* 151 N.C. 561 (mid. p. 567), 66 S.E. 607; *Jones v. Commissioners,* 130 N.C. 451 (mid. p. 452), 42 S.E. 144; *Moody v. State Prison,* 128 N.C. 12, 38 S.E. 131. See also McIntosh, North Carolina Practice and Procedure, p. 229.

It follows, therefore, that since there has been no statutory removal of the common law immunity from suit of the Trustees of the Hamlet City School Administrative Unit, the demurrer interposed by them as such trustees was properly sustained by Judge Clement.

Accordingly, we do not reach for decision the question, discussed in the briefs, as to whether, assuming the existence of general authority to sue a local agency of government like a city administrative school unit, such authority would extend only to such actions as are essentially incidental to the operation of the agency, and exclude causes of action sounding in tort. Suffice it to say, the decided weight of authority supports the view that an administrative school unit or school district may not be held liable for torts committed by its trustees or employees. *Benton v. Board of*

Education, 201 N.C. 653, 161 S.E. 96; 47 Am. Jur., Schools, Sec. 56; Annotation: 160 A.L.R. 7, pp. 17, 37, 38 and 40.

We come now to review the action of the court below in sustaining the demurrer interposed by the School Trustees and Park Commissioners as individuals.

It is settled law in this jurisdiction that a public official, engaged in the performance of governmental duties involving the exercise of judgment and discretion, may not be held personally liable for mere negligence in respect thereto. The rule in such cases is that an official may not be held liable unless it be alleged and proved that his act, or failure to act, was corrupt or malicious (*Miller v. Jones,* 224 N.C. 783, 32 S.E. 2d 594; *Hipp v. Ferrall,* 173 N.C. 167, 91 S.E. 831; *Templeton v. Beard,* 159 N.C. 63, 74 S.E. 735), or that he acted outside of and beyond the scope of his duties. *Gurganious v. Simpson,* 213 N.C. 613, 197 S.E. 163. And, while an employee of an agency of government, as distinguished from a public official, is generally held individually liable for negligence in the performance of his duties, nevertheless such negligence may not be imputed to the employer on the principle of *respondeat superior,* when such employer is clothed with governmental immunity. *Miller v. Jones, supra.* See also 23 N.C.L.R., p. 270 *et seq.*

In the instant case the School Trustees and Park Commissioners were engaged in official, administrative acts involving the exercise of discretion at the times laid in the complaint. It is not alleged that their conduct was either corrupt or malicious. Nor does it appear that they were acting beyond the scope of their duties as such trustees and commissioners. Under the modern concept of public education, which recognizes the necessity of ministering to the physical as well as the mental needs of school children, an athletic field for games and exhibitions, with grandstand or other seating facility, is an essential part of the physical plant of a well integrated school unit. This being so, the action of the School Trustees and Park Commissioners in providing for the erection of a grandstand may not be treated as an activity beyond the scope of their duties as such public officials. Nor is their position rendered less immune from liability by reason of the fact that the athletic field had been leased "for a monetary consideration and for profit and gain." Here, it is observed (as part of the allegations of the complaint), that in leasing the field to the League Baseball Club, the parties "reserved for the benefit of the Hamlet City School Administrative Unit . . . the use of said park and first-refusal to its use, and it was agreed that the . . . Baseball Club should check with the parties . . . and work out a schedule to avoid a conflict in games, plays and exhibitions." See *Boney v. Kinston Graded Schools,* 229 N.C. 136, 48 S.E. 2d 56.

It thus appears that in leasing the athletic field to the League Baseball Club so as to provide monetary benefits for the City Administrative

School Unit, the School Trustees and Park Commissioners nevertheless reserved the primary use of the field for the school children and their sports activities. Accordingly, the action of these officials in so leasing the athletic field may not be interpreted as abridging their ordinary governmental immunity from suit.

It follows, therefore, that the court below properly sustained the demurrer interposed by the School Trustees and Park Commissioners in their individual capacities.

The judgment below is

Affirmed.

F. L. KREEGER, HUGH PFAFF, R. C. REED, C. R. WATTS, FRANK STRUPE, GILBERT DOUB, J. H. NANCE, C. H. SMITHERMAN, H. K. HENDRIX AND ALL OTHER TAXPAYERS AND CITIZENS SIMILARLY SITUATED IN OLD RICHMOND SCHOOL DISTRICT, v. DAN L. DRUMMOND, B. E. WILSON, E. C. GOODMAN, G. S. COLTRANE AND WILMA MATTHEWS, MEMBERS OF FORSYTH COUNTY BOARD OF EDUCATION, AND DR. RALPH BRIMLEY, FORSYTH COUNTY SUPERINTENDENT OF SCHOOLS, AND FORSYTH COUNTY BOARD OF EDUCATION, A CORPORATE BODY.

(Filed 1 February, 1952.)

1. Schools § 3a—

A county board of education has the discretionary power, with the approval of the State Board of Education, to close a high school in a union school and transfer the high school pupils to other high schools in adjoining districts provided there is a consolidation of the districts involved and a finding as to the adequacy of the school facilities in the consolidated district or districts. G.S. 115-99.

2. Same—

The courts will not interfere with the action of the school authorities in creating or consolidating school districts unless the authorities act contrary to law or there is a manifest abuse of discretion on their part.

3. Same—

A county board of education has discretionary power to close a high school in a union school and thus change the district from a union or high school district to an elementary school district.

4. Schools § 5b—

The requirement that one or more public schools be maintained in each school district for at least six months in every year does not apply to high schools. Constitution of N. C., Art. IX, sec. 3.

5. Schools § 3a—

The power of the State Board of Education to transfer students from one district to another, G.S. 115-352, contemplates a transfer of students for a single year, or from year to year, and the statute has no application to a permanent transfer of high school students from a union school to

high schools in adjoining districts, which may be done by the county board of education with the approval of the State Board of Education by a consolidation of high school districts. The State Board of Education is not a necessary party in an action to determine the power of a county board to order such consolidation.

APPEAL by plaintiffs from *Pless, J.,* September Term, 1951, of FORSYTH.

This is a controversy arising out of an order duly passed by the Board of Education of Forsyth County on 18 July, 1950, to close Old Richmond High School and transfer the high school pupils to Old Town and Rural Hall school districts. Both the elementary and high school grades have been taught at Old Richmond High School for many years. It has been what is known as a union school. The Board set forth in its resolution that Old Richmond High School had less than one hundred students; that because of the smallness of the school the State Board of Education has refused to furnish a vocational home economics teacher, and that whatever training the pupils obtain in that field must be obtained from a teacher in another department. The Board found it would be for the best interest and advantage of the pupils of Old Richmond High School to transfer them to a larger high school; that it would result in a saving of money in the operation of the schools to close the Old Richmond High School and transfer its pupils to either Old Town High School or Rural Hall High School, and it was so ordered.

On 1 September, 1950, it appearing that additions to the Old Town and Rural Hall High Schools, which were under construction at that time, would not be completed and ready for use at the opening of school, the Board ordered that Old Richmond High School be kept "open for one more year, that is, the year 1950-1951."

A delegation from Old Richmond High School appeared before the Board of Education of Forsyth County on 6 August, 1951, and requested the Board to rescind its action of 1 September, 1950, and to continue the school for another year. The Board declined the request.

The delegation appealed from the action of the Board of Education of Forsyth County to the State Board of Education, and was given a hearing in Raleigh on 6 September, 1951. After hearing the arguments in said cause, the State Board of Education approved the action of the Board of Education of Forsyth County to transfer the high school pupils of the Old Richmond High School to the Old Town and Rural Hall High Schools.

The plaintiffs had theretofore, on 24 August, 1951, obtained a temporary restraining order against the defendants, enjoining them from interfering with the operation of a high school at Old Richmond and directed them to appear before the Honorable J. Will Pless, Jr., Judge presiding

and holding the courts of the Eleventh Judicial District, at 10 o'clock a.m., on the 10th day of September, 1951, and show cause, if any they have, why the order should not be made permanent or continued until the final hearing.

The plaintiffs, on 17 September, 1951, filed a motion to make the State Board of Education a party defendant, but it does not appear of record that a ruling thereon was requested in the court below or that the pending motion was called to the attention of the trial judge.

The cause came on for hearing before his Honor on 19 September, 1951, and upon a consideration of the affidavits and argument of counsel, the court held as a matter of law that the Board of Education of Forsyth County had the authority to make the order closing Old Richmond High School and to transfer the students therefrom to Rural Hall and to Old Town High Schools. And his Honor found as a fact that in making the order, the Board of Education of Forsyth County did not abuse its discretion, nor did it act in bad faith, and that the said order is in all respects lawful. Whereupon, the court dissolved the restraining order.

The plaintiffs appeal, assigning error.

Buford T. Henderson for plaintiffs, appellants.

Hastings & Booe and Deal, Hutchins & Minor for defendants, appellees.

DENNY, J. The question presented is whether the board of education in a county may, in its discretion, with the approval of the State Board of Education, close a high school in a union school and transfer the high school pupils to other high schools in adjoining districts.

Prior to the enactment of Chapter 562, Public Laws of 1933, this Court held in the case of *Clark v. McQueen,* 195 N.C. 714, 143 S.E. 528, that the board of education in a county, in this State, had the power, in the exercise of its discretion, to discontinue a high school in a union school, theretofore established by such board, in a school district of its county, and to transfer the high school to an adjoining district within the county, citing C.S. 5428, now G.S. 115-54, and C.S. 5437, now G.S. 115-61.

However, Chapter 562 of Public Laws of 1933, section 4, abolished "all school districts, special tax, special charter, or otherwise," as then constituted for school administration or for tax levying purposes and declared them to be nonexistent. The Act further provided, "the State School Commission in making provision for the operation of the schools shall classify each county as an administrative unit and shall with the advice of the county boards of education redistrict each county, thereby making provision for such convenient number of school districts as the Commission may deem necessary for the economical administration and operation

of the State school system and shall determine whether there shall be operated in such district an elementary or a union school."

The Public Laws of 1939, Chapter 358, as amended, now designated as the School Law of 1939, and codified as G.S. 115-347, *et seq.*, through 382, directed the State Board of Education, in section 5 of the Act, G.S. 115-352, to classify each county as an administrative unit, and with the advice of the county boards of education, to make a careful study of the district organization, as the same was constituted under the authority of section 4 of Chapter 562 of the Public Laws of 1933, as modified by the subsequent school machinery act. This section also contains these pertinent provisions: "The state board of education may modify such district organization when it is deemed necessary for the economical administration and operation of the state school system and it shall determine whether there shall be operated in such district an elementary or a union school. . . . School children shall attend school within the district in which they reside unless assigned elsewhere by the state board of education. It shall be within the discretion of the state board of education, wherever it shall appear to be more economical for the efficient operation of the schools, to transfer children living in one administrative unit or district to another administrative unit or district for the full term of such school without the payment of tuition: Provided, that sufficient space is available in the building of such unit or district to which the said children are transferred: Provided further, the provision as to the nonpayment of tuition shall not apply to children who have not been transferred as set out in this section."

The School Law of 1939 did not repeal the provisions of Chapter 136 of the Public Laws of 1923 and the amendments thereto, now codified as G.S. 115-1, *et seq.*, through 339, except to the extent of any conflict therewith.

In G.S. 115-10, being section 4 of the 1923 Act, a union school is defined as a school embracing both elementary and high school grades. And the duty to provide an adequate school system for all the children of a county, as directed by law, is vested in the county board of education. G.S. 115-54. And G.S. 115-56 provides: "The county board of education, subject to any paramount powers vested by law in the state board of education or any other authorized agency, shall have general control and supervision of all matters pertaining to the public schools in their respective counties, and they shall execute the school laws in their respective counties. . . ."

Furthermore, G.S. 115-99 contains the following provisions: "The county board of education is hereby authorized and empowered to consolidate schools located in the same district, and, with the approval of the state board of education, to consolidate school districts, over which

the board has full control, whenever and wherever in its judgment the consolidation will better serve the educational interests of the county or any part of it: Provided, existing schools having suitable buildings shall not be abolished until the county board of education has made ample provisions for transferring all children of said school to some other school in the consolidated district."

Under our present statutes pertaining to the operation and control of our public school system, we have two methods whereby a school district may be changed. Under the provisions of G.S. 115-352, the State Board of Education may modify a district organization when it is deemed necessary for the economical administration and operation of the state school system, and in the modification of a district the State Board of Education shall determine whether an elementary or union school shall be operated therein. And under the provisions contained in G.S. 115-99, a county board of education is authorized and empowered to consolidate schools located in the same district, and, with the approval of the State Board of Education, a county board of education may consolidate districts over which the board has full control, whenever and wherever in its judgment the consolidation will better serve the educational interests of the county or any part of it.

And, unless the school authorities act contrary to law, or there is a manifest abuse of discretion on their part, the courts will not interfere with their action in creating or consolidating school districts, or in the discharge of any other discretionary duty conferred upon them by law. *Gore v. Columbus County,* 232 N.C. 636, 61 S.E. 2d 890; *Feezor v. Siceloff,* 232 N.C. 563, 61 S.E. 2d 714; *Messer v. Smathers,* 213 N.C. 183, 195 S.E. 376; *Moore v. Board of Education,* 212 N.C. 499, 193 S.E. 732; *Atkins v. McAden,* 229 N.C. 752, 51 S.E. 2d 484; *Crabtree v. Board of Education,* 199 N.C. 645, 155 S.E. 550; *Clark v. McQueen, supra; Board of Education v. Pegram,* 197 N.C. 33, 147 S.E. 622; *Board of Education v. Forrest,* 190 N.C. 753, 130 S.E. 621; *School Commissioners v. Aldermen,* 158 N.C. 191, 73 S.E. 905; *Newton v. School Committee,* 158 N.C. 186, 73 S.E. 886; *Venable v. School Committee,* 149 N.C. 120, 62 S.E. 902.

The appellants contend that students cannot be transferred from the school district in which they reside to another district, except by the State Board of Education in the manner provided by G.S. 115-352. In our opinion the provisions contained in this section of the statute, with respect to the transfer of students from one district to another, have no application to the facts presented on this appeal. This statute contemplates a transfer of students for a single school year, or from year to year, and simply provides that when the State Board of Education orders such transfer, the pupils involved shall not be required to pay tuition.

The transfer contemplated and authorized by the resolution of the Board of Education of Forsyth County is tantamount to the abolition of the Old Richmond district as a union or high school district, but does not affect its continued existence as an elementary school district.

The Constitution of this State, Article IX, section 3, requires the maintenance of one or more public schools in each school district for at least six months in every year, but this mandate does not apply to high schools. *Elliott v. Board of Equalization,* 203 N.C. 749, 166 S.E. 918; *Clark v. McQueen, supra.*

It is provided, however, in G.S. 115-352, that school children shall attend school within the district in which they reside unless assigned elsewhere by the State Board of Education. And, as we have heretofore pointed out, the authority vested in the State Board of Education in this section, with respect to the transfer of students, did not contemplate the permanent transfer of an entire school. The transfer of an entire high school where the student body is to be divided between two other high schools, in our opinion, requires a modification of the high school districts involved by the State Board of Education, as provided in G.S. 115-352, or a consolidation of the area in which a union or high school is no longer to be maintained, with some other district or districts. Such consolidation may be made by a county board of education with the approval of the State Board of Education. G.S. 115-99.

Therefore, we hold that as a prerequisite to the enforcement of the order to close the high school presently operated as a union school in Old Richmond district, the area in this district must be consolidated in a manner provided by law, with some other high school district or districts. The entire area, or any part thereof, may be consolidated with the Rural Hall High School district. Likewise, all or any part thereof may be consolidated with the Old Town High School district. This is a matter committed to the sound discretion of the school authorities.

Furthermore, if the consolidation or consolidations are to be made pursuant to the provisions contained in G.S. 115-99, it should be made to appear that ample school facilities have been provided in the proposed consolidated district or districts to which the children residing in the Old Richmond district are to be transferred.

We concur in the opinion of the court below to the effect that in passing the order to close the high school department in the union school in Old Richmond district, the Board of Education in Forsyth County acted in good faith, and that the Board had the authority to make the order. We likewise concur in the judgment dissolving the restraining order. Even so, we hold that the school authorities may not close the Old Richmond High School and transfer the high school students now residing in the Old Richmond district, as contemplated by the resolution passed by

the Board of Education of Forsyth County, adopted on 18 July, 1950, and approved by the State Board of Education on 6 September, 1951, unless and until the school authorities comply with the legal requirements pointed out in this opinion with respect to the modification or consolidation of the districts involved, and the findings relative to the school facilities in the consolidated district or districts to which the children are to be transferred.

The motion pending in the Superior Court to make the State Board of Education a party defendant, having never been ruled upon by the court below, the question as to whether such Board is a necessary party to this action, is not before us. However, the State Board of Education is not a necessary party to a complete adjudication and settlement of the questions raised on this record.

Except as modified herein, the judgment of the court below is affirmed.

Modified and affirmed.

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

(Filed 1 February, 1952.)

1. Taxation § 29—

An expense must be an ordinary and also a necessary expense, and must ordinarily relate in a substantial way to the cost of current operations in order to be deductible in computing taxable income. G.S. 105-147.1.

2. Same—

Plaintiff corporation paid a large sum to a municipality in order to have the municipality extend its water and sewer lines through the public streets to plaintiff's property and permit plaintiff to make connections therewith for the purpose of increasing the amount of water available for plaintiff's manufacturing processes and also to provide better fire protection and water and sewerage facilities in its mill village. *Held:* Plaintiff's payment to the municipality is a capital expenditure and is not deductible as a current operating expense under G.S. 105-147.1.

3. Same—

A lump sum payment to a municipality to have it extend its water and sewer lines to plaintiff's property and permit plaintiff to make connections therewith for the purpose of furnishing plaintiff additional water for its manufacturing processes and additional fire protection and sewerage service to the houses of its mill village, cannot be deducted as "rentals and other payments" under the provisions of G.S. 105-147.2, since the statute relates to rentals accruing from year to year.

4. Same—

A lump sum payment to a municipality to have it extend its water and sewer lines to plaintiff's property and permit plaintiff to make connections therewith for the purpose of furnishing plaintiff additional water for its manufacturing processes and additional fire protection and sewerage service to the houses of its mill village may not be deducted as a general contribution to a municipality under G.S. 105-147.9¾ when such payment was made prior to the enactment of the 1949 amendment.

5. Statutes § 5a—

Where a statute contains no technical language it must be interpreted in accordance with the ordinary and common understanding of the words used.

6. Taxation § 29—

Where a taxpayer donates property for charitable and educational purposes it may deduct the value of such property at the time of its donation and the deduction may not be limited to the original cost of the property to the taxpayer. G.S. 105-147.9.

7. Same—

The rule that a taxpayer may deduct the value of property donated for charitable or educational purposes as of the time of the donation is not affected by G.S. 105-144, which relates solely to the mode of ascertaining realized capital gains or losses in computing taxable income.

APPEAL by plaintiff and defendant from *Clement, J.*, at May Term, 1951, of STANLY.

Civil action to recover for income taxes paid under protest by the plaintiff, heard on an agreed statement of facts without the intervention of a jury. (The case was here on former appeal involving demurrer to the complaint, 233 N.C. 71, 62 S.E. 2d 487).

These in substance are the admitted facts:

1. The plaintiff is a corporation with principal office in Stanly County, North Carolina, where it operates spinning and knitting mills in and near the City of Albemarle.

2. That during fiscal year 1946 the plaintiff by deed of gift conveyed to the Stanly County Hospital, Inc., in fee simple from its property near its plant, a large tract of land which is now being used for hospital purposes; that the Stanly County Hospital, Inc. is a corporation organized and operated exclusively for charitable, scientific, and educational purposes, no part of the earnings of which inures to the benefit of any private stockholder or individual; that the reasonable market value of the land on the date of the gift was $23,500; that the land cost the plaintiff, when acquired by it in 1898, $278.40.

3. That during fiscal year 1947, the plaintiff, by deed of gift conveyed to the Board of School Commissioners of the City of Albemarle in fee simple a large tract of land on which a new school building was erected;

that the land was conveyed for the purpose of, and is being used exclusively for, literary, scientific and educational purposes; that the land at the time of the gift to the School Board had a reasonable market value of $6,000; that the land cost the plaintiff, in 1898, the sum of $225.00.

4. That sometime prior to the end of fiscal year 1946, the requirements of the plaintiff's business made it obligatory for it to increase the water supply at its yarn mill for the purpose of providing needed additional water for use in the manufacturing processes, for the purpose of providing better fire protection, for the purpose of providing additional water and sewerage facilities in the mill village to make it possible to improve the sanitary conditions and the living conditions of the plaintiff's employees who live in plaintiff's houses, and for the purpose of providing better fire protection in the area where the plaintiff's houses are located.

5. In order to provide adequate water and sewerage facilities for these needs, an understanding was reached between the City of Albemarle and the plaintiff, whereby the City agreed to extend, and did extend, its water and sewer lines through the public streets and public roads at and about the plaintiff's plant and mill village, and made it possible for connections to be made therewith by the plaintiff, for which the plaintiff agreed to pay and did pay to the City the total sum of $78,000, of which amount $60,000 was paid during fiscal year 1946, and $18,000 was paid during fiscal year 1947. No part of the city's water and sewer lines was constructed on plaintiff's property.

6. That in the State income tax return for fiscal year 1946, the plaintiff claimed as a deduction the $23,500 item referred to in paragraph 2 hereof, which represents the reasonable market value of the land conveyed to the Stanly County Hospital, Inc. on the date of the gift. This deduction was disallowed by the defendant, and in lieu thereof a deduction of only $278.40 was allowed, representing the cost of the land at the time of its acquisition. The plaintiff also claimed a deduction of the $60,000 item, referred to in paragraph 5 hereof, paid to the City of Albemarle in fiscal year 1946 as inducement for the extension of the water and sewer lines. This item was disallowed *in toto* by the defendant.

7. That in the State income tax return for fiscal year 1947, the plaintiff claimed as deductions (1) the $18,000 item referred to in paragraph 5 hereof, paid to the City of Albemarle that year in respect to the water and sewer lines; and (2) the $6,000 item referred to in paragraph 3 hereof which represents the reasonable market value of the land conveyed to the Board of School Commissioners of the City of Albemarle on the date of the gift. Both of these items were disallowed *in toto* by the defendant.

8. The contributions claimed by the plaintiff during the two fiscal years in question did not in either year exceed five per centum of the plaintiff's net income.

9. That by reason of the disallowance of the several items claimed by the plaintiff as deductions for fiscal years 1946 and 1947, the defendant on 7 September, 1949, assessed additional income taxes and interest against the plaintiff for these years in the total amount of $7,311.89. This, the plaintiff paid under written protest on 7 October, 1949. And on 18 October, 1949, the plaintiff duly made written demand for refund. Thereafter and on 22 December, 1949, the defendant denied the claim for refund and refused to pay the sum demanded, and more than 90 days elapsed after demand before this action was instituted.

Upon the facts agreed the court below concluded and entered judgment directing:

1. That the sums paid to the City of Albemarle in the total amount of $78,000 in connection with the City's water and sewer extensions are not deductible items under the income tax law, G.S. 105-147, and were properly disallowed by the defendant, Commissioner of Revenue, and that the plaintiff was not entitled to recover any of the additional taxes and interest assessed and collected on account thereof. To this ruling, and the portion of the judgment sustaining it, the plaintiff excepted.

2. That the two tracts of land donated to the Board of School Commissioners of the City of Albemarle and to the Stanly County Hospital, Inc., respectively, are deductible under the State income tax law, G.S. 105-147 (9), at their fair market value on the date of each donation, as claimed by the plaintiff; that the plaintiff is entitled to recover the additional taxes and interest paid by the plaintiff on account of the defendant's previous assessment as to these two pieces of property, thus entitling the plaintiff to a refund of $1,994.69 with interest thereon at the rate of six per centum from 7 October, 1949, until paid, and judgment was entered directing a recovery of this amount in favor of the plaintiff and against the defendant. To this ruling, and the portion of the judgment sustaining it, the defendant excepted.

The plaintiff and the defendant, both having excepted as herein set out, appealed to this Court, assigning errors.

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

Harry McMullan, Attorney-General, James E. Tucker and Harry W. McGalliard, Assistant Attorneys-General, for defendant.

The Plaintiff's Appeal

JOHNSON, J. The plaintiff corporation made contributions of $60,000 and $18,000 in successive years to the City of Albemarle as inducement for the City to extend its water and sewer lines over its own streets to the plaintiff's mill and mill village. The plaintiff insists that for income tax purposes each of these items was deductible in its entirety the year

of payment. The court below adopted the view that the payments were capital expenditures, and thus not deductible. The record as presented sustains this view.

1. The plaintiff places main reliance on its contention that these items were deductible as ordinary and necessary operating expenses under the provisions of G.S. 105-147.1. This statute provides that in computing net income there shall be allowed as a deduction: "All the ordinary and necessary expenses paid during the income year *in carrying on any trade or business.* (Italics added).

This Court has not been called upon heretofore to determine what is or is not an "ordinary and necessary expense" within the meaning of this statute. Nor is it necessary in this case, or advisable for the annals, that we undertake to formulate an all-embracing definition of these words. This is so for the reason that what are "ordinary and necessary" expenses necessarily vary in individual cases, and depend upon the nature of a particular business, its size, its location, its mode of operations, and to some extent the business customs and practices prevailing at the time and in the locality or area where the taxpayer operates. Therefore, in order to take care of the varying situations as they arise, the statute should be left flexible in form for application in individual cases according to the practical meaning of the statutory language.

Examining the statute with this in mind, it seems clear that in order for an item of expense to be deductible it must be both an "ordinary" expense and a "necessary" expense, since these words are used conjunctively. Also of controlling significance is this phrase appearing in the statute: "in carrying on any trade or business." Here, the connotation is that the expense in order to be deductible must relate to the cost of "carrying on" the business, and carrying on a business in plain language means operating the business. Therefore, it would seem that an expense in order to be deductible within the purview of the statute not only must be an "ordinary and necessary" business expense, but as a general rule it must relate in a substantial way to the costs of current operations,—to the costs of producing the gross income from which the deduction is sought.

It is manifest that the statute does not sanction the deduction of an expenditure the underlying purpose and predominate effect of which are to provide permanent improvements or betterments reasonably calculated to enhance the value of the taxpayer's business or property for a period substantially beyond the year in which the outlay is made. Such an outlay is a capital expenditure, as distinguished from an item of normal operating business expense, and is not deductible for income tax purposes. See the following authorities relating to the interpretation of a substantially similar provision in the Federal income tax law: 47 C.J.S., Internal Revenue, Sec. 153; 27 Am. Jur., Income Taxes, Sec. 95 (in-

cluding 1951 cumulative supplement); *Welch v. Helvering*, 290 U.S. 111, 78 L. Ed. 212; *Deputy v. duPont*, 308 U.S. 488, 84 L. Ed. 416; Prentice-Hall Tax Service, 1951, Par. 11-090.

Ordinarily, the expense of installing sewers is treated as a capital expenditure. Paul and Mertens, Law of Federal Income Taxation, Sec. 23.149.

It seems to be conceded that if the plaintiff had laid water and sewer mains on its own property, the outlay therefor would be classified as a capital expenditure, to be depreciated on an amortization basis over a period of years. Here, however, the plaintiff urges that the general rule as to capital expenditures does not apply for the reason that the plaintiff does not own the property on which the water and sewer mains were laid, and that the plaintiff has no title thereto nor equity therein. Nevertheless, we do not think the fact that the plaintiff does not own the property on which the mains were laid and did not by contractual arrangement with the City acquire some vested property rights therein in return for the sums paid to the City should have the effect of transforming these capital expenditures into ordinary and necessary business expenses to be written off entirely within the year.

2. Nor is the plaintiff entitled to write off the controverted items as "rentals or other payments" under the provisions of G.S. 105-147.2. Indeed, it may be doubted that this statute has relevant application to the instant items. The statute by its express language allows the deduction only of such "rentals or other payments required to be made as a condition of the continued use or possession for the purpose of the trade of property to which the taxpayer has not taken or is not taking title, or in which he has no equity."

Necessarily, then, it would seem that the statute was intended to provide for the deduction only of "rentals or other payments" as and when the items accrue from year to year, and in no event may this statute be interpreted as authorizing the deduction in one year of a prepayment of rentals or other like charges for a period of years in advance. This is in accord with what is said in 27 Am. Jur., Income Taxes, Sec. 96, commenting on the Federal statute which is similar to our State statute: "Rentals required to be paid for the use or possession of business property, not owned by the taxpayer and in which he has no equity, may usually be deducted in computing income tax. However, where an expenditure made by a lessee is in the nature of an investment in property used in his trade or business, or is the cost, or part of the cost, of the lease itself, it cannot be deducted *in toto* from the lessee's taxable income as an expense for the year in which it occurred, but must be recovered in annual allowances. Thus, advance rentals and bonuses, the price paid for an assignment of a lease, and other similar expenditures by a lessee are not deductible as ordinary and necessary business expenses

in the year of payment, but are required to be spread over the entire life of the lease."

Nor may the controverted items be deducted as general contributions to a municipality under the provisions of Chapter 392, Section 3, subsection (c), Session Laws of 1949, now codified as G.S. 105-147.9¾. This is so because the items relate to taxes which accrued in 1946 and 1947, prior to the enactment of this amendment.

This record indicates that after the water and sewer mains were extended to the mill and mill village, the plaintiff made installations at the mill by which it materially increased the consumption of water at the dyeing plant and improved fire protection facilities through its then existing sprinkler system. The details of these installations are not shown by the record. However, it does appear therefrom that the plaintiff installed running water and bathroom facilities in 439 of the village houses which previously were without these facilities. These installations represent capital betterments on property actually owned by the plaintiff. The question whether the plaintiff may treat the controverted payments to the City as items of cost incidental to the installation of these added facilities at the mill and in the village houses, for the purpose of depreciation or amortization under G.S. 105-147.8, is not presented for decision on this record. This question, if need be, may be raised by motion in the cause below.

On the plaintiff's appeal, the judgment below is

Affirmed.

The Defendant's Appeal

The plaintiff corporation by deeds of gift donated from its real estate holdings a site for a public school and also a hospital site. It is admitted that these gifts are deductible for income tax purposes. The question posed by the appeal is whether the value of this property for purposes of deduction is to be fixed as of the date of each gift, as contended by the plaintiff, or as of the date the plaintiff acquired the property in 1898, as contended by the Commissioner of Revenue. The court below held that the value as of the date of the gift controls, and we approve.

G.S. 105-147.9 by its terms permits a corporation to deduct *"contributions or gifts"* made to certain designated charities and agencies "to an *amount* not in excess of five (5%) . . . of . . . net income." (Italics added).

This statute contains no technical language. Thus, it must be interpreted in accordance with the ordinary use and common understanding of the words used. *Cab Co. v. Charlotte,* 234 N.C. 572, 68 S.E. 2d 433. According to ordinary use, the "amount" of a gift and the value of a gift have the same meaning and effect. It follows, then, that when a contribution is made in property rather than in cash, the amount of the

gift, and the amount of the deduction, is the fair market value of the property at the time of the gift.

The principle here applied is in accord with the uniform interpretation and administration of the Federal Income Tax Law since 1923, and our statute, which first became effective in 1921, is substantially similar to the Federal act. See C. C. H. Par. 331.325.

The rule here applied harmonizes with one of the fundamental principles that undergirds the income tax law, and that is, that a taxpayer may not be taxed on the appreciation in value of property until the gain is realized. Here, the theory is that no gain is realized by a taxpayer when he gives property away. Stanley and Kilcullen, The Federal Income Tax, Sec. 23 (o), p. 90. See also Rabkin and Johnson, Federal Income Gift and Estate Taxation, Vol. 2, Sec. 59.05; C. C. H. Par. 331.325. Nor does the rule here applied in any way impinge G.S. 105-144. This statute has to do only with fixing for tax purposes the mode of ascertaining realized gains or losses sustained in respect to the disposal of property. Hence the statute is not applicable to the instant case.

This rule also rests upon considerations of sound public policy. It encourages, within reasonable limits, gifts to charities and benevolences. These gifts, for the most part, by indirection lighten the load of tax-supported public services; and it is always within the power of the law-making body to prevent abuses by controlling both the amount of deductible contributions that a taxpayer may make and also by restricting the objects to which these contributions may be made.

On the defendant's appeal, the judgment below is

Affirmed.

PEARL LAMBERT, ADMINISTRATRIX OF THE ESTATE OF FARRELL C. LAMBERT, v. EDWIN C. SCHELL, DAVID R. WALKER AND UNION PACIFIC RAILROAD COMPANY, INC.

(Filed 1 February, 1952.)

1. Process § 8c—

In order to acquire jurisdiction of a foreign corporation by service of process under G.S. 1-97, the corporation must be doing business in this State and it must be present in this State in the person of an authorized officer or agent.

2. Same—

A foreign corporation is present and doing business in this State through an authorized officer or agent within the purview of G.S. 1-97 when it has an officer or agent here who exercises some control over and discretionary power in respect to some function for which the corporation was created and not merely one incidental thereto.

3. Same—

A foreign railroad corporation without property in this State is not doing business in this State within the purview of G.S. 1-97 by advertising, soliciting, and creating good will here, and its agent whose duties are limited to inducing local shippers to request that their shipments to other parts of the country be so routed that the railroad company would constitute one of the connecting carriers, is not an agent upon whom process may be served, such activities being purely incidental to its business as a common carrier.

4. Same—

A finding that the agent of a foreign railroad corporation upon whom process was served was authorized to conduct generally the business of the railroad in this State cannot support the conclusion that he was an "agent" within the purview of G.S. 1-97 for the purpose of service of summons when the railroad has no property in this State, and its business here is limited to the creation of good will.

5. Same—

A finding that the agent of a foreign railroad corporation in this State was authorized to adjust grievances cannot support the conclusion that he was an agent upon whom process could be served within the purview of G.S. 1-97 when the nature of the "grievances" is not disclosed and it is apparent from the particular findings that the corporation was not conducting any business in this State upon which "grievances" might be adjusted in the conduct of its business as a common carrier.

6. Evidence § 5—

It is a matter of common knowledge that consignors ordinarily adjust their complaints with the initial carrier and that consignees ordinarily do so with the delivering carrier.

7. Pleadings § 31: Appeal and Error § 40f—

Motion to strike particular allegations of the complaint which are clearly impertinent and irrelevant should be allowed, and the refusal of the motion will be reversed when the matter is sufficiently prejudicial.

APPEAL by defendants from *Phillips, J.*, August Term, 1951, BURKE.

Civil action to recover damages for the alleged wrongful death of plaintiff's intestate, heard on motion made by the corporate defendant, on special appearance, to dismiss for want of service of process, and on motion by the individual defendants to strike certain portions of paragraph 5 of the complaint.

Plaintiff's intestate was a passenger on an automobile belonging to the defendant Walker and being operated by defendant Schell. The automobile collided with a bridge and plaintiff's intestate was killed. Negligence in the operation of the automobile by Schell is alleged.

It is further alleged that defendant Walker was at the time traveling freight and passenger agent of the corporate defendant whose duties were

"to cultivate good will among manufacturers' representatives in Western North Carolina and other points for and on behalf of the said Union Pacific Railroad Company with a view of inducing the routing or shipment of freight from such manufacturers over the lines of said Union Pacific Railroad Company, to solicit business for said railroad, to adjust grievances and generally to conduct the business of said railroad in this State"; that plaintiff's intestate was co-manager in the traffic department of Drexel Furniture Company, having authority to direct and control the routing of shipments of furniture from Drexel Furniture Company to points on the West Coast; that on the night of the accident, Walker was entertaining Lambert and other shipper representatives in furtherance of his duty to foster good will and promote the interests of his employer; and that the automobile was being operated by Schell, with the approval of Walker, in the course and as a part of said entertainment. Walker maintains offices in Winston-Salem, N. C.

Summons as to the corporate defendant was returned endorsed by the sheriff "Served 5/10/51 . . . and by delivering a copy of Summons & Complaint to David R. Walker, as Passenger & Travelling Freight Agent of the Union Pacific Railroad Co. Inc."

On .... June 1951 defendant railroad specially appeared and moved the court to strike the return and declare said attempted service void and of no effect for that said Walker is not and was not at the time an officer or agent or person upon whom process could be served upon defendant railroad and has no duties that do or would qualify him as such agent on whom such process could be served. The motion was supported by affidavits filed by said defendant.

The individual defendants likewise moved to strike certain portions of paragraph 5 of the complaint as being irrelevant, immaterial, evidentiary, redundant, and prejudicial.

When the motions came on to be heard in the court below, the trial judge found the following facts: (1) That the Union Pacific Railroad Company is a foreign corporation; (2) "That the said Union Pacific Railroad Company neither owns leases, or operates any line of railroad, nor any transportation facilities within the State of North Carolina, but that its activities within the State of North Carolina consists (*sic*) of the solicitation of freight and passenger business originating in or destined to points in North Carolina, which in the course of interstate and transcontinental transportation will be routed so as to move over the lines of the Union Pacific Railroad Company while within the general territory in which the lines of said company are located, as set forth in paragraph 3 hereof"; and (3) "That the said David R. Walker was at the time a freight and passenger agent and representative of said Union Pacific Railroad Company, whose duties and business as such agent and

representative were to cultivate good will among manufacturers' representatives in Western North Carolina and other points for and on behalf of said Union Pacific Railroad Company, with a view and purpose of inducing the routing or shipment of freight from such manufacturers over the lines of said Union Pacific Railroad Company, to solicit business for said railroad, to adjust grievances, and generally to conduct the business of said railroad in this state."

Upon the facts found the court concluded that (1) said railroad is doing business within the State of North Carolina, (2) defendant Walker is employed by it as a local agent within this State, and (3) the service of process on said Walker as local agent was duly made and is and was a valid service of process.

It thereupon denied the motion of the corporate defendant, and said defendant excepted and appealed.

The motion of the individual defendants to strike portions of paragraph 5 of the complaint was likewise denied, and said defendants excepted and appealed.

Mull, Patton & Craven for plaintiff appellee.

Deal, Hutchins & Minor for defendant appellants.

BARNHILL, J. Finding of Fact No. 2 (No. 4 in the judgment) quoted in the above statement of facts, contains the decisive facts in this case. There the judge details the nature and extent of the activities of the corporate defendant within this State. Defendant Walker is the local agent or representative through whom the corporation acts in furtherance of the objectives there outlined. Is he a local agent within the meaning of G.S. 1-97, upon whom process may be served, so as to subject the corporate defendant to the jurisdiction of the courts of this State? This is the one question posed for decision on the appeal of the Union Pacific.

Process issued out of a court of this State may be served on a nonresident under the "local agent" provision of G.S. 1-97 so as to subject it to the jurisdiction of the courts of this State only when it is present and doing business within this State through a duly authorized agent possessing general or limited authority to perform some of the functions authorized by its charter. That is, it cannot be served with process unless it can be "found" within the State, and it may be found within the State only when it is engaged in exercising in this State some of the functions for which the corporation was created, which are not purely incidental to the powers granted. *Service Co. v. Bank,* 218 N.C. 533, 11 S.E. 2d 556; *Cunningham v. Express Co.,* 67 N.C. 425; *Whitehurst v. Kerr,* 153 N.C. 76, 68 S.E. 913; *Schoenith, Inc., v. Manufacturing Co.,* 220 N.C. 390, 17 S.E. 2d 350; *Plott v. Michael,* 214 N.C. 665, 200 S.E. 429; *Radio*

Station v. Eitel-McCullough, 232 N.C. 287, 59 S.E. 2d 779; *Tobacco Co. v. Tobacco Co.,* 246 U.S. 79, 62 L. Ed. 587.

Briefly stated, where no property is seized or attached, there are two requisites to jurisdiction of a State court over a foreign corporation: (1) the corporation must be doing business in the State, and (2) it must be present in the State in the person of an authorized officer or agent. *Gloeser v. Dollar S. S. Lines,* 256 N.W. 666 (Minn.).

Doing business in this State means doing some of the things or exercising some of the functions in this State for which the corporation was created. *Ruark v. Trust Co.,* 206 N.C. 564, 174 S.E. 441; *Radio Station v. Eitel-McCullough, supra; Harrison v. Corley,* 226 N.C. 184, and cases cited. And the business done by it here must be of such nature and character as to warrant the inference that the corporation has subjected itself to the local jurisdiction and is, by its duly authorized officers and agents, present within the State. *Tobacco Co. v. Tobacco Co., supra.*

A corporation performs the functions authorized by its charter through the medium of officers and agents, and an agent of a foreign corporation through whom the corporation may be "found" within the State and upon whom service of process may be had so as to subject the corporation to the jurisdiction of the court is one who exercises some control over and discretionary power in respect to the corporate functions of the company. *Service Co. v. Bank, supra.*

"A local agent is one who stands in the shoes of the corporation in relation to the particular matters committed to his care. He must be one who derives authority from his principal to act in a representative capacity, *Watson v. Plow Co.,* 193 Pac., 222 (Wash.), and who may be properly termed a representative of the foreign corporation. *St. Clair v. Cox,* 106 U.S., 350, 27 L. Ed., 222. Anno. 113 A.L.R., 41. He must have the power to represent the foreign corporation in the transaction of some part of the business contemplated by its charter, *Booz v. Texas & P. R. Co.,* 250 Ill., 376, 95 N.E., 460; and he must represent the corporation in its business in either a general or limited capacity. *Peterson v. Chicago R. I. & P. R. Co.,* 205 U.S., 364, 51 L. Ed., 841. Thus the question is to be determined from the nature of the business and the extent of the authority given and exercised. *Lumber Co. v. Finance Co.,* 204 N. C., 285, 168 S.E., 219." *Service Co. v. Bank, supra; Plott v. Michael, supra; Conn. Mutual Life Ins. Co. v. Spratley,* 172 U.S. 602, 43 L. Ed. 569; *Chicago Board of Trade v. Hammond Elevator Co.,* 198 U.S. 424, 49 L. Ed. 1111.

It is well settled that soliciting in a State by a foreign common carrier of the business of transporting persons and property between the states is not the doing or transaction of business within the State so as to bring the corporation within the jurisdiction of the local courts in an action

in personam, at least where such foreign railroad corporation has no line in the State and does no business there other than soliciting business for interstate commerce, even though it maintains an office and employs an agent within the State, because this is merely incidental to the main business of the corporation. 18 Fletcher Cyc. Corporations, Perm. Ed., 382, sec. 8719; *Green v. Chicago B. & Q. R. Co.,* 205 U.S. 530, 51 L. Ed. 916; *Philadelphia & Reading R. Co. v. McKibbin,* 243 U.S. 264, 61 L. Ed. 710; Anno. 46 A.L.R. 583, and 95 A.L.R. 1480; 34 Mich. Law Rev. 979. (See other cases cited in Fletcher.)

Thus the maintenance of an office and the employment by a foreign corporation of a "district freight and passenger agent to solicit and procure passengers and freight to be transported over defendant's line," and having under his direction "several clerks and various traveling passenger and freight agents" has been held not to constitute "doing business within the state." *Philadelphia & Reading R. Co. v. McKibbin, supra;* 18 Fletcher Cyc. Corporations 384.

While the judge found that Walker's duties in part were "generally to conduct the business of said railroad in this state," the business of "said railroad" conducted within this State is spelled out in particularity. It includes the commission of no act, or the performance of no duty, which would constitute "doing business" such as would subject it to the jurisdiction of the courts of this State.

On this record defendant Walker, as agent of the corporate defendant, was not authorized to issue a bill of lading or sell a ticket or route a shipment or do anything else that constitutes a part of the usual and ordinary business of a common carrier, for the Union Pacific has no part of its railroad in this State and is engaged in no business here which requires or necessitates any such activity on the part of any of its agents.

The duty assigned to him was to induce local shippers to request that their shipments to and from the Pacific Northwest be so routed that the Union Pacific would constitute one of the connecting carriers. To accomplish this objective, he was engaged in advertising, soliciting, and creating good will for and on behalf of his principal. These are activities which are purely incidental to the business of a common carrier, as they are to any other large business enterprise.

Likewise, it is alleged in the complaint, and the court found, that it was the duty of Walker "to adjust grievances." However, the nature of the "grievances" is not disclosed, and it is neither alleged nor found that he ever adjusted any type or kind of grievance against the corporate defendant. It is a matter of common knowledge that consignors ordinarily adjust their complaints or grievances with the initial, and the consignees with the delivering, carrier. The Union Pacific maintains neither position within this jurisdiction. Therefore, in view of its lim-

ited activities within this State, as found by the court, this allegation and finding must be deemed too general and indefinite to have any substantial meaning. It is the statement of a conclusion rather than the statement of a fact.

It follows that the corporate defendant is not doing business or maintaining a local agent within this State so as to render it amenable to process issued in this cause. The conclusion to the contrary made by the court below is unsupported by the evidence offered or the facts found and must be reversed.

APPEAL OF INDIVIDUAL DEFENDANTS.

Paragraph 5 of the complaint does not contain the allegation of a single ultimate fact necessary to a statement of plaintiff's alleged cause of action. Some of the facts there stated are evidentiary in nature and some are wholly irrelevant. The competency of evidence in respect to still others will perhaps depend upon the developments at the trial. The admissibility of evidence in respect thereto is best left to the trial judge.

But the defendants do not seek to strike the paragraph as a whole. They seek only to strike allegations (1) referring to one Newton, a co-employee of plaintiff's intestate, (2) of the rapid advancement of plaintiff's intestate in his employment, (3) the duty of Walker to solicit plaintiff's intestate and others, and (4) prior entertainments by Walker of plaintiff's intestate.

The references to Newton are clearly impertinent and irrelevant. The other allegations to which objection is entered are evidentiary and repetitious. Evidence in respect thereto may be tendered at the hearing in support thereof under the allegations contained in paragraph 4 of the complaint. The injection of matter relating to Newton is sufficiently prejudicial to warrant a reversal of the judgment on the motion to strike. *Hinson v. Britt,* 232 N.C. 379, 61 S.E. 2d 185.

On both appeals the judgment entered is

Reversed.

IN RE WILL OF FRANK ELLIS.

(Filed 1 February, 1952.)

1. Wills § 16—

The probate of a will in common form is *ex parte*, and while conclusive until set aside in a proper proceeding, it is subject to caveat at the time of probate or at any time within seven years thereafter by any person entitled under the will or interested in the estate, G.S. 31-32, or the will may be probated *per testes* without probate in common form.

2. Wills § 17—

The clerk may probate a will in solemn form without a verdict of the jury where all interested parties are cited to appear or they come in voluntarily, provided such parties raise no issue of fact; but where issues of law and of fact, or issues of fact are raised by any party denying the validity of the will, the issue of *devisavit vel non* is raised and must be tried by a jury, and in such instance trial by jury may not be waived by any of the parties nor may nonsuit or a directed verdict be entered. G.S. 1-273.

3. Same—

The clerk refused to probate the paper writing in question in common form because of the testimony of one of the subscribing witnesses that he did not sign same in the presence of testator. No appeal was taken by propounder. Thereafter the widow filed a petition for probate in solemn form, and citation to interested parties was duly issued and served. Upon like testimony the clerk refused to admit the paper writing to probate in solemn form. *Held:* The parties are not bound by the findings of the clerk, since an issue of fact was raised by the parties which must be determined by the jury upon the issue of *devisavit vel non.*

4. Wills § 24—

Testimony of a subscribing witness that he did not sign the paper writing in the presence of testator is not conclusive, but the contrary may be shown by other testimony.

APPEAL by petitioner from *Stevens, J.*, May Term, 1951, of DURHAM.

The facts pertinent to this appeal are as follows:

1. Frank Ellis died on 20 November, 1948, leaving a paper writing purporting to be his last will and testament, witnessed by Robert F. Adcock and Lonnie Maynard. This paper was presented to the clerk of the Superior Court of Durham County for probate in common form, but the witness Maynard testified that he did not sign the paper writing in the presence of the testator, whereupon the clerk refused to probate the paper. No appeal was taken by the propounder.

2. Thereafter, on 17 January, 1949, Mrs. Mary Ellis, widow of the testator and one of the chief beneficiaries under his purported will, filed a petition before the clerk of the Superior Court for probate of the instrument in solemn form, and prayed that citation be issued to all interested parties to come in and contest the probate of said paper writing if they so desired. The devisees and legatees named in the purported will are Mary Ellis, Lera Ellis Williams, Dora Ellis Adcock, Beadie Ellis, Otho J. Ellis, and Levi J. Ellis.

3. On 19 February, 1949, the clerk held a hearing on the petition. The citation "to come and see proceedings," had been duly issued and served on the interested parties, and the respondents Levi Ellis, Lera Ellis Williams, and Dora Ellis Adcock had theretofore filed an answer to the citation denying that the paper offered for probate is the last will and testa-

ment of Frank Ellis, deceased. The evidence taken before the clerk discloses that Garland E. Adcock prepared the purported will at the request of Frank Ellis, on 25 June, 1948, in the home of the testator. Others present at the time the will was prepared were Robert F. Adcock, Mrs. Mary Ellis, wife of Frank Ellis, and Lonnie Maynard. According to the testimony of Garland E. Adcock, Mrs. Mary Ellis and Robert F. Adcock, after the will was prepared, Frank Ellis signed it and requested Lonnie Maynard and Robert F. Adcock to sign it as witnesses; that each of them saw Lonnie Maynard and Robert F. Adcock sign the will as witnesses in the presence of Frank Ellis. Maynard, however, testified that he signed it but not in the presence of the testator. Whereupon, the clerk entered an order declining to admit the paper writing to probate in solemn form. The petitioner excepted to the order and the clerk certified a transcript of the proceedings before him to the Superior Court and transferred the cause to the civil issue docket for trial.

4. When the cause came on for hearing in the Superior Court, the respondents made a motion to remand to the clerk with instructions to appoint an administrator of the estate, on the ground that the hearing before the clerk, constituted a final trial upon the merits and that the ruling of the clerk declining to admit the paper writing to probate was conclusive on the propounders upon the issue of *devisavit vel non,* as to all matters save possible errors of law committed by the clerk. His Honor granted the motion and entered judgment accordingly. The petitioner appeals and assigns error.

Fuller, Reade, Umstead & Fuller and A. H. Graham, Jr., for petitioner, appellant.

Robinson O. Everett, Kathrine R. Everett, Jas. R. Patton, and R. O. Everett for respondents, appellees.

DENNY, J. The determinative question presented on this appeal is whether the interested parties in a proceeding before a clerk of the Superior Court to probate a will in solemn form are bound by the findings of the clerk where an issue of fact is raised by the parties. The answer must be in the negative.

The appellees contend that if the propounders originally had a right to trial by jury, it was restricted to a caveat after probate in common form, or to an appeal from the order rejecting the probate in common form; but in any event the propounders had a right to waive a trial by jury, which they did by petitioning the clerk to issue citations to the interested parties, to hear the evidence and probate the will in solemn form in a recognized "come and see proceeding," citing *Redmond v. Collins,* 15 N.C. 430; *Etheridge v. Corprew,* 48 N.C. 14; *Randolph v. Hughes,* 89 N.C. 428; *Collins v. Collins,* 125 N.C. 98, 34 S.E. 195; *In re*

Will of Rowland, 202 N.C. 373, 162 S.E. 897; Mordecai's Law Lectures, Vol. II, 2nd Ed., page 1213.

We do not construe these decisions as controlling on the question before us, nor the comments of Mr. Mordecai, cited by the appellees, as supporting their contention.

In the case of *Redmond v. Collins, supra,* the will was offered for probate in common form. A caveat to its probate was filed at the time the order of probate was entered. Thereupon an issue of *devisavit vel non* was made up, and the jury found that the paper tendered for probate was not the last will and testament of the deceased party. Whereupon the court pronounced against the paper as a will and granted letters of administration to Redmond, the caveator. The propounders did not appeal. Later a petition was filed by the children of one of the beneficiaries under the will, the beneficiary having died, in an attempt to have the will admitted to probate on the ground of alleged fraud in connection with the original proceeding. The court held that the propounders in the first instance kept back none of the proper proofs and the paper writing should have been pronounced a good will, the error was one of the tribunal and not of the parties. However, since no appeal was taken from the judgment by the executors, not resulting from bad faith, but from a misapprehension of their duty and of their personal liability for costs, the parties were bound by the judgment. The appellees, herein, contend the following statements in the opinion by *Ruffin, C. J.,* support their position: "To enable the propounder to bind others a decree is taken out by him authorizing him to summon all persons, 'to see proceedings,' not to become parties, but to witness what is going on, and take sides if they think proper. If the propounder does not choose to adopt that course, he may at once take his decree; which in relation to this subject is called proving the will in common form. If he take out a decree and summon those in interest against him, 'to see proceedings,' they are concluded, whether they appear and put in an allegation against the will or not, and as against those summoned this is called probate in solemn form.

"But besides these methods, there is another, by which persons may be heard and concluded. If the propounder will not take out a decree 'to see proceedings,' a person in interest is not bound to wait the result of that proceeding, and then prefer an allegation to call in the decree made on it, and asserting his own rights; but he may at once 'intervene' by a counter allegation, because the proceeding is *in rem* and all shall be heard. Upon which intervention each of the persons are of course bound by the sentence as before."

In view of the facts before the Court in the above case, we do not think there is anything in the opinion from which it may be inferred that the court intended to hold that in a proceeding before a clerk of the Superior

Court to probate a will in solemn form, the clerk has the power to preclude the submission of the issue of *devisavit vel non* to a jury where issues of fact are raised in the hearing before him.

In *Etheridge v. Corprew, supra,* the purported will of John Wheatly was probated in common form. Many years later a petition was filed praying for an order to have the script re-propounded to the end that the petitioners might show that the same was not the last will and testament of Wheatly. The Court held that the petitioners had the right "to call for a probate in solemn form, so as to have the validity of the will passed upon by a jury—a test to which it has not before been subjected." And *Pearson, J.,* speaking for the Court, said: "The exigence of the estates of deceased persons, sometimes requires that probate of wills should be taken before there is time to serve notice upon the next of kin, because of a present necessity that someone should represent the deceased, take charge of the estate, collect debts, pay creditors, &c., for this reason a probate 'in common form,' that is, without citation to the next of kin, or others who may be interested, is allowed. This probate is valid until it is set aside, and cannot be impeached collaterally . . . But such probate is not conclusive. To have that effect the probate must be in 'solemn form;' that is, after citation, *per testes;* or under our statute, in case of a *caveat, by verdict of a jury.* If the executor wishes to conclude the matter, he may, after probate in 'common form,' proceed to have citations issued and propound the will in 'solemn form.' Or the next of kin are entitled, of common right, to have such probate set aside, so as to give them an opportunity of contesting its validity, and having a probate *per testes,* or by the verdict of a jury."

In the case of *Collins v. Collins, supra,* a paper writing purporting to be the last will and testament of J. T. Collins was exhibited to the clerk for probate by the widow and heirs at law of the deceased, except J. K. Collins and W. G. Collins, who, without entering a formal caveat, objected to the probate and recording of the instrument. The clerk made inquiry by taking evidence of witnesses, examined and cross-examined by the two objecting heirs. The clerk declined to admit the paper writing to probate. The propounders appealed to the Superior Court and the clerk certified his acts and entered the cause on the civil issue docket. When the cause came on for hearing, the objectors took the same position which the appellees have taken in the instant case. "The objecting parties at the trial, . . . insisted that there was nothing for a jury to try—that a question of law only was presented by the appeal, and that that depended upon the evidence and ruling before and by the clerk. His Honor held otherwise, and proceeded with the jury to try the issue," of *devisavit vel non.* Upon appeal to this Court the procedure adopted by the court below was approved and the judgment affirmed.

Likewise, the cases of *Randolph v. Hughes, supra,* and *In re Will of Rowland, supra,* are not decisive of the question presented for determination on this appeal.

Moreover, we find a correct statement of the law with respect to the two forms of probate in solemn form, in Mordecai's Law Lectures, Vol. II, 2nd Ed., page 1211: "(1) Where the next of kin and other interested persons are cited to appear and 'see proceedings,'—or they come in voluntarily to 'see proceedings'—and a judgment is entered for or against the will, but there is no verdict of a jury because no issue is raised by the parties; (2) Where a person, entitled so to do, intervenes and enters a caveat—denies the validity of the will—and thereby raises an issue of *devisavit vel non,* upon which issue a verdict is taken, and judgment entered in accordance with the verdict."

The probate of a will in common form, being an *ex parte* proceeding on application of the propounder, may be caveated at the time of application for probate or at any time within seven years thereafter by "any person entitled under such will, or interested in the estate." G.S. 31-32. On the other hand, a probate in solemn form is in the nature of a decree pronounced in open court where all interested parties have been duly cited and is irrevocable.

A clerk of the Superior Court may probate a will in solemn form, without the verdict of a jury, that is *per testes,* where interested parties are cited to appear and "see proceedings," or they come in voluntarily to "see proceedings," and such parties raise no issue of fact. But, where an interested party intervenes in such proceeding and objects to the probate of the will, denying its validity, whether he files a formal caveat or not, it will raise the issue of *devisavit vel non,* which issue must be tried by a jury. Such procedure is required by G.S. 1-273, which reads as follows: "If issues of law and of fact, or of fact only, are raised before the clerk, he shall transfer the case to the civil issue docket for trial of the issues at the next ensuing term of the superior court." *Brittain v. Mull,* 91 N.C. 498; *Collins v. Collins, supra; In re Little,* 187 N.C. 177, 121 S.E. 453; *In re Will of Brown,* 194 N.C. 583, 140 S.E. 192; *Brissie v. Craig,* 232 N.C. 701, 62 S.E. 2d 330.

The propounder, intervener, objector, or caveator, may not waive a trial by jury on the issue of *devisavit vel non.* Such cause must proceed to judgment, and a motion for judgment as of nonsuit, or for a directed verdict, will not be allowed. *In re Will of Roediger,* 209 N.C. 470, 184 S.E. 74; *In re Will of Redding,* 216 N.C. 497, 5 S.E. 2d 544; *In re Will of Hine,* 228 N.C. 405, 45 S.E. 2d 526; *In re Will of Morrow,* 234 N.C. 365, 67 S.E. 2d 279.

Moreover, it is said in *In re Will of Kelly,* 206 N.C. 551, 174 S.E. 453: "The law makes two subscribing witnesses to a will indispensable to its

formal execution. But its validity does not depend solely upon the testimony of the subscribing witnesses. If their memory fail, so that they forget the attestation, or they be so wanting in integrity as wilfully to deny it, the will ought not to be lost, but its due execution and attestation should be found on other credible evidence. And so the law provides." *Bell v. Clark,* 31 N.C. 239; *In re Will of Deyton,* 177 N.C. 494, 99 S.E. 424; *In re Will of Redding, supra.* "The law seems to be settled in this State that parties are not bound or concluded by the testimony of one of the subscribing witnesses, but may show the very truth of the matter by other testimony." *In re Will of Deyton, supra.*

The judgment entered in the court below is

Reversed.

STATE OF NORTH CAROLINA AND BLADEN COUNTY BOARD OF COMMISSIONERS UPON THE RELATION OF JOHN C. CAIN, AND JOHN C. CAIN, v. W. M. CORBETT, JR., AND J. L. CORBETT, TRADING AS CORBETT BROTHERS, HARVEY THOMPSON, DEPUTY SHERIFF, JOHN B. ALLEN, SHERIFF, AND MARYLAND CASUALTY COMPANY.

(Filed 1 February, 1952.)

1. Pleadings § 19b—

A demurrer for misjoinder of parties and causes admits for the purpose the truth of allegations of fact contained in the complaint.

2. Sheriffs § 6b—

A sheriff is liable for the wrongful acts or omissions of his deputy to the same extent as he is for his own.

3. Sheriffs §§ 6b, 6c: Principal and Surety § 5a—

A sheriff and his deputy, as well as the surety on their bonds, may be held liable for false arrest made by the deputy under color of his office. G.S. 162-8, G.S. 109-34.

4. Contracts § 19—

Where a contract is made for the benefit of a third party, such third party may maintain an action thereon.

5. Sheriffs § 6b, 6c: Principal and Surety § 5a: False Imprisonment § 2—

Where the complaint alleges false arrest by a deputy sheriff while acting in the scope of his employment by individuals and also under color of his office, the joinder of the deputy, the sheriff, the surety on their bonds, and the alleged employers is not a misjoinder. Whether the deputy was acting in his capacity as employee or public officer is a question of fact for the jury under the pleading.

6. Parties § 3—

If plaintiff be in doubt as to the persons from whom he is entitled to redress, he may join two or more defendants to determine which is liable. G.S. 1-69.

7. Pleadings § 8a: False Imprisonment § 2—

Where the complaint states a cause of action for false imprisonment and also alleges malicious prosecution in connection with other matters on the question of punitive damages, but does not attempt to state them as separate causes (G.S. 1-123) and seeks no actual damages on account of malicious prosecution, it states but a single cause of action for false arrest, and any doubt in this respect is removed by plaintiff's declaration, constituting an election of remedies, that the action was for "false arrest and damages."

8. Pleadings § 19c—

In this action for false imprisonment, demurrer on the ground of misjoinder of parties and causes of action should have been overruled, it appearing that all parties defendant were proper or necessary parties and that the complaint stated but one cause of action.

APPEAL by plaintiff from *Williams, J.*, at April-May Term, 1951, of BLADEN.

Civil action to recover actual and punitive damages on account of false arrest, etc., heard upon demurrer by defendants to complaint of plaintiff for alleged misjoinder of parties and of causes of action.

Plaintiff alleges in his complaint in pertinent part substantially the following:

1. That he is a citizen and resident of Bladen County, North Carolina, and that this suit is brought upon his relation and in his own behalf.

2. That W. M. Corbett, Jr., and J. L. Corbett were, at the times mentioned, co-partners trading and doing business under the name of Corbett Brothers, and together operated Crystal Beach on White Lake in Bladen County.

3 and 4. That prior to the times mentioned defendant Harvey Thompson, a resident of Bladen County, North Carolina, was appointed by John B. Allen, Sheriff of Bladen County, to position of deputy sheriff therein, and thereupon Thompson entered into a bond payable to Bladen County Board of Commissioners covering the period from 1 May, 1950, to 1 September, 1950, in the penal sum of $3,000, with defendant, Maryland Casualty Company, a corporation doing business in the State of North Carolina, as surety, undertaking that Thompson, as deputy sheriff during such period would "well and faithfully perform all and singular the duties incumbent upon him by reason of his appointment to said office," and the same was in full force and effect at the times herein mentioned.

5 and 6. That John B. Allen, at the times mentioned herein, was duly elected, qualified and acting sheriff of Bladen County, and, as required by law to do, had entered into a bond payable to the State of North Carolina in the penal sum of $5,000, with Maryland Casualty Company, a corporation doing business in the State of North Carolina, as surety,

"undertaking that in all things he would well and truly and faithfully execute the said office during his continuance therein," and said bond was in full force and effect at the times herein mentioned.

8 and 9. That to the end that order should be maintained and the law observed at Crystal Beach W. M. Corbett, Jr., and J. L. Corbett employed defendant Thompson, and paid him compensation during the summers of 1947, 1948, 1949 and 1950 to as late as 14th of June, and requested John B. Allen, Sheriff as aforesaid, to appoint Thompson a deputy sheriff and permit him to remain at Crystal Beach and serve them, agreeing in such event to pay his compensation and see to it that without cost to the sheriff or the county he would furnish bond to Bladen County Board of Commissioners as aforesaid, and thereupon John B. Allen, Sheriff as aforesaid, appointed Thompson a deputy sheriff and agreed that he might continue to serve defendants W. M. Corbett, Jr., and J. L. Corbett at Crystal Beach for the period, among previous like periods, from "May 1st to September 1, 1950."

10 and 11. That on 2 June, 1950, at some time past ten o'clock in the evening, while plaintiff and others together were taking part in the pleasures and entertainments afforded by Crystal Beach, defendant Harvey Thompson, deputy sheriff, was present dressed in uniform, wearing a badge and armed with a black-jack and pistol, and, in conversation with plaintiff, suddenly appeared to become greatly angered by some remark of plaintiff that was intended to give no offense whatsoever, and abruptly and gruffly, in the presence of many, said to plaintiff, "You will have to come along with me, I will have to take you in," or words to that effect, and, although he had no warrant or authority whatsoever, publicly arrested plaintiff and took him into custody, and in so doing wrongfully and unlawfully assaulted plaintiff, in manner detailed, pushing him across the premises of Crystal Beach to a point near the office of defendants Corbett, when defendant W. M. Corbett, Jr., came out, and "soon advised plaintiff he had best go along with defendant, Thompson, deputy sheriff," and, in spite of his protestations, Thompson, in presence of said Corbett, continued to assault plaintiff and shot him, whereupon "said defendants together put plaintiff in the automobile of defendant W. M. Corbett, Jr., and took him to Elizabethtown, the county seat of Bladen, all of which was wrongful, unlawful and in flagrant violation of the rights of plaintiff to his great injury and lasting damage"; and that "on account of all of which plaintiff has sustained and still suffers great mental and physical actual damages proximately caused by the gross negligence and as the direct and natural result of the unlawful and wilful acts and conduct of defendant, Harvey Thompson, deputy sheriff."

12 and 13. That on 3 June, 1950, Harvey Thompson swore to an affidavit charging that on 2 June of said year "plaintiff John C. Cain did unlawfully appear in public while under the influence of intoxicants, and did

then and there unlawfully and wilfully resist, delay and obstruct a public officer while in the discharge of his official duty, and did unlawfully and wilfully assault a public officer in the discharge of his official duty," and procured a warrant to be issued thereon by the Recorder's Court of Bladen County for his arrest, and when plaintiff came on to be tried upon said charges in said court, the court found plaintiff not guilty, and dismissed the case; and plaintiff alleges that the criminal prosecution of him as aforesaid was frivolous and malicious, without probable cause and not in good faith, but, in flagrant violation of his rights, was undertaken in an effort by defendants Corbett and Thompson, deputy sheriff, to shield themselves against responsibility on account of the wrongful, false and unlawful arrest of plaintiff and the wilful and wanton manner in which he had been assaulted and shot and carried away from Crystal Beach on the night of 2 June, etc., embarrassing and humiliating and injurious to him in his character, reputation and standing to his great damage.

14. That defendant Thompson, deputy sheriff, having acted in the capacity and as agent and employee of the Corbetts during summer seasons of three previous years, knew, or ought to have known, that he had no right or authority to arrest plaintiff without a warrant, and in so doing was actuated by anger or malice, etc., "on account of which . . . plaintiff is entitled to recover punitive damages, as he is advised and believes."

15. That in falsely and unlawfully arresting and thereafter without probable cause maliciously prosecuting plaintiff in the manner alleged, defendant Thompson was an employee of defendants W. M. Corbett, Jr., and J. L. Corbett acting within the scope of his employment, and was at the same time a deputy sheriff of Bladen County acting under color of his office, and such acts and unlawful conduct constituted at once a breach of official duty on the part of Harvey Thompson, deputy sheriff, as well as upon the part of John B. Allen, Sheriff of Bladen County, whose deputy he was, which acts and unlawful conduct are and constitute likewise a breach of the official bond of each of said defendants wherein defendant Maryland Casualty Company undertook in the penal sum of $3,000 as to defendant Harvey Thompson, deputy sheriff, and in the penal sum of $5,000 as to defendant John B. Allen, Sheriff, that each would well and faithfully perform all and singular the duties incumbent upon him during his term of office.

16. That by reason of his false and unlawful arrest and detention as hereinbefore alleged plaintiff has suffered actual, mental and physical injury and damage in the sum of $7,500, and by reason of his angry and insulting public arrest without warrant and the willful and wanton employment of excessive force to the extreme of being shot and hauled away from Crystal Beach like a criminal and thereafter maliciously prosecuted

without probable cause, plaintiff is entitled, as he is informed and believes, to recover punitive damages in the sum of $10,000.

Wherefore plaintiff demands judgment against defendants and each of them in the sum of $7,500 actual damages and $10,000 punitive damages and the cost of this action, together with such other relief as plaintiff is or may be entitled to have, to be discharged in full however as to Maryland Casualty Company upon payment thereon by it in the sum of $8,000.

Thereupon W. M. Corbett, Jr., and J. L. Corbett, trading as Corbett Brothers, filed a separate demurrer, and John B. Allen, Sheriff, and Maryland Casualty Company together filed a separate demurrer, and Harvey Thompson and Maryland Casualty Company together filed a separate demurrer, each of which was in same words and figures, save only language naming the parties whose demurrer it is, to wit: That according to the complaint filed herein there is a misjoinder of parties defendants and a misjoinder of causes. Then follows a summary of the allegations of the complaint, as interpreted by defendants, and concluding with prayer that "there being a misjoinder of causes of action as above set forth and there being a misjoinder of parties defendants as shown, these defendants demur to the complaint and move that the action be dismissed."

Thereafter upon hearing on the demurrers filed, the court adjudged that there is a misjoinder of parties and causes of action set out in the complaint and dismissed the action at the cost of plaintiff and sureties upon the prosecution bond.

Plaintiff excepted, and appeals to Supreme Court and assigns error.

Clark & Clark for plaintiff, appellant.

Leon D. Smith, Robert J. Hester, Jr., and Nance & Barrington for defendants, appellees.

WINBORNE, J. This appeal challenges the correctness of the ruling of the court below in sustaining the demurrers to the complaint on the ground that the complaint shows upon its face a misjoinder both of parties and of causes of action. Admitting for the purpose the truth of the allegations of facts contained in the complaint, as is done when testing the sufficiency of such allegations to withstand demurrer, and applying pertinent statutes, as interpreted in decisions of this Court, we conclude that the challenge is valid, and should be sustained.

At the outset it is noted that plaintiff, appellant, states, in his brief filed in this Court, that this is an action for false arrest and damages; and that while he does not allege or pray actual damages by reason of malicious prosecution, he does allege it together with ill treatment and make it in part the basis of his prayer for the award of punitive damages.

And on the other hand, defendants, appellees, state in their brief filed on this appeal: "It is not contended that there are not sufficient allegations in the complaint upon which to base either a suit for assault and false arrest, or a suit for malicious prosecution."

Hence it is appropriate to consider, first, the question as to whether there is a misjoinder of parties on the alleged cause of action for assault and false arrest. In this connection a sheriff is required by statute in this State, G.S. 162-8, formerly C.S. 3930, as amended by 1943 Session Laws, chap. 543; to execute two several bonds payable to the State of North Carolina, the second of which shall be not more than five thousand dollars, in the discretion of the board of county commissioners, and shall be conditioned that if he shall in all other things (than as specified) well and truly and faithfully execute said office of sheriff during his continuance therein, then the obligation to be void; otherwise to remain in full force and effect.

It is also provided by statute, G.S. 109-3, that "Every . . . sheriff . . . and every other officer of the several counties who is required by law to give a bond for the faithful performance of the duties of his office, shall give a bond for the term of the office to which such officer is chosen."

It is further provided by statute, G.S. 109-34, that "Every person injured by the neglect, misconduct, or misbehavior in office of any . . . sheriff . . . or other officer, may institute a suit or suits against said officer or any of them and their sureties upon their respective bonds for the due performance of their duties in office in the name of the State, without any assignment thereof; . . . and every such officer and the sureties on his official bond shall be liable to the person injured for all acts done by said officer by virtue or under color of his office."

Moreover, as declared by this Court in *Styers v. Forsyth County,* 212 N.C. 558, 194 S.E. 305: "Under our law a deputy sheriff is authorized to act only in ministerial matters, and in respect to these matters he acts as vice-principal or *alter ego* of the sheriff, for the sheriff 'and his deputy are, in contemplation of law, one person' . . . The acts of the deputy are the acts of the sheriff . . . For this reason the sheriff is liable on his official bond for acts of his deputy" . . . "A sheriff is liable for the acts or omissions of his deputy as he is for his own." See also *Borders v. Cline,* 212 N.C. 472, 193 S.E. 826. *Blake v. Allen,* 221 N.C. 445, 19 S.E. 2d 871, and *Towe v. Yancey County,* 224 N.C. 579, 31 S.E. 2d 754.

And in the present case it is alleged that defendant, Allen, executed the sheriff's bond required of him as above shown, with defendant Maryland Casualty Company as his surety, and that defendant Thompson, as deputy sheriff, executed a bond to the Board of County Commissioners of Bladen County, conditioned that he would well and faithfully perform all and singular the duties incumbent upon him by reason of his appointment to

said office of deputy sheriff, with defendant Maryland Casualty Company as his surety.

Furthermore, it is well settled that where a contract between parties is made for the benefit of a third party, the latter is entitled to maintain an action for its breach. *Boone v. Boone,* 217 N.C. 722, 9 S.E. 2d 383, and cases there cited. See also *Chipley v. Morrell,* 228 N.C. 240, 45 S.E. 2d 149, and *Canestrino v. Powell,* 231 N.C. 190, 56 S.E. 2d 566, where additional cases are cited.

In the light of these statutes and principles of law, it appears that if the defendant Thompson were acting in the capacity of deputy sheriff at the time of the alleged assault and false arrest, he and the surety on his bond, and the Sheriff and the surety on his bond, would be proper and necessary parties to the action based on the cause of action for the alleged assault and false arrest.

But it is contended by defendants, appellees, that in this event the defendants Corbett would be improper parties. It is noted, however, that plaintiff alleges that Thompson was an employee of the defendants Corbett acting within the scope of his employment, and was at the same time a deputy sheriff of Bladen County acting under color of his office. Therefore, whether at the time of the alleged assault and false arrest Thompson was acting in his capacity as servant or public officer is a question of fact for the jury. See *Tate v. R. R.,* 205 N.C. 51, 169 S.E. 816, and *Rhodes v. Asheville,* 230 N.C. 134, 52 S.E. 2d 371.

Thus the joining of the Corbetts will not be held to be a misjoinder. Indeed, if the plaintiff be in doubt as to persons from whom he is entitled to redress, he may join two or more defendants, to determine which is liable. G.S. 1-69.

By these same principles, and for like reasons, all the defendants are proper and necessary parties to the alleged cause of action for malicious prosecution.

Therefore this Court is constrained to hold that there is no misjoinder of parties to this action, whether it be considered on the cause of action for assault and false arrest, or on the cause of action for malicious prosecution.

We now come to this question: Do the allegations of the complaint constitute a misjoinder of causes of action? While the allegations of the complaint may be susceptible of being interpreted as stating two causes of action, one for false arrest, and the other for malicious prosecution, and while in the main the respective allegations are separate paragraphs, patently no attempt is made to state separate causes of action as required by Statute, G.S. 1-123. *King v. Coley,* 229 N.C. 258, 49 S.E. 2d 648.

Plaintiff does not seek relief by way of actual damages on account of malicious prosecution. And he expressly declares in this Court that "this

is an action for false arrest and damages." Manifestly if there were doubt as to the cause or causes of action alleged, this statement constitutes an election of remedies. Hence we hold that there is stated only one cause of action. Compare *Caudle v. Benbow,* 228 N.C. 282, 45 S.E. 2d 361.

Reversed.

PATRICIA ANN JOHNSON, BY HER NEXT FRIEND, MRS. CLARA JOHNSON DICKSON, v. DAN GILL, ZEB MATTOX, SAM WHITE, AND MIKE GRATE.

(Filed 1 February, 1952.)

1. Partnership § 6d—

Partners are liable jointly and severally for a tort committed by one of them in the course of the partnership business. G.S. 59-39, G.S. 59-43.

2. Partnership § 1a—

A partnership is an association of two or more persons to carry on as co-owners a business for profit, but proof of division of profits is alone insufficient to establish a partnership and is not even *prima facie* evidence thereof in instances, among others, when payment of a share of the gross returns of the business is to discharge a debt by installments or as rental for real or personal property. G.S. 59-36 (1), G.S. 59-37 (3) (4) (a) (b) (e), G.S. 42-1.

3. Same—

Evidence tending to show merely that a person sold or leased a truck to partners for the conduct of the partnership business, with the purchase price or rental to be paid in a stipulated sum weekly, is insufficient to be submitted to the jury on the question of whether such person was a member of the partnership, notwithstanding further evidence that the stipulated weekly rental of the truck was in excess of its true rental value.

4. Partnership § 6d—

Where the evidence is insufficient to be submitted to the jury on the question of whether defendant appellee was a member of the partnership, his motion to nonsuit in an action seeking to hold him liable for a tort committed by one of the partners is properly entered.

APPEAL by plaintiff from *Bennett, Special Judge,* at 28 May, 1951, Extra Civil Term, of MECKLENBURG.

Civil action for recovery of damages for personal injuries allegedly resulting from actionable negligence of defendants.

The action was instituted first against defendant Dan Gill,—time being extended for filing complaint. During this time, and upon order obtained on motion of plaintiff, Zeb Mattox was made a party defendant. Thereupon plaintiff filed a complaint in which it is alleged that on 4 May, 1949, about 3:30 p.m., plaintiff, a minor ten years of age, while crossing

West Trade Street at its intersection with Cedar Street, in the city of Charlotte, N. C., without fault on her part, was struck and injured by a 2½ ton truck, owner by defendant Zeb Mattox, and negligently operated by defendant Dan Gill; and that at the time Gill was operating the truck on behalf of, and in furtherance of the business of defendant Mattox, and with his knowledge and consent, etc.

Defendant Mattox, answering the complaint, admitted the ownership of the truck, but denied in material aspect all other allegations of the complaint, and, by way of further defense, pleaded contributory negligence of plaintiff.

Thereafter plaintiff, upon motion, obtained an order for the adverse examination of defendants Gill and Mattox, and to take depositions of Sam White and Mike Grate,—notice of which was given to attorneys for Zeb Mattox.

Thereafter plaintiff, upon motion, obtained an order making Sam White and Mike Grate parties defendant, and allowing an amended complaint to be filed. White and Grate were served with summons, etc.

Thereupon plaintiff filed an amended complaint in which she alleged, with respect of the defendant, in addition to allegations of actionable negligence, that on 4 May, 1949, at time she was stricken, "and for some time theretofore defendant Mattox was associated with defendants Gill, Grate and White as co-partners in a landscaping and grading business . . . and . . . had placed the above described . . . truck and other equipment he owned with the said co-partnership for use in its business, and, in addition, for use by any one of his defendant co-partners on that individual's personal business; and that defendant Gill was driving the . . . truck on behalf of, for the benefit of, and in the interest of the co-partnership and of himself and of each of his co-partners, and was then and there acting within the scope of the co-partnership business and was engaged in and about the carrying out of the acts, duties, responsibilities and affairs of the co-partnership business," etc.

Defendant Mattox, answering the amended complaint, while admitting ownership of the truck described in the complaint, and that he is engaged in business in Mecklenburg County, N. C., and from time to time in his business activities used the truck, denies that the truck was being operated by him or on his behalf or on his business upon the occasion and time set out and described in the complaint; that on the contrary, he avers, said truck was being driven by defendant Gill on the occasion and at the time referred to in the complaint without his knowledge or consent; and that in other material respects the allegations of the complaint are denied.

And as further defense defendant Mattox pleads that plaintiff was contributorily negligent in way and manner stated.

Upon the trial in Superior Court plaintiff examined adversely defendants Sam White, Dan Gill, Mike Grate and Zeb Mattox, and also offered in evidence the entire adverse examination of defendant Dan Gill, and portions of the deposition of defendant Mike Grate, each taken before a commissioner appointed for the purpose.

The testimony of defendants Sam White, Dan Gill and Mike Grate so taken, tends to show substantially these facts: In 1949 they were engaged in yard landscape work in the city of Charlotte. The exact terms under which they worked, as among themselves, are not in entire accord. But it seems that Sam White would obtain jobs at certain prices, and then he and Dan Gill and Mike Grate would get together, and Sam would tell them "what he would make" and "what he would give them," and then they would do the job. In connection with their work the three of them owned a truck, bought from Pyramid Chevrolet Company, and in the name of Mike Grate. And prior to the date of the injury of which plaintiff complains, Sam White bought a Ford tractor from defendant Zeb Mattox, and agreed to pay him "ten hundred dollars." Sam testified: "I got it on pretty good terms,—a hundred dollars a week suited me all right. Many a time one hundred dollars a week took all I could make with the tractor. Lots of times I didn't make but fifty dollars a week. I gave my part of the fifty dollars to Mattox . . . I got the money out of the use of the tractor and doing grading and landscape work. I employed Dan Gill and Mike Grate on the basis that when I got a job I gave them so much and I took so much and paid on the tractor. I didn't give them a percentage. If I made one hundred dollars I would give them twenty-five dollars apiece and take fifty dollars myself. If my part was fifty dollars sometimes I gave Mattox all of the fifty dollars. And sometimes when I would get behind on my payments I would borrow. If the job carried over the weekend on Saturday, I would borrow and pay Mike and Dan . . . whatever they told me they needed. I paid them according to what I made . . . whatever we agreed on. I would tell them plain, 'I'll give you ten dollars or fifteen to help me.' I would tell them what I would give them before they did it . . . I did not tell Mattox how much I would make . . ."

Also the testimony of White, Gill and Grate tends to show: That on Saturday afternoon before the Wednesday on which injury to plaintiff took place, the truck they owned, as aforesaid, broke down near the place of business of defendant Mattox, as Sam White was on the way to pay Mattox some money, and Sam borrowed from Mattox a truck to pull the broken-down truck to the place of business of Pyramid Chevrolet Company. Then Sam White took the truck to his home, and on Monday morning it was taken out on the job they were working. The truck was kept. And on Wednesday afternoon at direction of White or Grate, or

of another tractor operator (as to whom it is not clear), Gill used the truck in going after some bolts for one of the tractors, and on that trip the plaintiff was struck and injured.

These witnesses further testified: Sam White said: "Mr. Mattox did not have anything to do with my business." Dan Gill said: "I never worked for Mr. Mattox." And Mike Grate said that he was "in the landscaping business with Sam White and Dan Gill." And "I never had any dealings with Mr. Mattox. I never worked for Mr. Mattox."

Defendant, Zeb Mattox, examined adversely, testified: "I am the person from whom Sam White got the tractor. It was a Ford tractor . . . I leased it to him on a rental basis of one hundred dollars a week. There was no sale of the tractor to Sam White . . . I did not sell him the tractor . . . Sam was the only one I did business with." Then as to the truck, this witness testified substantially as did the other defendants,—giving the circumstances under which he let Sam White have the truck for one day.

Plaintiff also offered the testimony of another witness, tending to show that in May, 1949, the fair market value of a Ford tractor like the Mattox tractor was $1,300 or $1,400; and that the reasonable rental value was $30 to $35 a week.

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

Elbert E. Foster, Richard M. Welling, and Robert D. Potter for plaintiff, appellant.

Tillett, Campbell, Craighill & Rendleman and McDougle, Ervin, Horack & Snepp for defendant, appellee.

WINBORNE, J. This is the pivotal question on this appeal: Is the evidence elicited and offered by plaintiff as shown in the record of the case on appeal, taken in the light most favorable to her, as we must do in considering a motion for judgment as in case of nonsuit, sufficient to take the case to the jury upon an issue as to the existence of a partnership between defendant Dan Gill and defendant Zeb Mattox at the time of, and in respect to the operation by Gill of the truck of Mattox which struck and injured plaintiff as alleged in the complaint?

The ruling of the trial judge in granting the motion of defendant Mattox for judgment as of nonsuit furnishes a negative answer. And after careful consideration of the evidence, in such light, the opinion of this Court is accordant therewith.

At common law the liability of members of a partnership for a tort committed in the course of its business is joint and several. *Hall v.*

Younts, 87 N.C. 285; *Mode v. Penland*, 93 N.C. 292. Annotations 175 A.L.R. 1310. See also *Dwiggins v. Bus Co.*, 230 N.C. 234, 52 S.E. 2d 892.

And the common law rule of joint and several liability of partners for a tort committed by one of the members of the partnership is incorporated in the Uniform Partnership Act, adopted by the General Assembly of this State. See P.L. 1941, Chap. 374, now Article 2 of Chap. 59 of the General Statutes.

This Uniform Partnership Act declares that every partner is an agent of the partnership for the purposes of its business, and the act of every partner for apparently carrying on in the usual way the business of the partnership of which he is a member ordinarily binds the partnership, G.S. 59-39; that where by any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership or with the authority of his co-partners, loss or injury is caused to any person, not being a partner in the partnership, or any penalty is incurred, the partnership is liable therefor to the same extent as the partner so acting or omitting to act, G.S. 59-43; and that all partners are liable jointly and severally for everything chargeable to the partnership under G.S. 59-43. See *Dwiggins v. Bus Co., supra.*

Therefore, if defendants Gill and Mattox were partners, and plaintiff suffered injury by the wrongful act or omission of Gill acting in the ordinary course of the business of the partnership, or with the authority of his co-partners, Mattox, as a partner, would be liable jointly and severally therefor.

In this connection, 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). See also *Dwiggins v. Bus Co., supra; McGurk v. Moore*, 234 N.C. 248, 67 S.E. 2d 53.

The Uniform Partnership Act further provides that in determining whether a partnership exists, these rules apply: G.S. 59-37 . . . (3) "The sharing of gross returns does not of itself establish a partnership, whether or not the persons sharing them have a joint or common right or interest in any property from which the returns are derived." (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: (a) As a debt by installments or otherwise, (b) As wages to an employee or rent to a landlord . . ., (e) As the consideration for the sale of a good will of a business or other property by installments or otherwise." G.S. 59-37 (3) (4) (a) (b) (e), as applied in *McGurk v. Moore, supra.* Compare *Eggleston v. Eggleston*, 228 N.C. 668, 47 S.E. 2d 243.

"To make a partnership, two or more persons should combine their 'property, effects, labor, or skill' in a common business or venture, and

under an agreement to share the profits and losses in equal or specified proportions, and constituting each member an agent of the others in matters appertaining to the partnership and within the scope of its business." This definition given by *Hoke, J.*, in the case of *Gorham v. Cotton,* 174 N.C. 727, 94 S.E. 450, as containing the substantive features of definition of the term is approved and applied in numerous cases in this State, as in *Fertilizer Co. v. Reams,* 105 N.C. 283, 11 S.E. 467, and *Mauney v. Coit,* 86 N.C. 464. See also *Rothrock v. Naylor,* 223 N.C. 782, 28 S.E. 2d 572.

However, the principle is well settled in this State that "while an agreement to share profits, as such, is one of the tests of a partnership, an agreement to receive part of the profits for his services and attention, as a means only of ascertaining the compensation, does not create a partnership." *Kootz v. Tuvian,* 118 N.C. 393, 24 S.E. 776. See also *Rothrock v. Naylor, supra,* and cases there cited.

Also in this State it is provided by statute, G.S. 42-1, that "No lessor of property, merely by reason that he is to receive as rent or compensation for its use a share of the proceeds or net profits of the business in which it is employed, or any other uncertain consideration, shall be held a partner of the lessee." See *Perkins v. Langdon,* 231 N.C. 386, 57 S.E. 2d 407, and cases cited.

In the present case, if it be conceded that defendants Sam White, Dan Gill and Mike Grate were partners in the business of yard landscaping, as to which the evidence is not clear, and that the tractor was acquired for use in this business, the evidence relating to the transaction between Sam White and defendant Zeb Mattox, as to the tractor, tends to show that the tractor was either sold by Mattox to White for "ten hundred dollars," payable one hundred dollars per week, or that it was leased by Mattox to White on rental basis of one hundred dollars per week. And though it appears that the money White paid to Mattox was money received by White from the landscaping business, no inference arises therefrom that Mattox was a partner in the business. This is true under the provisions of the Uniform Partnership Act above quoted, whether the transaction as to the tractor be a sale or a lease. And the evidence offered is not susceptible of the inference that Mattox was a partner in the landscaping business with Sam White, Dan Gill and Mike Grate, or with either of them. Nor may such inference arise upon the evidence as to the rental value of a tractor of the kind in question.

And as to the truck here involved, all the evidence tends to show that it was merely borrowed by White from Mattox, and used in White's landscaping business. This is not sufficient to create an inference that Mattox thereby became a partner in the business.

Hence the judgment from which appeal is taken is

Affirmed.

HARRY RICHARD HOLT AND WIFE, MARY J. HOLT, AND VITUS REID HOLT AND WIFE, BLANCHE HOLT, PETITIONERS, v. HARRIET M. MAY AND HATTIE DAVIS MAY, DEFENDANTS.

(Filed 1 February, 1952.)

1. Judicial Sales § 10—

Taxes assessed at the time of a judicial sale should be paid out of the proceeds of sale. G.S. 105-408.

2. Same: Taxation § 32c—

"Assessed" as used in G.S. 105-408 is synonymous with "levied," and therefore taxes levied at the time of a judicial sale should be paid out of the proceeds of sale.

3. Judicial Sales § 7—

Until confirmation, a purchaser at a judicial sale is but a mere preferred bidder, and therefore those taxes which have been levied at the time of confirmation must be paid out of the proceeds of sale under G.S. 105-408, the doctrine of relating back not being applicable since title is not involved.

4. Waiver § 2—

Waiver is an intentional relinquishment of a known right.

5. Same: Judicial Sales § 11—

Where the purchaser at a judicial sale states at the time he accepts deed that he will continue to insist that taxes then levied should be paid out of the proceeds of sale, his acceptance of deed, even though the commissioners state at that time that they would not pay the taxes, cannot constitute a waiver.

6. Equity § 3—

Laches will not bar a party when the adverse party has not been prejudiced by any delay.

APPEAL by original petitioners, Harry Richard Holt and Vitus Reid Holt, and defendants, Harriet M. May and Hattie Davis May, from *Carr, Resident Judge,* at Chambers in Graham, 28 April, 1951, in proceeding pending in Superior Court of ALAMANCE County.

Petition and motion in the cause by purchaser of land sold under order of court in partition proceeding, demanding that the original owners be held liable for city and county *ad valorem* taxes levied and assessed against the land the year of the sale.

These in substance are the salient facts, as found by Judge Carr, to which no exception was taken:

1. Petition was filed 4 May, 1950, in this proceeding for the partition by sale of land located in the City of Burlington, owned by the original petitioners and the defendants as tenants in common. The defendants answered on 26 June, 1950.

2. On 27 June, 1950, an order was entered by the Clerk of the Superior Court ordering a sale at public auction of the land described in the petition and appointing commissioners to make the sale.

3. The land was sold at public auction on 28 July, 1950, with O. H. Westmoreland being the last and highest bidder.

4. The commissioners filed report of sale on 28 July, 1950, and on 10 August, 1950, the Clerk entered an order of confirmation, directing the commissioners to execute and deliver to the purchaser, or his assignee, a good and sufficient deed for the property upon receipt of the purchase price, with direction that the proceeds be paid over to the tenants in common as their interests appeared in the petition. The bid was assigned to Sidney B. Guyes, movant, to whom title deed was made by the commissioners upon payment of the purchase price.

5. The order of sale entered by the Clerk on 27 June, 1950, made no reference to the 1950 County of Alamance or City of Burlington taxes. Nor did the notice of sale published by the commissioners make any reference to such taxes, and no announcement relative thereto was made at the sale on 28 July, 1950. Also, the movant and his attorney were present at the sale on 28 July, 1950, and no inquiry was made by either, or by any other person present, relative to the 1950 city and county taxes.

6. After entry of the order of confirmation and on 24 August, 1950, a meeting for the purpose of delivery of the deed and payment of the purchase price was held. Present were the movant and his attorney and one of the commissioners. Prior to acceptance of the deed and payment of the purchase price, the attorney for movant Guyes advised the commissioner who was present that the 1950 city and county taxes were unpaid and that the movant insisted that the same should be paid from the proceeds of the sale. Considerable discussion of the question ensued, and prior to delivery of the deed and payment of the purchase price the commissioner stated in the presence of Sidney B. Guyes and his attorney "that the commissioners did not consider it legal and proper that such taxes be paid out of the proceeds of the sale and that the commissioners would not pay such taxes in accordance with the request made by Sidney B. Guyes through his attorney . . ." On the same day deed to the property was delivered to, and the purchase price paid by, Sidney B. Guyes, movant.

7. The commissioners filed their final report on 24 August, 1950, and it was approved that day by the Clerk. The report set forth the commissioners' receipts and disbursements and did not show as disbursements any payment of the 1950 city and county taxes.

8. On 3 October, 1950, movant Guyes filed a motion in the cause moving the court for an order directing the commissioners, in the distribution of the proceeds of sale, to pay the 1950 city and county taxes. On 9 October, 1950, the commissioners filed answer to the motion.

9. On 9 October, 1950, a hearing was held before the Clerk, with the commissioners and movant Guyes and his attorney being present. On 14 November, 1950, the Clerk rendered his decision, adjudging that the commissioners be required to pay the city, but not the county, taxes for the year 1950. From this judgment the commissioners and the movant appealed.

10. On 3 October, 1950, the date on which the motion of the movant was filed, the commissioners had disbursed all funds in their hands and on that date were not in possession, as commissioners, of any of the proceeds of the sale.

11. On 7 April, 1951, Judge Carr entered an order in the form of a notice to the attorneys for the tenants in common, directing that the tenants in common appear before the court at the courthouse in Graham, N. C., at 11 o'clock a.m. on 14 April, 1951, and show cause why the court should not enter an order requiring each of the tenants in common to refund to the commissioners such pro rata part of the proceeds of the sale received by each of them as may be necessary to pay the 1950 city and county taxes. Pursuant to the notice, all the parties appeared before the court, through counsel, at the appointed time and place, and the movant was granted right to file a reply to the commissioners' answer to the motion, the reply being filed 20 April, 1951.

12. That on the day of the order directing the sale of the property, same being 27 June, 1950, the amount of the 1950 county or city taxes upon the property had not been determined, and on that date the tax rate of neither political subdivision had been set; that the Commissioners of the County of Alamance set the county tax rate on 31 July, 1950, and the City Council of the City of Burlington set the city tax rate on 18 July, 1950.

13. The 1950 county taxes amounted to $258.90 and the 1950 city taxes amounted to $352.47.

Upon the facts found Judge Carr concluded as a matter of law that the movant, Sidney B. Guyes, is entitled to judgment against the former owners of the land requiring them to pay both the city and county taxes against the land for the year 1950, and judgment was entered directing each of them to pay his or her pro rata share of the total amount of these taxes.

From the judgment entered, the original petitioners and defendants, former owners of the land, appealed to this Court, assigning errors.

Cooper, Sanders & Holt and Long & Long for the original petitioners and defendants, appellants.

Thomas C. Carter, J. Elmer Long, and Clarence Ross for movant, appellee.

JOHNSON, J. Ordinarily, in the absence of statute, when land is sold under judicial sale, all taxes accrued prior to the consummation of the sale are charges on the property, rather than on the proceeds of the sale, and pass with the property to the purchaser. 31 Am. Jur., Judicial Sales, sections 172 and 220.

In this jurisdiction, however, by statute, G.S. 105-408, a judicial sale of land, as between the purchaser and the parties to the proceeding, transfers the lien of a designated class of tax accruals to the proceeds of sale in exoneration of the land. The pertinent provisions of this statute are as follows: "In all civil actions and special proceedings wherein the sale of any real estate shall be ordered, the judgment shall provide for the payment of all *taxes then assessed upon the property* and remaining unpaid, . . . all of which payments shall be adjudged to be made out of the proceeds of sale . . ." (Italics added).

In the instant case, the order directing the sale was entered by the court on 27 June, 1950. The City Council of the City of Burlington (acting under the provisions of G.S. 105-339), set the tax rate and levied for the City on 18 July, 1950. The Board of Commissioners of Alamance County set the tax rate and levied for the County on 31 July, 1950. The sale was confirmed 10 August, 1950. The purchase price was paid and the deed delivered by the commissioners on 24 August, 1950.

The question for decision here is: What taxes are intended to be covered by the statutory expression "taxes then assessed upon the property"?

The question seems to be settled by what is said in *Chemical Co. v. Brock,* 198 N.C. 342, 151 S.E. 869. It is there said: "The statute contemplates the payment, out of the proceeds of the sale, of such taxes as are assessed when the sale is made . . ." *Adams, J.,* speaking for the Court, then goes on to define the word "assessed" as used in the statute: "To assess a tax is to fix the proportion which each person among those who are liable to it has to pay; to fix or settle a sum to be paid by way of a tax; to charge with a tax. Black's Law Dictionary; Bouvier's Law Dictionary. An assessment or levy of a tax is essential to its certainty." It thus appears that the Court interpreted the word "assessed" as being synonymous with "levied." This is manifest from the conclusion reached in the decision, bot. p. 345: "For the purpose of attaching to and following the land the lien of the tax when *assessed and levied* relates back to the first day of May; but the proceeds of a sale made under section 7980 (now G.S. 105-408) *may be applied to such taxes only as are assessed when the sale is made.*" (Italics added.)

Until a judicial sale is confirmed, the purchaser is a mere preferred proposer. *Parker v. Dickinson,* 196 N.C. 242, 145 S.E. 231; *Dixon v. Osborne,* 204 N.C. 480, 168 S.E. 683. Therefore it would seem that a judicial sale is not deemed made as contemplated by the statute (G.S.

105-408) until it is confirmed. See *Harrell v. Blythe,* 140 N.C. 415, 53 S.E. 232. This is in accord with the rationale of the decision in *Chemical Co. v. Brock, supra,* cited by the appellants. See last paragraph of page 345.

Title is not involved here. Therefore we are not concerned with the rule under which title, upon confirmation, relates back to the date of sale. *Parker v. Dickinson, supra; Vass v. Arrington,* 89 N.C. 10.

In the instant case the tax levies had been made by both the city and the county before the order of confirmation was entered 10 August, 1950.

It follows, then, that the court below correctly ruled that the taxes of both taxing units should have been paid out of the proceeds of sale.

The appellants' plea of waiver seems to be without substantial merit. An intentional relinquishment of a known right is a prerequisite of waiver. 56 Am. Jur., Waiver, sec. 15. The purchaser's right to have the city and county taxes paid out of the proceeds of sale was fixed by statutory mandate. On the record as presented it has not been made to appear that he intentionally relinquished this right. The case of *Johnson v. Lumber Co.,* 225 N.C. 595, 35 S.E. 2d 889, cited by the appellants, is distinguishable. Nor has it been made to appear that appellants have been prejudiced by any delay of the movant, appellee, in asserting his rights, and in the absence of such showing the benefits of the defense of laches may not be invoked. 30 C.J.S., Equity, sections 112 and 118. The court below properly overruled the appellants' pleas of waiver and laches.

The judgment below is

Affirmed.

ETHEL G. ROBERSON v. E. D. SWAIN AND R & S PACKING COMPANY, A CORPORATION.

(Filed 1 February, 1952.)

1. Pleadings § 19c—

Upon demurrer, a pleading will be liberally construed, giving the pleader the benefit of every reasonable inference and intendment deducible from the facts alleged as well as all relevant inferences of fact, and the demurrer cannot be sustained if upon the entire pleading any part presents facts or reasonable inferences of fact sufficient to constitute a cause of action.

2. Evidence § 39—

Parol evidence is competent to show that an obligation was assumed only under certain contingencies, certainly upon allegations that the delivery of the paper writing attacked was produced by fraudulent misrepresentations.

3. Fraud § 3—

A promissory misrepresentation may constitute the basis of fraud when it is made to mislead the promisee, and the promissor, at the time of making it, has no intent to comply therewith, since in such instance the state of mind of promissor is a subsisting fact.

4. Fraud § 9—Complaint held sufficient to state cause of action for fraud.

The complaint alleged an agreement under which plaintiff was to sell certain real and personal property to defendant for a stated consideration to be evidenced by notes executed by defendant and his wife. Only a part of the consideration agreed upon was set forth in writing. Plaintiff further alleged that defendant tendered notes representing the entire purchase price signed by defendant alone, but that, upon plaintiff's objection, defendant promised to take the notes and have them signed by defendant's wife also, and return same to plaintiff, that thereupon plaintiff delivered that part of the agreement which was in writing, but that defendant failed and refused to deliver the notes representing the purchase price. *Held:* The complaint is sufficient to state a cause of action for fraud.

5. Same—

Allegations to the effect that defendant by fraudulent misrepresentations induced plaintiff to execute and deliver an agreement for the sale of real property, and thereafter had title to same transferred to a corporation in which defendant owned the majority of stock, and alleging facts sufficient to support the inference that transfer of title to the corporation was a part of the scheme to deprive plaintiff of property by fraud, and that the corporation had actual knowledge thereof, *is held* sufficient to state a cause of action against the corporation, and the corporation may be joined as a party defendant.

6. Pleadings §§ 2, 19b—

Plaintiff may unite in a single action several causes of action if they all arise out of the same transaction or transactions connected with the same subject matter, and tell a connected story forming a general scheme tending to a single end.

6. Pleadings § 19b—

Where there is no misjoinder of causes of action, the fact that one defendant may not be a proper or necessary party is not ground for demurrer, but may be regarded as surplusage.

APPEAL by plaintiff from *Bone, J.,* March 1951 Term, WAKE.

Civil action for the cancellation of the written part of a contract, for a restraining order and for an accounting.

Plaintiff and defendant Swain on and prior to 26 July, 1947, were tenants in common and as such owned certain real estate and personal property in the city of Raleigh. This property was known as the R & S Packing Company and consisted of lands, buildings, slaughter house, equipment, improvements and additions. Plaintiff bargained to convey her interest to defendant Swain. She thereafter instituted this action

to vacate her contract to convey said property alleging fraud in its procurement.

Defendant Swain and the corporate defendant filed separate demurrers to the complaint on the ground that the complaint does not state a cause of action against either defendant and on the further ground that there is a misjoinder of parties defendant and causes of action.

From a judgment sustaining the demurrers of both defendants, and dismissing the action, plaintiff appealed, assigning errors.

Wheeler Martin, Clem B. Holding, and Douglass & McMillan for plaintiff, appellant.

Brassfield & Maupin and R. Roy Carter for defendants, appellees.

VALENTINE, J. A demurrer admits the truth of all allegations of fact and such inferences of fact as can reasonably be drawn from a pleading. As against a demurrer, a complaint must be liberally construed and every reasonable inference and intendment deducible therefrom must be resolved in favor of the pleader before a demurrer prevails. A pleading cannot be overthrown by a demurrer unless it is wholly insufficient. If, upon a liberal construction of the entire pleading, any part presents facts or reasonable inferences of fact which taken as true make out a cause of action, the pleading is sufficient to repel the attack of the demurrer. *Mills Co. v. Shaw, Comr. of Revenue,* 233 N.C. 71, 62 S.E. 2d 487; *Sparrow v. Morrell & Co.,* 215 N.C. 452, 2 S.E. 2d 365; *Meyer v. Fenner,* 196 N.C. 476, 146 S.E. 82; *Deaton v. Deaton,* 234 N.C. 539; *Guerry v. Trust Co.,* 234 N.C. 644.

On this question, *Barnhill, J.,* in *Mills Co. v. Shaw, Comr. of Revenue, supra,* said: "It must be fatally defective in that it fails to allege any fact or combination of facts which, if true, entitles plaintiff to some relief." *Blackmore v. Winders,* 144 N.C. 212, 56 S.E. 874; *Fairbanks, Morse & Co. v. Murdock Co.,* 207 N.C. 348, 177 S.E. 122.

The complaint in the instant case presents a difficult question, but viewed in the light of the controlling principles of law, we are led to the conclusion that it is sufficient to repel the demurrers of the defendants.

The pertinent facts stated in the complaint are as follows: On and prior to 26 July, 1947, plaintiff and defendant Swain owned as tenants in common certain real and personal property in the city of Raleigh, known as the R & S Packing Company. This property consisted of land, buildings, slaughter house, improvements and equipment. Plaintiff owned 3/4ths interest in the land and 5/8ths interest in the improvements, additions and equipment, while the defendant Swain owned 1/4th interest in the land and 3/8ths interest in the improvements, additions and equipment. Upon negotiations instituted by Swain, plaintiff agreed to

sell and Swain agreed to purchase plaintiff's interest in both the real and personal property at the price of $150,000. It was agreed that this contract should be carried out by the execution and delivery to the plaintiff of two series of promissory notes signed by defendant Swain and his wife, Pearl M. Swain, one series aggregating $30,000 and the other series aggregating $120,000. These notes were to be payable at various intervals beginning 1 January, 1949, to and including 1 January, 1960. The total of both series of notes represented the total consideration agreed upon as the purchase price of plaintiff's interest in said property. It was further agreed that a part of the contract would be written embodying the terms and conditions of the sale of the property and reciting a consideration of $30,000. The series of notes aggregating $120,000 for some reason not disclosed by the record were not to appear in the written part of the contract.

On 26 July, 1947, D. M. Roberson, husband and agent of plaintiff, and defendant Swain met in Williamston, North Carolina, to complete the transaction. Swain had prepared all of the notes, including those set out in the paper writing and those agreed to be delivered in addition thereto, but none of the notes had been signed by the wife of defendant Swain. The contract provided that all of the notes were to be signed by both Swain and his wife. When this discrepancy was called to the attention of Swain by plaintiff's agent, Swain represented to plaintiff's agent that he would take all of said notes back to Raleigh and in compliance with the original agreement would obtain the signature of his wife to all of the notes and immediately return them to the plaintiff. It was upon this statement and representation that plaintiff's husband delivered to defendant Swain the paper writing with the notes. At that time it was the distinct understanding between plaintiff's agent and defendant Swain that Swain would have his wife execute all of said notes and would immediately forward them to the plaintiff. Defendant Swain has kept the written part of the contract, but has failed and refused and still fails and refuses to deliver to the plaintiff said notes representing the consideration of said agreement.

The plaintiff sets forth in her complaint that the statements and representations made by the defendant Swain to her agent that he would have said notes executed according to the agreement and return them to the plaintiff were false and that defendant Swain knew the statements were false and that they were made by him with the intent to deceive the plaintiff and that relying upon said false representations, plaintiff was deceived to her injury in delivering to said Swain the written part of the agreement. The complaint alleges that a delivery of the paper writing upon the consideration and upon the representation of Swain makes the

delivery of the written part of the contract ineffectual in law and that it should be set aside.

The complaint further alleges that defendant Swain has caused to be formed a corporation which is designated as R & S Packing Company, the identical name by which the property holding of plaintiff and defendant Swain is known, and that the title to said property has been put in the name of the corporation by Swain; that the grantee had knowledge of the fraud; and that a transfer of the property by said corporation would be detrimental and injurious to the rights of the plaintiff. The complaint asserts that in some way the defendant Swain owns a majority of the stock of said corporation and that by reason of the matters and things alleged in the complaint, she is entitled to an order restraining the corporation from disposing of any of the property above mentioned.

The contract here is for the sale of both real and personal property. *Jamerson v. Logan,* 228 N.C. 540, 46 S.E. 2d 561. The essential problem arises from the delivery of the written portion of the contract. The contention of the plaintiff is that the paper writing represented only a portion of the contract and that the whole contract included the execution and delivery of notes by the defendant Swain and his wife in the aggregate amount of $150,000, and that the written part of the contract was delivered upon the strength of the false and fraudulent representations made by defendant Swain. Since the written part of the contract falls within the statute of frauds, delivery of it is a prerequisite to its effectiveness. "Both the delivery of the instrument and the intention to deliver it are necessary to a transmutation of title." *Insurance Co. v. Cordon,* 208 N.C. 723, 182 S.E. 496.

Whether the paper writing was delivered or whether its physical passage into the hands of Swain was induced by his fraudulent representations are jury questions upon the evidence to be adduced at the trial and upon appropriate instructions from the court. *Gaylord v. Gaylord,* 150 N.C. 222, 63 S.E. 1028; *Fortune v. Hunt,* 149 N.C. 358, 63 S.E. 82; *Tarlton v. Griggs,* 131 N.C. 216, 42 S.E. 591; *Carroll v. Smith,* 163 N.C. 204, 79 S.E. 497; *Lee v. Parker,* 171 N.C. 144, 88 S.E. 217; *Insurance Co. v. Cordon, supra.*

If the physical delivery of the paper writing was conditioned upon a delivery to the plaintiff of the notes representing the purchase price properly signed by Swain and his wife, upon a failure of that condition the delivery is ineffectual. *Lerner Shops v. Rosenthal,* 225 N.C. 316, 34 S.E. 2d 206. But the plaintiff bottoms her cause of action upon the fraud of the defendant Swain and not upon a conditional delivery of the paper writing.

Be that as it may, it is well established in this jurisdiction that parol evidence may be used to show that an obligation is assumed only upon

certain contingencies. *Jones v. Casstevens,* 222 N.C. 411, 23 S.E. 2d 303; *Kindler v. Trust Co.,* 204 N.C. 198, 167 S.E. 811; *Thomas v. Carteret,* 182 N.C. 374, 109 S.E. 384; *Insurance Co. v. Morehead,* 209 N.C. 174, 183 S.E. 606. This is certainly true when the delivery of a paper writing is induced by fraudulent representations as here alleged.

When a representation contains all the elements of fraud except that it is not a representation of an existing fact but is promissory in nature, the "state of mind" of the promissor is material. If he made the promissory representations merely to mislead the promisee with no intent to comply with the promise, and the other elements of fraud are made to appear, such representations will support an action in fraud notwithstanding the promissory nature of the representation, for the "state of mind" of the promissor is a subsisting fact. What his condition of mind was at the time and his intent in respect to the fulfillment of the promise presents a question for the jury. *Laundry Machinery Co. v. Skinner,* 225 N.C. 285, 34 S.E. 2d 190; *Williams v. Williams,* 220 N.C. 806, 18 S.E. 2d 364; *Bank v. Yelverton,* 185 N.C. 314, 117 S.E. 299.

Therefore, it appears plaintiff has stated facts sufficient to repel a demurrer.

As to the demurrer of defendant corporation: A logical inference to be drawn from the plaintiff's complaint is that defendant Swain has caused to be formed a corporation bearing the identical name as that used to designate the property holdings of the plaintiff and defendant Swain and that he caused the title to the property in question to be placed in the name of the corporation. Just how this was accomplished does not clearly appear. The complaint is, however, susceptible to an inference that this fact is a part of the manipulations of defendant Swain in his effort to gain control and ownership of the property for $30,000, when in fact it is worth $150,000. The complaint is susceptible also to the inference that the corporation was created by the defendant Swain for the purpose of confusing the issue and of juggling the property in such a way as to defeat the plaintiff's claim.

The complaint in the instant case relates a connected story forming a general scheme and tending to a single end. The plaintiff may unite in a single complaint several causes of action if they all arise out of the same transaction or a transaction connected with the same subject matter. *Shaffer v. Bank,* 201 N.C. 415, 160 S.E. 481.

While the complaint does not state specifically that the formation of the corporation for the purpose of taking title to the property was a part of the fraudulent plan and purpose of defendant Swain to obtain plaintiff's property for an inadequate consideration, an inference to that effect is permissible from the entire complaint. "And if the objects of the suit are single, and it happens that different persons have separate interests

in distinct questions which arise out of the single object, it necessarily follows that such different persons must be brought before the court in order that the suit may conclude the whole subject." *Barkley v. Realty Co.*, 211 N.C. 540, 191 S.E. 3.

If the corporation is not a proper or necessary party, this fact may be regarded as surplusage and is not grounds for a demurrer. *Shuford v. Yarborough*, 197 N.C. 150, 147 S.E. 824; *Furniture Co. v. R. R.*, 195 N.C. 636, 143 S.E. 242.

The cases cited in defendant's brief have been thoroughly examined and are factually distinguishable from the instant case.

Applying the applicable rules of law, we must conclude that the plaintiff is entitled to be heard upon the merits of the case and that the demurrers of the defendants were improperly sustained.

The ruling of the court below is

Reversed.

ELSIE MAE PAUL SANDERSON, ZELMA PAUL BARDO, DEBORAH SUTTON PAUL AND LILLIAN PAUL v. HORACE LAYTON PAUL AND WIFE, MRS. HORACE LAYTON PAUL.

(Filed 1 February, 1952.)

1. Evidence § 32—

In order for testimony of transactions or communications with a decedent to be incompetent it is necessary that the witness (1) be a party or interested in the event, (2) that his testimony relate to a personal transaction or communication with decedent, (3) that the testimony be against the deceased's personal representative or person deriving title through or under the deceased, (4) that the witness be testifying in his own behalf or interest. G.S. 8-51.

2. Same—

A witness is competent to testify against his interest in regard to a transaction or communication with decedent, and where such witness has alternative interests the competency of the testimony depends upon which interest predominates or is the more immediately valuable.

3. Same—

The interest which affects the competency of a witness under G.S. 8-51 is a present pecuniary interest existing at the time the witness is examined, and mere sentimental reasons or personal predilections does not affect the question of qualification.

4. Same—

The party asserting that a witness is disqualified under G.S. 8-51 to testify as to transactions or communications with a decedent has the burden of showing the disqualifying interest of the witness.

5. Trial § 19—

The general rule is that it is the province of the judge to determine preliminary questions of fact upon which the admissibility of evidence depends.

6. Evidence § 32—

As grantee in the deed attacked, the witness would take a one-half interest, defeasible upon her death without issue; as heir at law of grantor she would take a one-fourth undivided interest in the land in fee, subject to the dower right of grantor's widow. *Held:* It is error to exclude her testimony of transactions or communications with deceased grantor offered for the purpose of attacking the deed for undue influence, without evidence or a finding as to which interest of the witness is of greater pecuniary value.

7. Appeal and Error § 40i—

Where testimony of a witness is excluded without proper predicate, and decision of the question of competency of the testimony materially affects the correctness of the judgment of nonsuit, the judgment will be reversed.

APPEAL by plaintiffs from *Williams, J.*, May Term, 1951, of ROBESON. Reversed.

Plaintiffs instituted this action to set aside a deed executed by Henry Luther Paul to Lillian and Horace Paul. The deed was attacked on the ground of fraud and undue influence alleged to have been exerted by the grantees.

The deed in question was executed by Henry Luther Paul, then a widower, 5 August, 1943, and purported to convey described land to his children Lillian and Horace Paul, with provision that if either died without issue the property conveyed should pass to the other. The grantor reserved a life estate in the land. On 11 September, 1943, Henry Luther Paul married Deborah Sutton. The grantor died in 1949 leaving him surviving his widow and four children by a former marriage, the plaintiffs Elsie Mae Sanderson, Zelma Bardo and Lillian Paul, and the defendant Horace Paul.

It was alleged in the complaint that after the death of his first wife Henry Luther Paul wished to marry Deborah Sutton, but Lillian and Horace, who were living with him in the home, strenuously objected, and by their continued nagging and harassment caused his mind and will to be weakened to the extent that his will was subverted to that of Lillian and Horace, and to relieve himself of this unbearable situation he yielded to their influence and to their suggestion that if he would sign a deed to them for the land they would cease their conduct; that the deed he then executed was procured by the undue influence of Lillian and Horace, and reflects their will rather than his own; and that he was thereby caused to execute a deed which he would not otherwise have done.

After the institution of this action Lillian Paul, who was originally served with summons as a defendant, expressed the view that she and Horace had exerted undue influence on their father, and that the deed should be set aside. On motion of defendant Horace Paul the court ordered that she be made party plaintiff and that her name be stricken from the record as a defendant.

On the trial plaintiffs offered Lillian Paul as a witness to show certain transactions and communications between herself and her father, the decedent, tending to support the allegations of undue influence set out in the complaint. Defendant's objection to this evidence was sustained and her testimony in so far as it related to personal transactions and communications with decedent was excluded.

At the close of plaintiffs' evidence motion for judgment of nonsuit was allowed, and from judgment dismissing the action plaintiffs appealed.

McKinnon & McKinnon for plaintiffs, Elsie Mae Sanderson, Zelma Bardo, and Deborah Sutton Paul.

McLean & Stacy for plaintiff Lillian Paul.

E. E. Page and Varser, McIntyre & Henry for defendants, appellees.

DEVIN, C. J. The judgment of nonsuit rendered by the court below was predicated upon the ruling that Lillian Paul, party plaintiff, was disqualified by the statute G.S. 8-51 to testify in her own interest concerning personal transactions or communications between herself and the decedent, against the defendant Horace Paul who is claiming under the deed of the decedent.

This statute, which is a recodification of sec. 590 of the Code, provides in brief that in the trial of an action a party, or person interested in the event, shall not be examined as a witness in his own behalf or interest, against the personal representative of a deceased person or a person deriving his title or interest through or under a deceased person, concerning a personal transaction or communication between the witness and the deceased person, with certain exceptions not pertinent here. G.S. 8-51.

This statute in its application to a great variety of circumstances and situations has been many times considered by this Court. In *Bunn v. Todd,* 107 N.C. 266, 11 S.E. 1043, *Chief Justice Clark* in an opinion written in 1890 analyzed the provisions and effect of this statute, and in a recent opinion written for the Court by *Justice Ervin* in *Peek v. Shook,* 233 N.C. 259, 63 S.E. 2d 542, a succinct resume of the provisions of the statute was aptly stated. See also *Sprinkle v. Ponder,* 233 N.C. 312, 64 S.E. 2d 171.

In order to render the testimony of a witness incompetent under this statute it must appear, (1) that he is a party, or interested in the event,

(2) that his testimony relates to a personal transaction or communication with the deceased person, (3) against his personal representative or a person deriving title or interest through or under the deceased, and (4) it must also appear that he is testifying in his own behalf or interest. The provision in the present statute last above referred to was added by sec. 590 of the Code of 1883 to sec. 343 of the original Code of Civil Procedure. Hence, when the witness is testifying not in his own behalf or interest, but against his interest, he is not disqualified by the statute. *Tredwell v. Graham,* 88 N.C. 208; *Bunn v. Todd,* 107 N.C. 266, 11 S.E. 1043; *In re Worth's Will,* 129 N.C. 223, 39 S.E. 956; *In re Fowler's Will,* 159 N.C. 203, 74 S.E. 117; *Seals v. Seals,* 165 N.C. 409, 81 S.E. 613; *Sorrell v. McGhee,* 178 N.C. 279, 100 S.E. 434; *Price v. Edwards,* 178 N.C. 493, 101 S.E. 33; *Peek v. Shook,* 233 N.C. 259, 63 S.E. 2d 542; Stansbury on Ev., sec. 71. "A witness may always testify against his own interest, regardless of the subject matter of his testimony or his relation to the parties." Stansbury, sec. 71. "It is not within the spirit or the letter of the statute, as his own interest is supposed to be a sufficient protection for the opposite party against false or fabricated testimony." *Seals v. Seals, supra.* Courts are not disposed to extend the disqualification of a witness under the statute to those not included in its express terms. 58 A.J. 177.

In the case at bar the witness Lillian Paul was a party plaintiff. Her excluded testimony related to personal transactions and communications between herself and the decedent, and was against defendant Horace Paul who claimed title under the deed of decedent. But one other element was necessary to complete her disqualification. Was she testifying in her own interest, or was she testifying against her interest? If she was testifying against her interest her testimony was competent.

The testimony of this witness was offered for the purpose of attacking the validity of the deed of Henry Luther Paul. Should the attack prove successful and the deed be set aside, she would become entitled as heir of the decedent to one-fourth undivided interest in the land in fee, subject to the dower right of the widow, who is 48 years of age. On the other hand, if the deed be upheld, under the deed she would be entitled to one-half undivided interest in the land, but her title would be a defeasible fee, subject to be divested should she die without children. Her tenure, however, would in any event continue as long as she lived. So that under the deed her interest would be equivalent to that of an unencumbered life estate. She is 41 years of age and unmarried. Having an alternative interest it would seem to follow that the competency of her testimony must depend on which interest predominated. This Court several times has had a similar situation presented in ruling on the competency of testimony under sec. 590 of the Code, now G.S. 8-51.

In *In re Fowler's Will,* 159 N.C. 203, 74 S.E. 117, the matter being heard was a caveat to a will on the ground of fraud and undue influence. The witness Rena Jackson was an heir and also a devisee. She was offered to prove transactions and communications with the deceased, and against the will. It was admitted, however, that she would receive less as an heir, if the will was set aside, than she would if it was sustained. The Court said she testified against her interest and was not disqualified by the statute.

In re Worth's Will, 129 N.C. 223, 39 S.E. 956, was also a case involving a caveat to a will. The caveators offered as a witness Mrs. Crocker for the purpose of showing personal transactions and communications with deceased, and against the will which was dated in 1899. In the will she was given a legacy of $2,000. It appeared, however, that there had been a previously executed will in which also she was a legatee but the amount in the former will did not appear. There was no evidence that the former will had been revoked. This Court reversed the ruling of the lower court and held she was testifying against her interest and that her testimony was competent, as the statute excluded testimony only when the witness was testifying in his own behalf. In that case it was urged that as a legatee in both wills without proof of the amount in the former will her testimony should have been excluded in absence of proof that the legacy in former will was smaller. But the Court declared "the witness should have been permitted to testify, if the legacy in the former will did not disqualify her. We think for it to have that effect it was necessary that evidence should have been adduced going to show that the legacy in the former will was larger than that given to the witness in the script of 1899 and that was not done."

In *Weinstein v. Patrick,* 75 N.C. 344, the plaintiff sued the administrator of a deceased grantor and others to set aside an alleged fraudulent conveyance. The grantee in the alleged fraudulent deed, and who had reconveyed to another, was offered as a witness by plaintiff to show transactions and communications with the deceased, against the validity of the deed. The grantee was also a creditor of the estate. It was held the grantee's testimony should have been excluded because as a creditor, if the deed was set aside, he would get his debt and would be testifying in his own interest. It was said in the opinion by *Justice Reade* that while this witness in his conveyance had warranted the title, so that to that extent his interest would be in support of the deed, "we do not know on which side his interest predominates."

It seems therefore to determine the competency of a witness who has a dual or alternative interest in the event of the action, the Court must decide which of the two interests was the more immediately valuable.

The interest which determines the competency of a witness under the statute is a present direct pecuniary interest. *Burton v. Styers,* 210 N.C. 230, 186 S.E. 248; *Helsabeck v. Doub,* 167 N.C. 205, 83 S.E. 241. It is a substantial pecuniary interest in the result. *Jones v. Emory,* 115 N.C. 158, 20 S.E. 206; *Vannoy v. Stafford,* 209 N.C. 748, 184 S.E. 482; *Allen v. Allen,* 213 N.C. 264, 195 S.E. 801. The interest which affects the competency of the witness must be a present interest, a legal pecuniary interest existing at the time the witness is examined. *Isler v. Dewey,* 67 N.C. 93. A mere sentimental interest or consideration or preference for one party as against the other, not based on some direct pecuniary interest of value, will not affect the question of the qualification of the witness. *Jones v. Emory,* 115 N.C. 158, 20 S.E. 206; *Sutton v. Walters,* 118 N.C. 495, 24 S.E. 357; *Ins. Co. v. Woolen Mills,* 172 N.C. 534, 90 S.E. 574; *Coward v. Coward,* 216 N.C. 506 (510), 5 S.E. 2d 537.

To determine this question, the rental value or annual income from the land, and the present market value of the land, are material factors. G.S. 8-46; G.S. 8-47. *Thompson v. Avery Co.,* 216 N.C. 405 (409), 5 S.E. 2d 146. No evidence on those points was offered. The burden was not upon the plaintiffs to offer evidence to show that the witness was competent. The general rule established by G.S. 8-49 and 8-50 is that no person offered as a witness shall be excluded on account of interest or because a party to the action, except as otherwise provided. Hence, it was incumbent upon one who challenged the competency of the witness to show disqualification. Here, no evidence was offered to show that the value of the interest the witness would take as heir was greater than that conveyed by the deed, and that she was therefore testifying in her own interest. *In re Worth's Will, supra.*

The preliminary inquiry into the facts to determine whether the witness was excluded by the statute was one for the judge. His finding on this preliminary question based on the evidence heard by him would determine whether or not her testimony as to personal transactions and communications with deceased should be permitted to go to the jury. The general rule is that it is the province of the judge to determine preliminary questions of fact upon which the admissibility of evidence depends. *Avery v. Stewart,* 134 N.C. 287, 46 S.E. 519; *S. v. Fain,* 216 N.C. 157, 4 S.E. 2d 319; *S. v. Jordan,* 216 N.C. 356 (361), 5 S.E. 2d 156; *S. v. Peterson,* 225 N.C. 540, 35 S.E. 2d 645; *State v. Lee,* 127 La. 1077; Stansbury on Ev., sec. 8; 50 Harvard Law Review, 392. Wigmore states the rule as follows: "It follows that, so far as the admissibility in law depends on some incidental question of fact—the absence of a deponent from the jurisdiction, the use of threats to obtain confession, the sanity of a witness and the like—this also is for the judge to determine before he admits the evidence to the jury." 5 Wigmore, sec. 2550.

There was no finding on this point and no evidence upon which to base a finding. While we think there was some evidence offered at the trial in support of plaintiffs' allegations of undue influence, unaffected by G.S. 8-51, the question of the competency of the witness Lillian Paul, presented by the appeal, and upon which the case was made to turn below, should be ascertained as material to the proper determination of the issues in the case. For this reason we think the judgment of nonsuit should be stricken out, and the case remanded for appropriate proceeding in accord with this opinion.

Reversed.

STATE v. ALONZA HARPER, JESSE JAMES HADDOCK, HARVEY BOWEN AND ROY DAVIS.

(Filed 1 February, 1952.)

1. Criminal Law § 54d—

A special verdict must incorporate a finding by the jury of all essential facts upon which the guilt or innocence of defendant must follow as a conclusion of law, and while it should not contain the evidence to prove such essential facts, it may not submit for the determination of the jury the competency of evidence offered by the State.

2. Same—

It is error to incorporate into a special verdict facts relating to the issuance of a search warrant and defendant's motion to suppress evidence for the State on the ground that it was incompetent because of defects in the search warrant under which it was obtained, since the jury may not pass upon the competency of evidence, this being the exclusive province of the court.

3. Criminal Law § 51—

It is the exclusive province of the court to determine the competency and admissibility of evidence and in no instance may this duty be imposed upon the jury.

4. Criminal Law § 83—

Where the fact of guilt follows as a conclusion of law upon the facts found in a special verdict, but it appears that the question of the competency of evidence was also submitted to the jury under the special verdict, *held* on the State's appeal from judgment of not guilty a new trial will be ordered, since it would be unfair to defendant to reverse the ruling on the special verdict and remand for sentence without giving him an opportunity to be heard upon the question of the competency of the evidence presented against him.

APPEAL by the State from *Carr, J.*, June 1951 Term, GREENE.

STATE *v.* HARPER.

Criminal prosecution upon an indictment charging the defendant Jesse James Haddock with possession, possession for the purpose of sale, and transporting nontax-paid intoxicating liquor.

This case and the case, *S. v. Harper, post,* 67, involving the appeal of Alonza Harper, are companion cases. The charges against the defendants Harvey Bowen and Roy Davis were disposed of in the court below without appeal.

Upon the call of the case, the defendants made a motion to suppress the State's evidence for that such evidence would be based on an unlawful search warrant, or secured without a search warrant. This motion was denied. Thereafter, the following action was taken:

"State of North Carolina
v. } SPECIAL VERDICT
Jesse James Haddock

"By agreement of the Solicitor for the State and Counsel for defendant, the jury is permitted to render a Special Verdict in this case, and for that Special Verdict the jury says:

"That on the 23rd day of May 1951, one Milton Brown, a Deputy Sheriff, appeared before Ray Doc Gay, a Justice of the Peace of Greene County, and applied for a search warrant; that before issuing said search warrant, the said Justice of the Peace undertook to administer an oath to said officer, and in doing so did require him to hold up his right hand and did say to him: 'Do you solemnly swear that the facts set forth in the complaint and search warrant are true?,' and the said Officer Brown answered: 'I do;' that said Brown did not place his hand on the Bible, and the said Brown does not have any conscientious scruples against placing his hand on the Bible while being sworn, and he is not a Quaker, a Moravian, a Dunkard, or a Mennonite, and he did not request that he be permitted to affirm. The facts included in the complaint and search warrant, to which he made such oath, are as follows:

" 'Milton Brown, D. S., upon information and belief, an officer with the execution of the law, says under oath, that he is informed and believes that Harvey Bowen has in his possession intoxicating liquors and narcotic drugs for the purpose of sale located in his dwelling, garage, filling station, barns and outhouses and premises or automobile which is located on No. 123 road and near Ormondsville, which is located in Ormonds Township, Greene County, N. C.' The said complaint was duly signed by Officer Brown.

"Pursuant to said affidavit, a search warrant was issued by said Justice of the Peace in due form directing said Deputy Sheriff Brown, accompanied by other officers including Sheriff Kirby Cobb of Greene County, and S. G. Gibbs, an agent of the State Bureau of Investigation, proceeded

to the residence of Harvey Bowen, in Greene County, and arrived there at or about 2 A. M. on the 24th day of May 1951. Sheriff Cobb, before arousing said Harvey Bowen, requested the said S. G. Gibbs to read the search warrant to said Bowen, stating that he did not have his glasses, and the said warrant was read to the said Bowen by the said S. G. Gibbs in the presence of said Sheriff Cobb. A search was then made of the premises of the said Bowen, and in the course of the search the officers went to a tobacco barn on said premises located between sixty (60) and seventy-five (75) yards from said dwelling house which had a shed room adjoining it, and officer Brown knocked on the door of said shed room and the defendant, Jesse James Haddock, who was sleeping therein, answered, but did not come promptly to the door. Officer Brown then shook the door, and a tobacco stick fell from the back of the door and he was able to open it and walked in. With the aid of a search light he found the defendant sleeping on a couch or bed in said shed room, and also found fifty-two (52) cases of nontax-paid intoxicating liquor on which there were no stamps indicating that the tax due the Federal Government had been paid, there being six (6) gallons to the case, making a total of three hundred and twelve (312) gallons.

"After said search was made the defendant stated to officer Brown and others that the said intoxicating liquor belonged to him, and he transported twenty-eight (28) cases of the same to the shed room in his Ford car, and that Harvey Bowen had nothing to do with it and knew nothing about it, and the jury finds that said intoxicating liquor was in the possession of the defendant for the purpose of sale.

"When the case was called for trial and before pleading to the charge, the defendant made a motion to suppress the evidence of the State, for that it was incompetent because of defects in the search warrant under which it was obtained, and the ruling on said motion was deferred until the evidence was offered. The defendant then offered a plea of not guilty and objected to the introduction of the State's evidence, which has been set out in this Special Verdict, for the reason that it was not admissible under the law by reason of the facts and circumstances under which said warrant was obtained, served and used, show that it was an illegal search warrant, and that any evidence obtained pursuant thereto was incompetent and inadmissible.

"There were no articles of furniture in the shed room other than a bed that was not well kept and was badly soiled. The defendant admitted that he was employed by Harvey Bowen and that he had been using the shed room for his sleeping quarters for a considerable time, as much as six months prior to the search.

"The jury finds the foregoing facts, and if upon said facts the court is of the opinion that the defendant is guilty of the possession of intoxi-

cating liquors upon which the tax due the Federal Government had not been paid and guilty of possession of same for the purpose of sale, and guilty of transporting said intoxicating liquor, then the jury finds the defendant guilty of all three charges; and if upon said facts the court is of the opinion that the defendant is not guilty of said charges, the jury finds the defendant not guilty.

"The Court being of the opinion that upon the foregoing special verdict the defendant Jesse James Haddock is not guilty of each of the charges and offenses set out in said special verdict, it is ordered that said defendant is not guilty of said charges and offenses.

LEO CARR
Judge Presiding."

To the judgment entered, the State excepted and appealed, assigning errors.

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

C. W. Beaman and K. A. Pittman for defendant, appellee.

VALENTINE, J. It appears from the record that this case was tried upon an erroneous interpretation of the meaning of a "special verdict." A special verdict must contain the facts as established by the evidence to the satisfaction of the jury and not the evidence to prove them. *S. v. McIver,* 216 N.C. 734, 6 S.E. 2d 493; *S. v. High,* 222 N.C. 434, 23 S.E. 2d 343.

A special verdict is permissible in appropriate criminal cases, but when such procedure is had, the whole of the essential facts must be found by the jury. Essential facts may not be referred to the judge even by consent of counsel for the accused or by the accused himself. When once a defendant has entered a plea of "not guilty" to the charge preferred against him, whether the charge be a misdemeanor or a felony, he may not thereafter waive his constitutional right of a trial by jury without first changing his plea. *S. v. Hill,* 209 N.C. 53, 182 S.E. 716; *S. v. Muse,* 219 N.C. 226, 13 S.E. 2d 229.

When a jury is allowed to render a special verdict, in such a verdict the jury must find all the essential facts, and the guilt or innocence of the defendant must follow as a conclusion of law from the facts so found. Any special verdict which refers or attempts to refer to the decision of the judge any fact or inference of fact necessary to a full determination of the issue is insufficient in law and must be set aside. *S. v. Allen,* 166 N.C. 265, 80 S.E. 1075; *S. v. Fenner,* 166 N.C. 247, 80 S.E. 970; *S. v. Barber,* 180 N.C. 711, 104 S.E. 760.

But this does not mean that testimony respecting the circumstances under which a search warrant was procured, offered for the purpose of enabling the trial judge to determine the validity of the search warrant and the competency of the evidence procured thereunder, should be submitted to the jury or that the jury may or should find the facts established thereby. Such testimony presents questions of fact the judge only may decide.

His Honor submitted to the jury the details of and a dissertation upon the evidence in the case, including a search warrant which had no bearing upon the guilt or innocence of this defendant. No search warrant was actually used when the officer entered the sleeping quarters of the defendant and there found 312 gallons of nontax-paid liquor. This drew into question the competency of the evidence thus procured, and it then became the duty of the trial judge to analyze all the facts and circumstances and to apply the appropriate rules of evidence to the facts so found, and then either admit or reject the evidence. It was likewise the duty of the court below to have passed upon the validity of the search warrant when and if the search warrant or evidence procured thereunder became a proper subject of inquiry. The jury in no aspect of this or any other case has the duty of determining either the competency or the admissibility of evidence. These are questions addressed solely to the presiding judge. *Munroe v. Stutts,* 31 N.C. 49; *S. v. Whitener,* 191 N.C. 659, 132 S.E. 603; N. C. Evidence by Stansbury, sec. 187, page 405; *Sanderson v. Paul, ante,* 56. The judge's duty and that of the jury are different and neither may invade the province of the other. *S. v. Fogleman,* 204 N.C. 401, 168 S.E. 536.

The jury found that the defendant had in his possession 312 gallons of nontax-paid intoxicating liquor for the purpose of sale, and upon this finding the defendant is clearly guilty. As to this there could be no serious controversy. This merely points up the fact the real question the parties seek to present on this appeal is not whether the defendant is guilty or not guilty, but whether the testimony establishing his guilt, admitted in evidence without exception, was competent or incompetent. This is further demonstrated by the fact the State assigns as error two excerpts from the charge of the court respecting the testimony. While this is a novel position, it goes without saying that neither an exception to the admission of evidence nor to error in the charge can be made the basis of an appeal by the State.

Even so, upon the present state of the record it would be manifestly unfair to reverse the ruling on the special verdict and remand for sentence without giving the defendant an opportunity to be heard upon the question of the competency of the evidence presented against him. For that

reason, the special verdict is vacated and set aside and the cause is remanded for a

New trial.

STATE v. ALONZA HARPER, JESSE JAMES HADDOCK AND HARVEY BOWEN.

(Filed 1 February, 1952.)

1. Criminal Law § 54d—

A special verdict must incorporate a finding by the jury of all essential facts upon which the guilt or innocence of defendant must follow as a conclusion of law, but it may not submit to the jury the competency of evidence presented to prove such facts.

2. Intoxicating Liquor § 9c: Searches and Seizures § 1—

Where an officer of the law sees and recognizes intoxicating liquor in defendant's car without a search thereof, it becomes his duty to act, either with or without a search warrant. G.S. 18-6.

3. Criminal Law § 83—

Where the facts found in a special verdict clearly establish defendant's guilt, but it appears that the question of the competency of evidence was also submitted to the jury under the special verdict, the judgment of guilty cannot be allowed to stand, but a new trial will be ordered upon defendant's appeal.

APPEAL by defendant Alonza Harper from *Carr, J.*, June 1951 Term, GREENE.

Criminal prosecution upon a warrant charging defendant Alonza Harper with possession, possession for the purpose of sale, and transporting nontax-paid intoxicating liquor.

This case and the case, *S. v. Harper, ante,* 62, are companion cases. The charges against the defendant Harvey Bowen were disposed of in the court below without appeal.

Upon the call of the case, the defendants made a motion to suppress the State's evidence for that such evidence would be based on an unlawful search warrant or secured without a search warrant. This motion was denied.

Thereafter, by consent of the solicitor for the State and counsel for the defendant, the court submitted to the jury a special verdict, therein reciting the details under which the search warrant was obtained and the manner of its service in exactly the same language employed in the special verdict in *S. v. Harper, supra,* and further reciting that while the search was in progress, defendant Harper drove up in his automobile and when he got out of his car, one of the officers by the use of his flashlight saw

in defendant's car two ½ gallon jars containing white nontax-paid liquor, the jars being unwrapped and easily visible to the officer. The officer thereupon seized the two jars of liquor and looked in the trunk of said car and found five cases of intoxicating liquor upon which the tax due the Federal Government had not been paid, being 30 gallons in all. Harper then admitted that he had found this liquor at a point not far away and that he intended to put the liquor in the shed room where Jesse James Haddock was sleeping. Harper also admitted that he had assisted in the transportation of the 52 cases of nontax-paid liquor which had just been discovered by the officers in the sleeping quarters of Haddock.

The jury found upon the special verdict that the defendant had the 30 gallons of nontax-paid liquor in his possession for the purpose of sale, and further found the facts to be as set forth in the special verdict and concluded that if upon the facts so found the court was of the opinion that the defendant was guilty as charged, then the jury makes the opinion of the court its verdict.

Upon the findings of the jury, the court adjudged that the defendant Harper was guilty of each of the three charges and offenses set out. To the judgment entered, the defendant Harper excepted and appealed, assigning errors.

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

C. W. Beaman and K. A. Pittman for defendant, appellant.

VALENTINE, J. The submission of the special verdict in this case was not the proper procedure and had the effect of placing upon the jury the responsibility of determining the competency of the evidence, and tended only to confuse the issue. The jury may never be properly called upon to determine the competency or the admissibility of evidence. These are questions addressed solely to the presiding judge and must be by him determined and ruled upon. *Sanderson v. Paul, ante,* 56. He cannot place upon others a duty which rests upon him and him alone. *S. v. Whitener,* 191 N.C. 659, 132 S.E. 603; *S. v. Fogleman,* 204 N.C. 401, 168 S.E. 536; *S. v. Harper, ante,* 62.

The entire question of the search warrant should have been ruled upon by the court and the case submitted to the jury upon the evidence of the officer who saw the nontax-paid liquor clearly visible in defendant's car and who thereupon had the duty under G.S. 18-6 to take possession of the automobile and the liquor found therein and to arrest the defendant. In this case, the officer saw and recognized the liquor in defendant's car. It then became his duty to act either with or without the aid of a search warrant. *S. v. Godette,* 188 N.C. 497, 125 S.E. 24.

On the facts found it would appear that the defendant is clearly guilty of the crimes with which he is charged, but in the light of the confusion that appears to have prevailed at the trial, the ends of justice require that there be a new trial, and it is so ordered.

New trial.

STATE v. ELGIE WAGSTAFF.

(Filed 1 February, 1952.)

1. Constitutional Law § 34d—

Ordinarily, in offenses less than capital, the presiding judge is not required to assign counsel to represent defendant, but where an inexperienced youth is charged with a serious felony it is proper for the court to assign counsel for him, and failure to do so may be held for error. Here the trial judge's explanation to the jury of the absence of counsel may have left the impression that this was due to defendant's stubbornness and resentfulness.

2. Contempt of Court § 2a—

The trial judge has power to order anyone, either witness or spectator, into custody for what the court finds is a contempt committed in his presence.

3. Same: Criminal Law § 50d—Ordering of defendant's father into custody in presence of jury held prejudicial under facts of this case.

Defendant's father, following some conversation with the judge, was ordered to sit down, and upon a second protest that the case should be continued and counsel obtained for the defendant saying "he was not getting a fair trial," in the presence of the jury the father was ordered into custody and removed from the court room. It also appeared on cross-examination that previously defendant had had an altercation with his father. *Held:* Under the facts and circumstances of this case, the deprivation of defendant of the aid and advice of his father, the only person present who could explain the previous altercation between them, must be held for error as prejudicing defendant in the eyes of the jury, there being nothing in the record to indicate that the conduct of defendant's father was engaged in for the purpose of causing a mistrial.

4. Constitutional Law § 34a—

A person charged with crime is entitled to a fair trial before an unprejudiced jury in an atmosphere of judicial calm, and the responsibility rests upon the trial judge to preserve that right.

5. Criminal Law § 78c—

Where a youthful, inexperienced defendant is not represented by counsel, the State properly makes no point as to the time, manner, or form of an exception presenting defendant's contention that an incident during the trial unduly prejudiced him in the eyes of the jury.

STATE *v.* WAGSTAFF.

APPEAL by defendant from *Frizzelle, J.*, April Term, 1951, of PERSON. New trial.

The defendant was indicted for assault with intent to kill in violation of G.S. 14-32.

The State's witness L. J. Martin, the operator of a filling station and store, testified that on the occasion alleged he had an altercation with defendant in the course of which the witness had drawn his pistol and ordered the defendant off his premises; that thereafter while witness was putting gasoline in a truck the defendant seized him from behind, wrested the pistol from him, struck him on the head with it, inflicting a scalp wound requiring five stitches, and threw him on the ground and kicked him, causing a fracture of a bone in his hip, declaring he was going to kill him. He was taken to a hospital and after two months was still unable to sit up straight.

On the other hand, the defendant testified that Mr. Martin pointed his pistol at him and threatened to kill him; that he twisted his arm to prevent him from shooting and the pistol was discharged, burning defendant's coat; that Mr. Martin seized his arm and tried to pull him down, and he struck him on the head to get loose.

There was verdict of guilty as charged. From judgment imposing sentence of not less than eight nor more than ten years defendant appealed.

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

D. Emerson Scarborough for defendant, appellant.

DEVIN, C. J. The defendant, a Negro 19 years of age, was without counsel at the trial below. He was a resident of an adjoining county and at the time of the offense charged was a soldier in the United States Army. There was no motion for judgment of nonsuit and the evidence was sufficient to carry the case to the jury.

The defendant, however, challenges the validity of the result below chiefly on the ground that an incident which occurred during the trial prejudiced him before the jury, and improperly influenced the adverse verdict and consequent judgment.

The facts in connection with the incident referred to and upon which the defendant bases his assignment of error are set out in the record. It seems that in the seating arrangement of the courtroom, Negroes customarily sat in the gallery unless they were parties or witnesses. During the examination of the State's witness Martin, the father of the defendant who had been seated in the gallery came down into the bar and approached the bench, and had some conversation with the Judge as to the trial of the case. What was said does not appear, but the Judge ordered

him to sit down. He took a seat beside the defendant, but later he again approached the Judge and protested to him that the case should be continued so that he could get a lawyer for his son, "that he was not getting a fair trial, or words to that effect." The record states "whereupon the Judge in the presence of the jury ordered the defendant's father into the custody of the sheriff, and he was taken upstairs and locked in the jail and remained there during the remainder of the trial."

The defendant testified he had never before been arrested for anything. During his cross-examination he said his father on some occasion not explained had shot him but he did not know why. The State offered evidence that defendant's general reputation was bad. The sheriff further testified that when defendant was put in jail he told him if he wanted to see a lawyer he would get one, and any witnesses he wished. Defendant gave him names of four witnesses, but said the Army would see about a lawyer for him; that defendant's father and brothers were notified, but the sheriff said "They did not seem to care much about it, and the father (who had just been released from hospital) did not care enough to go to see him." When the defendant closed his case the court inquired if there were any witnesses subpoenaed for the defendant. The Solicitor stated one Fuller, and Frank Smith for whom subpoenas had been issued could not be found. Frank Smith was called out. The court inquired what defendant wished to show by Frank Smith, and the defendant said Smith was present at the time of the difficulty, but he didn't know what he would testify to if he were present.

The defendant noted exception to the following statement by the court in closing his charge to the jury: "I will call the jury's attention to the fact that while the defendant is not represented by counsel in this case, evidence in this case tends to show that several times last week and several times today after the case was called, opportunity was afforded the defendant to engage counsel and to avail himself of the testimony of any person whom he might desire to have subpoenaed."

While ordinarily in criminal actions less than capital the presiding judge is not required to assign counsel to represent the defendant (*State v. Hedgebeth*, 228 N.C. 259, 45 S.E. 2d 563; *Uveges v. Pennsylvania*, 335 U.S. 437), in view of the youth and inexperience of the defendant in this case charged with a serious felony it would seem the court should have gone further than afford him opportunity to employ counsel and have assigned counsel to represent him. The defendant also assigns error in that the court's final words to the jury, in explanation of the absence of counsel, tended rather to hold the defendant up to the jury as stubborn and resentful, and not meriting consideration for his defense which ordinarily would have been accorded to uncounseled youth.

Unquestionably it is within the power of the presiding judge to order anyone, either witness or spectator, into custody for what the court finds

is a contempt committed in his presence. *State v. Slagle,* 182 N.C. 894, 109 S.E. 844; *State v. McNeill,* 231 N.C. 666, 58 S.E. 2d 366; *State v. Simpson,* 233 N.C. 438, 64 S.E. 2d 568; *State v. Kirkman,* 234 N.C. 670. But when this is done in the immediate presence of the jury in a criminal action, whether it is to be regarded as prejudicial to the defendant depends upon the circumstances of the case. While neither the language nor the manner of the defendant's father in the instant case is set out in the record, no question is raised so far as defendant's father is concerned as to the propriety of the action of the judge in ordering him into custody, but the point is made that this tended to reflect discredit on the son charged with a serious crime of violence, and also to deprive him of the presence and aid of one who might have been both an adviser and a material witness as to some phases of the case. True, the able and careful judge who presided over the trial of this case was doubtless at the time unaware that defendant's case would be improperly discredited by the court's action, but looking at it in the cold light of the record we perceive that harm could and probably did result to the defendant in the trial of his case. The arrest and removal of his father tended to disparage the defendant in the eyes of the jury in a case in which he was charged with a felonious assault, and deprived him of the aid and advice of his father, the only one present who could refute or explain the suggestion of previous violent conduct on the part of father and son. The jurors presumably saw what took place in their immediate presence and observed the action of the court with respect to defendant's father. *State v. McNeill, supra; State v. Simpson, supra.* What impression the incident made on their minds does not appear, but the defendant urges it must have been harmful to him.

Numerous instances have come to the attention of the Court where persons connected with the trial have been ordered into custody. In the *McNeill case, supra,* a new trial was awarded because the judge ordered defendant's witness into custody on his leaving the stand in the presence of the jury. In the *Simpson case, supra,* two of defendant's witnesses during noon recess of court were ordered arrested. Some of the jurors were present at the time, and when court resumed session the witnesses were brought in in custody. A new trial was awarded. In *State v. Slagle, supra,* a codefendant in an indictment for murder had been discharged. Later during court session this person was ordered arrested for violation of the prohibition law, but this was held under the circumstances not prejudicial.

It is the well settled rule in this jurisdiction that a person charged with crime is entitled to a fair trial before an unprejudiced jury "in an atmosphere of judicial calm," and that the responsibility rests upon the trial judge to preserve this right. *State v. Carter,* 233 N.C. 581, 65 S.E. 2d 9.

The defendant's exception on the ground of harmful effect on the jury of the court's action in ordering the arrest and removal of defendant's father would have been more aptly presented by a motion at the time for a mistrial and continuance, but in view of the defendant's inexperience in court procedure and absence of counsel the State properly makes no point as to the time, manner or form of the exception.

There is nothing in the record to indicate that the conduct of defendant's father, which the court found contemptuous, was engaged in for the purpose of causing a mistrial. In *Dennis v. U.S.*, 183 F. (2) 201 (226), *Judge Hand,* speaking for the Court, reviewed the conduct of the trial of persons charged with conspiracy to advocate overthrow of the government of the United States. The opinion sets forth the improper conduct of attorneys for the defendants, apparently in effort to cause a mistrial, and the constant bickering between counsel and the trial judge, and the latter's warning that they would be punished for contempt. It was said, "throughout, the Judge kept repeating to the jury that they were not to take what he said to the attorneys against their clients." Under the circumstances set out in the opinion in that case the result of the trial was upheld. The decision of the Circuit Court of Appeals was affirmed by the Supreme Court of the United States in *Dennis v. U. S.*, 341 U.S. 494. See also Hyatt on Trials, sec. 1065.

After a careful consideration of the case as presented by the record before us, we reach the conclusion that the defendant should be awarded a new trial, and it is so ordered.

Other exceptions noted by the defendant and brought forward in his assignments of error are not discussed or considered as they may not arise on another hearing.

New trial.

THOMAS B. WOODY, DALLAS RAMSEY, RALPH RAMSEY, J. C. GALBREATH, LOUISE AND TOM OLIVER, JUNIOUS DUNN, FRANKLIN JOHNSON, AUBREY BARNETT, AND THE BOARD OF EDUCATION OF PERSON COUNTY, NORTH CAROLINA, v. HUBERT H. BARNETT AND WIFE, BESSIE BARNETT, AND JAMES GARLAND BARNETT.

(Filed 1 February, 1952.)

1. Highways § 15—

Each section of State highway which has been abandoned but which remains open and in general use as a necessary means of ingress to and egress from the dwelling house of one or more families is established as a neighborhood public road by G.S. 136-67.

2. Highways § 15—

A proceeding to have a section of abandoned State highway "declared" a neighborhood public road is properly instituted before the clerk, G.S. 136-67, the prayer that the section of road be "declared" a neighborhood public road meaning "judicially determined" rather than a request for a declaration of the rights of the parties under the Declaratory Judgment Act.

3. Courts § 4c—

A proceeding instituted before the clerk to have an abandoned section of State highway declared a neighborhood public road is not subject to demurrer on appeal to the Superior Court even if it be conceded that the proceeding is one under the Declaratory Judgment Act, since if the clerk exceeded his authority the Superior Court would nevertheless obtain jurisdiction, the clerk being but a part of the Superior Court and the Superior Court having the right to proceed as though no action had been taken by the clerk other than to transfer the cause to the civil issue docket.

4. Highways § 16: Pleadings § 31—

In a petition to have a section of abandoned State highway declared a neighborhood public road, allegations to the effect that a school was situated at each end of the abandoned section of road and that the road constituted the most direct route between the two institutions, though evidentiary, are germane as tending to show that the road remained open and in general use, and the refusal of respondents' motion to strike such allegations will not be held prejudicial.

5. Appeal and Error § 40f—

Refusal to strike evidentiary allegations which are germane to the inquiry ordinarily is not prejudicial, certainly where the proceeding presents questions of fact for the court rather than issues of fact for a jury.

APPEAL by plaintiffs and defendants from *Frizzelle, J.*, April Term, 1951, PERSON.

Proceeding instituted before the clerk to have a section of a public highway abandoned by the Highway Commission declared a public neighborhood road under G.S. 136-67, heard on demurrer to the petition and motion to strike allegations therein.

The petitioners make the allegations necessary to bring the abandoned section of Highway 57, described in the petition, within the provisions of G.S. 136-67. They further allege that defendants own land bordering on the east side of said road at the southern end thereof where it enters Highway 57 and have threatened and are threatening to close the south end thereof, along their property, to traffic by petitioners and others.

They also allege in paragraph 3 that the County Board of Education has constructed and maintains a Negro consolidated high school near the south end and a Negro consolidated grammar school near the north end of said segment of road, and said road is the most direct route between

the two schools for school buses and other vehicles and is being used generally by such vehicles.

They further allege in paragraph 2 that the Foushee estate owned property lying on both sides of said road, that the executor subdivided and platted the property, that said plat, which was duly recorded, shows said road with lots facing on each side thereof, that lots were sold as per said plat to petitioners and others and some of petitioners have erected homes on the respective lots purchased by them, and that "the executor at the time of the said sale recognized the existence of said public road as a necessary course of travel to the purchasers of said property, as well as to the public generally."

They pray:

"1. That the court declare as a fact and as a matter of law that said road is a neighborhood road serving a public use as a means of ingress and egress for one or more of the petitioners in accordance with the public laws of North Carolina, General Statutes 136-67, 136-68, 136-69 and 136-70.

"2. That the court declare said road to be a neighborhood public road of the width of 30 feet."

The defendants appeared before the clerk and demurred to the petition for that the clerk has no jurisdiction to grant the relief therein prayed. They also moved to strike that part of paragraph 2 of the petition above quoted and paragraph 3 relating to the two schools now maintained on and using said road as a means of ingress and egress. The clerk overruled the demurrer but granted the motion to strike paragraph 3 and the indicated portion of paragraph 2. Petitioners appealed.

On the hearing of the appeal in the court below, the judge affirmed the judgment of the clerk in overruling the demurrer and striking the quoted part of paragraph 2 but reversed the same insofar as it strikes paragraph 3 of the petition. Both plaintiffs and defendants excepted and appealed.

R. B. Dawes, Thomas B. Woody, Jr., R. P. Burns, and R. P. Reade for petitioner appellees.

Gaither M. Beam and Davis & Davis for defendant appellants.

BARNHILL, J. The plaintiffs failed to perfect their appeal. The same has been dismissed under Rule 17. Hence the questions raised by the appeal of the defendants are the only ones posed for decision.

G.S. 136-67 converts into neighborhood public roads "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." That is to say, the easements

theretofore owned by the State in and to such segments of abandoned road are retained and reserved by the State for use by the public, not as public highways but as neighborhood public roads. Every segment of public road which has been abandoned as a part of the State road system coming within the terms of the statute is thus, by legislative enactment, established as a neighborhood public road.

All the petitioners seek in this proceeding is to obtain a judicial declaration of the existence of those facts which are necessary to bring the road in question within the definition contained in the statute, so as to procure the establishment thereof as a neighborhood public road as a matter of public record. They do not invoke the provisions of the Declaratory Judgment Act. The word "declare" as used in the prayer for relief means and was intended to mean "judicially determine" or "establish the existence of" the facts essential to show that said road has already, in fact, been established by the Legislature as a neighborhood public road.

The Legislature has vested in the clerks of the Superior Courts of the State jurisdiction over proceedings relating to the establishment, maintenance, alteration, discontinuance, or abandonment of neighborhood public roads, church roads, and cartways. This authority is contained in Art. 4 of Chap. 136 of the General Statutes. The pertinent section of the Code, G.S. 136-67, is the first section thereof. Proceedings under this article of the Code ordinarily involve questions of fact rather than issues of fact. An expeditious method of entertaining and disposing of such proceedings, without unnecessarily cluttering the civil issue docket of the Superior Court, was desired. To this end jurisdiction was vested in the clerk.

In view of the general scope of the jurisdiction vested in the clerk by said article and the inclusion therein of the provisions of law here invoked by the petitioners, it would seem to follow that this proceeding was properly instituted before, and should be disposed of initially by, the clerk of the Superior Court of Person County.

But let us concede that this is in fact a proceeding under the Declaratory Judgment Act in which the petitioners seek to have their rights and status under the statute, G.S. 136-67, in respect to such easement, judicially determined and declared as provided by said Act. Even so, the demurrer is without merit and was properly overruled.

The office of the clerk of the Superior Court is the main reception room of the Superior Court. It is but a part of that institution which is devoted to the administration of legal remedies. *Windsor v. McVay*, 206 N.C. 730, 175 S.E. 83. The clerk is the officer in charge, as a servant of the court, *Turner v. Holden*, 109 N.C. 182; he is possessed of jurisdiction to grant many of the remedies afforded by the law. In so doing he is but a part of the Superior Court. *Perry v. Bassenger*, 219 N.C. 838,

15 S.E. 2d 365. That he may have exceeded his authority affords no cause for booting the petitioners out of court. *Williams v. Dunn,* 158 N.C. 399, 74 S.E. 99; *In re Anderson,* 132 N.C. 243. Instead, the judge should proceed as if the clerk had taken no action other than to transfer the cause to the proper docket. *Perry v. Bassenger, supra.*

"Where the clerk exceeds his authority, *Hodges v. Lipscomb,* 133 N.C. 199, 45 S.E. 556, or has no jurisdiction, *Roseman v. Roseman, supra* (127 N.C. 494), and the cause for any ground is sent to the judge, the judge may retain jurisdiction and dispose of the cause as if originally before him. *Perry v. Bassenger, supra.*" *McDaniel v. Leggett,* 224 N.C. 806, 32 S.E. 2d 602; G.S. 1-276; *Moody v. Howell,* 229 N.C. 198, 49 S.E. 2d 233; *Plemmons v. Cutshall,* 230 N.C. 595, 55 S.E. 2d 74; *Bailey v. Davis,* 231 N.C. 86, 55 S.E. 2d 919; *In re Estate of Johnson,* 232 N.C. 59, 59 S.E. 2d 223.

Therefore, in any event, the demurrer was properly overruled.

The allegations made in paragraph 3 of the complaint contain facts tending to show that the segment of abandoned road in question here remains "open and in general use as a necessary means of ingress to and egress from" not only the dwelling house of one or more families but also to and from two important county institutions. While the allegations are evidentiary in character, they are not of such prejudicial nature as to require a reversal. *Hinson v. Britt,* 232 N.C. 379, 61 S.E. 2d 185. This is particularly true in the light of the fact the petition presents questions of fact for the court rather than issues of fact for a jury.

The judgment entered in the court below is

Affirmed.

HADLEY HORNER, FOR AND ON BEHALF OF HIMSELF AND ALL OTHER TAXPAYERS OF THE CITY OF BURLINGTON, v. THE CHAMBER OF COMMERCE OF THE CITY OF BURLINGTON, INC., AND THE CITY OF BURLINGTON.

(Filed 1 February, 1952.)

1. Appeal and Error § 40d—

In determining whether the findings of the trial court are supported by evidence, and therefore binding, the Supreme Court will consider not only the facts in evidence favorable to the successful party, but also all reasonable inferences which may be drawn in his favor from such facts.

2. Municipal Corporations § 41: Taxation § 38a—Evidence held to support finding that chamber of commerce did not expend tax moneys as agency of municipality for purposes specified in G.S. 158-1.

Facts in evidence tending to show that defendant municipality made an absolute gift of tax moneys to a chamber of commerce without specifying

how they were to be spent or reserving any right to direct or control their use; that the municipality did not in fact direct or control the chamber of commerce in the expenditure of the funds and did not even receive a report from it as to disbursement; that the chamber of commerce commingled the tax moneys with its other revenues and used the resulting common fund in the discharge of its functions, *is held* to support the finding of the trial court that the tax moneys were not expended under the direction and control of the municipality through the agency of the chamber of commerce for the purposes specified in G.S. 158-1, and supports its judgment for the recovery of the tax moneys from the chamber of commerce. The trial court correctly rejects as irrelevant testimony of expenditures by the chamber of commerce prior to the payment of the tax moneys to it.

3. Evidence § 45—

Whether a particular disbursement of tax moneys is authorized by statute is not a proper subject for opinion evidence.

4. Municipal Corporations § 41: Taxation § 38a—

Good faith in the expenditure of tax moneys does not affect the question of whether such expenditure is authorized.

APPEAL by defendants, the Chamber of Commerce of the City of Burlington, Inc., and the City of Burlington, from *Sharp, Special Judge,* at the April Term, 1951, of the Superior Court of ALAMANCE County.

Civil action by taxpaying citizen to compel private corporation to restore to municipality tax moneys alleged to have been unlawfully diverted from the municipal treasury.

The record discloses these things:

1. The defendant, the City of Burlington, which is herein called Burlington, is a municipality in Alamance County, North Carolina.

2. The defendant, the Chamber of Commerce of the City of Burlington, Inc., which is herein designated as the Chamber of Commerce, is a private non-profit corporation having these corporate purposes: (1) The promotion of every plan for the advancement of the commercial, manufacturing, civic, and monetary interests of the community of Burlington and Alamance County, and the abatement of every grievance injuriously affecting such interests; (2) the establishment and application of uniform and equitable rates and usages of trade; (3) the collection and preservation of statistical information concerning the commerce, capital, production, and growth of Burlington; (4) the speedy and economical settlement of differences among its members, without resort to litigation; (5) the assembling of a general meeting of all the businessmen of Burlington in all emergencies wherein their rights, or interests may be affected; and (6) the discussion of all questions affecting the interests, trade, or manufacturers of Burlington and Alamance County, and the pecuniary welfare of Burlington and Alamance County.

3. On December 15, 1925, the voters of Burlington approved the statute now codified as Chapter 158 of the General Statutes at an election conforming to G.S. 158-3.

4. Thereafter, to wit, during the fiscal year beginning on July 1, 1947, the Burlington City Council adopted a municipal budget, making an appropriation in this indefinite fashion: "Publicity: Chamber of Commerce, $2,000.00." At the same time, it levied a special ad valorem tax on all taxable property in the municipality at a rate within the limits specified in G.S. 158-1 to cover such appropriation. When collected, this special tax netted $2,000.00.

5. The Burlington City Council delivered the $2,000.00 mentioned in the preceding paragraph to the Chamber of Commerce in these installments on these occasions: $1,000.00 on 12 November, 1947; and $1,000.00 on 8 May, 1948. The Chamber of Commerce indistinguishably commingled this tax money and its other revenues, and expended the resultant common fund for various purposes.

6. Subsequent to these events, the plaintiff, a taxpaying citizen of Burlington, demanded that the Chamber of Commerce restore the $2,000.00 to Burlington, and that the Burlington City Council institute proceedings for its recovery. These demands were refused by the Chamber of Commerce and the Burlington City Council on the ground that the appropriation and expenditure were authorized by G.S. 158-1.

7. The plaintiff thereupon brought this action against the Chamber of Commerce, Burlington, and four members of the Burlington City Council, to wit, Jennings M. Bryan, H. L. Galloway, J. O. Bayliff, and C. W. Burke, to compel the restoration of the $2,000.00 to Burlington.

8. The complaint is analyzed in the opinion on a former appeal in this cause. See: *Horner v. Chamber of Commerce,* 231 N.C. 440, 57 S.E. 2d 789. It charges initially that the tax money in question was turned over to the Chamber of Commerce by the Burlington City Council free from "any restrictions, conditions, or requirements" as to its use, and with intent on the part of the Burlington City Council that it should be used by the Chamber of Commerce in its "untrammeled discretion in furtherance of the ordinary . . . activities of said Chamber of Commerce"; that the money was mingled with the general funds of the Chamber of Commerce "derived from numerous other sources," and was "used, *pro rata,* for all the . . . expenses of said Chamber of Commerce"; and that such outlay was unlawful because it was not authorized by G.S. 158-1 or any other statute. It asserts secondarily that the outlay of the tax money was not for a public purpose within the meaning of Article V, Section 3, of the State Constitution, and by reason thereof was unconstitutional if it was in fact sanctioned by G.S. 158-1. The answer asserts "that the tax levy, appropriation and payment made by the City of Burlington to the Chamber of Commerce were made pursuant

to . . . Chapter 158 of the General Statutes of North Carolina," and that such statute did not offend the constitutional provision invoked by the plaintiff.

9. Subsequent to the filing of the answer the plaintiff submitted to a voluntary nonsuit as against Jennings M. Bryan, H. L. Galloway, J. O. Bayliff, and C. W. Burke. When the action was heard at the April Term, 1951, of the Superior Court of Alamance County, the plaintiff and the remaining defendants waived trial by jury, and presented testimony before the presiding judge for the avowed purpose of sustaining their respective pleadings. After hearing the evidence, the judge found the facts in great detail. When the findings are properly interpreted, they come to this: That the tax moneys in controversy were not used or expended under the direction and control of the Burlington City Council through the agency of the Chamber of Commerce for the purposes specified in G.S. 158-1, but, on the contrary, they were used or expended by the Chamber of Commerce at its own untrammeled discretion for its own ordinary activities. The judge concluded "that the payment of the . . . $2,000.00 to the Chamber of Commerce by the City of Burlington was not authorized by law and its expenditure . . . was an illegal use of tax money," and entered judgment "that the . . . City of Burlington . . . recover of the . . . Chamber of Commerce of the City of Burlington, Inc., the sum of $2,000.00, with interest on $1,000.00 since 12 November 1947, and with interest on $1,000.00 since 8 May 1948, and that the plaintiff recover his costs to be taxed against the . . . Chamber of Commerce by the Clerk." The remaining defendants excepted to the judgment and appealed to the Supreme Court, assigning errors.

William R. Dalton, Jr., for plaintiff, appellee.

Cooper, Sanders & Holt and W. D. Madry for defendants, appellants.

ERVIN, J. There is certainly no statutory warrant for the outlay of tax funds under scrutiny unless it can be found in G.S. 158-1, which provides that the governing body of any city, whose qualified voters have approved Chapter 158 of the General Statutes in an appropriate election, may annually set apart and appropriate from the funds derived annually from the general taxes levied and collected in the city an amount not less than one-fortieth of one per cent, nor more than one-tenth of one per cent, upon the assessed value of all real and personal property taxable in the city, which funds shall be used and expended under the direction and control of the governing body of the city, under such rules and regulations or through such agencies as such governing body shall prescribe, for the purpose of aiding and encouraging the location of manufacturing enterprises, making industrial surveys and locating industrial and commercial plants in or near the city; encouraging the

building of railroads thereto, and for such other purposes as will, in the discretion of the governing body of the city, increase the population, taxable property, agricultural industries, and business prospects of the city.

The facts found by the trial judge undoubtedly sustain the adjudication that the outlay in question does not fall within the compass of G.S. 158-1, and by reason thereof constitutes an unlawful diversion of tax funds from the treasury of Burlington. The findings are binding on the parties to the appeal if they are supported by evidence. *Poole v. Gentry,* 229 N.C. 266, 49 S.E. 2d 464.

This brings us to the chief question presented by the assignments of error: Does the testimony support the findings of fact of the trial judge?

In determining whether there is evidentiary support for the findings of the trial judge in an action where trial by jury is waived, this Court considers not only the facts in evidence favorable to the successful party, but also all reasonable inferences which may be drawn from such facts in his favor. 5 C.J.S., Appeal and Error, Section 1656 i.

When the evidence in the instant case is considered in this manner, it indicates that the tax moneys in controversy were appropriated and used under these circumstances:

1. The governing body of Burlington, *i.e.,* the Burlington City Council, made an absolute gift of the tax moneys to the Chamber of Commerce without specifying how they were to be spent, and without reserving the right to direct or control their use.

2. The Burlington City Council did not, in fact, direct or control the Chamber of Commerce to any degree in its disposition of the tax moneys. Indeed, the Chamber of Commerce did not even report to the Burlington City Council what it did with them.

3. The Chamber of Commerce indistinguishably commingled the tax moneys and all its other revenues, and indiscriminately used the resultant common fund to pay rents, salaries, and other expenses incurred by it in carrying out its corporate functions.

These things being true, there is sufficient evidentiary support for the findings of the trial judge that the tax moneys in controversy were not used or expended under the direction and control of the Burlington City Council through the agency of the Chamber of Commerce for the purposes specified in G.S. 158-1, but, on the contrary, they were used or expended by the Chamber of Commerce at its own untrammeled discretion for its own ordinary activities.

The trial judge rightly rejected for irrelevancy the statements of Philip Swartz and R. S. Winslow, witnesses for the defendants, that they had examined "Exhibit B showing various expenditures by the Burlington Chamber of Commerce . . . for publicity," and "that the matters for which the expenditures shown were made are generally accepted as

approved methods of publicity for obtaining new industrial, commercial, and business enterprises for a city . . . in . . . North Carolina and elsewhere." The expenditures listed in Exhibit No. 8 antedated the payment of the tax moneys to the Chamber of Commerce, and do not represent outlays of those moneys. Besides, whether a particular disbursement falls within the compass of G.S. 158-1 is not a proper subject for opinion evidence. *S. v. Cuthrell,* 233 N.C. 274, 63 S.E. 2d 549.

Since no occasion for so doing arises on the present record, we do not express any opinion as to whether the objects enumerated in G.S. 158-1 constitute public purposes in a constitutional sense under Article V, Section 3, of the State Constitution.

The trial judge found as a fact that the officials of both the Chamber of Commerce and the City of Burlington acted at all times in the honest belief that the appropriation and expenditure of the $2,000.00 were within the law. Their good faith does not impair the legal doctrine that "a tax is an imposition for the supply of the public treasury and not for the supply of individuals or private corporations, however benevolent they may be." 51 Am. Jur., Taxation, Section 6.

The judgment requiring the restoration of the tax moneys to the municipal treasury is

Affirmed.

BRUCE B. CAMERON v. MARY VAIL CAMERON.

(Filed 1 February, 1952.)

1. Abatement and Revival § 5½—

The pendency of an action in a court of competent jurisdiction abates a subsequent action between the same parties for the same cause either in the same court or in another court of the State having like jurisdiction.

2. Abatement and Revival § 9—

Where the same plaintiff brings both actions against the same defendant, or where the parties are reversed in the second action but the plaintiff in the second action as defendant in the first actually pleads a counterclaim, the test for determining the identity of the actions for the purpose of abatement is whether there is a substantial identity as to parties, subject matter, issues involved, and relief demanded.

3. Same—

Where the parties in a second action appear in reverse order and plaintiff in the second action as defendant in the first does not plead a counterclaim, the first action will not abate the second even though plaintiff in the second action could obtain the same relief by counterclaim in the prior action unless judgment in the prior action would necessarily adjudicate the matters raised in the second and operate as a bar to it.

4. Pleadings § 10—

A defendant cannot be compelled to file a counterclaim in plaintiff's suit, but may in his election reserve such matter for a future independent action unless the claim is essentially a part of the original action and will necessarily be adjudicated in it.

5. Divorce and Alimony § 5e—

Defendant in an action for divorce, either absolute or from bed and board, may set up a cross action for divorce, either absolute or from bed and board, as a counterclaim or cross demand, and such counterclaim or cross demand may be based, in whole or in part, upon facts occurring after institution of the action.

6. Pleadings § 10—

It is not required that a counterclaim be based on matters existing at the time of the commencement of the action except when arising out of contract. G.S. 1-137.

7. Divorce and Alimony § 1b—

In a wife's action for divorce from bed and board on the ground of abandonment, G.S. 50-7 (1), she must prove as an essential part of her case that her husband had willfully abandoned her.

8. Divorce and Alimony § 2a—

While it is not required that the husband in an action for divorce on the ground of two years separation be the injured party, the law will not permit him to take advantage of his own wrong, and the wife may defeat his action by showing as an affirmative defense that the separation was due to the husband's willful abandonment of her. G.S. 50-6.

9. Same: Abatement and Revival § 9—

The prior institution by the wife of an action for divorce from bed and board on the ground of abandonment abates the husband's subsequent action for absolute divorce on the ground of separation, since adjudication in the first action that the husband had willfully abandoned her would bar his action for divorce on the ground of separation.

10. Divorce and Alimony § 5e: Pleadings § 22b—

A husband will be allowed to amend his answer in his wife's action for divorce from bed and board to permit him to set up a cross action for divorce on the ground of separation so as to enable the parties to end the controversy in one and the same litigation.

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

APPEAL by defendant from *Parker, J.*, at the March Term, 1951, of the Superior Court of NEW HANOVER County.

Civil action in which the defendant pleads the pendency of a prior action between the parties in abatement of the present action.

For convenience of narration, the plaintiff, Bruce B. Cameron, is called Cameron, and the defendant, Mary Vail Cameron, is designated as Mrs. Cameron.

Stripped of all non-essentials, the facts are as follows:

1. The parties, who are husband and wife, maintained their matrimonial domicile in New Hanover County, North Carolina, until 31 August, 1948, when they separated. They have lived separate and apart since that time.

2. Soon thereafter, to wit, on December 23, 1948, Mrs. Cameron, claiming to be the injured party, sued Cameron for a divorce from bed and board under G.S. 50-7 (1) upon the ground that Cameron had abandoned her. This action, which has been heard on appeal on two occasions, is still pending undetermined in the Superior Court of Sampson County, North Carolina. *Cameron v. Cameron*, 232 N.C. 686, 61 S.E. 2d 913, and 231 N.C. 123, 56 S.E. 2d 384. Cameron has filed an answer therein alleging that Mrs. Cameron was to blame for the separation of the parties.

3. On 5 December, 1950, Cameron brought the present action against Mrs. Cameron in the Superior Court of New Hanover County, North Carolina, alleging that the parties have lived separate and apart since 31 August, 1948, and seeking an absolute divorce under G.S. 50-6 upon the ground of two years' separation. Mrs. Cameron answered, alleging that the separation of the parties had been caused by the act of Cameron in wrongfully abandoning her, pleading the pendency of the prior action in Sampson County in abatement of the present action, and praying judgment sustaining her plea in abatement and dismissing the present action. Cameron filed a reply in which he admitted the pendency of the Sampson County action, but denied it was sufficient in law to work an abatement of the present action.

4. When the present action was heard in the court below, the presiding judge entered a judgment overruling the plea in abatement and refusing to dismiss the action, and Mrs. Cameron appealed, assigning such judgment as error.

Stevens, Burgwin & McGee and Howard H. Hubbard for plaintiff Bruce B. Cameron, appellee.

Butler & Butler and Welch Jordan for defendant Mary Vail Cameron, appellant.

ERVIN, J. The appeal presents this question for decision: Does the pendency of a prior action by the wife for a divorce from bed and board upon the ground of abandonment abate a subsequent action by the husband for an absolute divorce upon the ground of two years' separation?

The pendency of a prior action between the same parties for the same cause in a State court of competent jurisdiction works in abatement of a subsequent action either in the same court or in another court of the State having like jurisdiction. *Seawell v. Purvis*, 232 N.C. 194, 59 S.E. 2d

572; *Taylor v. Schaub,* 225 N.C. 134, 33 S.E. 2d 658; *Moore v. Moore,* 224 N.C. 552, 31 S.E. 2d 690; *Brown v. Polk,* 201 N.C. 375, 160 S.E. 357; *Bank v. Broadhurst,* 197 N.C. 365, 148 S.E. 452; *Underwood v. Dooley,* 197 N.C. 100, 147 S.E. 686; 64 A.L.R. 656; *Morrison v. Lewis,* 197 N.C. 79, 147 S.E. 729; *Bradshaw v. Bank,* 175 N.C. 21, 94 S.E. 674; *Pettigrew v. McCoin,* 165 N.C. 472, 81 S.E. 701, 52 L.R.A. (N.S.) 79; *McNeill v. Currie,* 117 N.C. 341, 23 S.E. 216; *Long v. Jarratt,* 94 N.C. 443; *Smith v. Moore,* 79 N.C. 82; *Claywell v. Sudderth,* 77 N.C. 287; *Harris v. Johnson,* 65 N.C. 478. It is immaterial that the parties, plaintiff and defendant, are reversed in the two actions. *Brothers v. Bakeries,* 231 N.C. 428, 57 S.E. 2d 317; *Crouse v. York,* 192 N.C. 824, 135 S.E. 451; *Emry v. Chappell,* 148 N.C. 327, 62 S.E. 411.

The ordinary test for determining whether or not the parties and causes are the same for the purpose of abatement by reason of the pendency of the prior action is this: Do the two actions present a substantial identity as to parties, subject matter, issues involved, and relief demanded? *Whitehurst v. Hinton,* 230 N.C. 16, 51 S.E. 2d 899; *Lumber Co. v. Wilson,* 222 N.C. 87, 21 S.E. 2d 893; *Redfearn v. Austin,* 88 N.C. 413; *Casey v. Harrison,* 13 N.C. 244. This test lends itself to ready application where both actions are brought by the same plaintiff against the same defendant, or where the plaintiff in the second action, as defendant in the first, has actually pleaded a counterclaim or cross demand for the same cause of action.

The ordinary test of identity of parties and causes is not appropriate, however, when the parties to the prior action appear in the subsequent action in reverse order, and the plaintiff in the second action, as defendant in the first, has failed to plead a counterclaim or cross demand for the same cause of action. Under the law, a defendant, who has a claim available by way of counterclaim or cross demand, has an election to plead it as such in the original action, or to reserve it for a future independent action, unless the claim is essentially a part of the original action and will necessarily be adjudicated by the judgment in it. *Bell v. Machine Co.,* 150 N.C. 111, 63 S.E. 680; *Shakespeare v. Land Co.,* 144 N.C. 516, 57 S.E. 213; *Mauney v. Hamilton,* 132 N.C. 303, 43 S.E. 903; *Shankle v. Whitley,* 131 N.C. 168, 42 S.E. 574. As a consequence, the general rule is that a subsequent action is not abatable on the ground that the plaintiff therein might obtain the same relief by a counterclaim or cross demand in a prior action pending against him. *Trust Co. v. McKinne,* 179 N.C. 328, 102 S.E. 385; *Blackwell Mfg. Co. v. McElwee,* 94 N.C. 425; *Woody v. Jordan,* 69 N.C. 189.

In the very nature of things, however, this general rule is not applicable where the cause of action asserted by plaintiff in the second action is essentially a part of the first action and will necessarily be adjudicated by the judgment in it. 1 C.J.S., Abatement and Revival,

section 43 C. For these reasons, the law devises a special test of identity of parties and causes where the parties to the prior action appear in the subsequent action in reverse order and the plaintiff in the second action, as defendant in the first, has failed to plead a counterclaim or cross demand for the same cause of action. In such case, the pendency of the prior action abates the subsequent action when, and only when, these two conditions concur: (1) The plaintiff in the second action can obtain the same relief by a counterclaim or cross demand in the prior action pending against him; and (2) a judgment on the merits in favor of the opposing party in the prior action will operate as a bar to the plaintiff's prosecution of the subsequent action. *Brothers v. Bakeries, supra; Reece v. Reece,* 231 N.C. 321, 56 S.E. 2d 641; *Dwiggins v. Bus Co.,* 230 N.C. 234, 52 S.E. 2d 892; *Johnson v. Smith,* 215 N.C. 322, 1 S.E. 2d 834; *Allen v. Salley,* 179 N.C. 147, 101 S.E. 545; *Emry v. Chappell, supra; Alexander v. Norwood,* 118 N.C. 381, 24 S.E. 119; *Gray v. A. & N. C. R. R. Co.,* 77 N.C. 299.

These things being true, the primary question raised by the appeal necessarily embraces the subsidiary inquiries whether Cameron can obtain the relief sought by him in the subsequent action in New Hanover County by a counterclaim or cross demand in the prior action pending against him in Sampson County, and whether a judgment on the merits in favor of Mrs. Cameron in the prior action in Sampson County will operate as a bar to Cameron's prosecution of the subsequent action in New Hanover County.

It is well settled that in an action for divorce, either absolute or from bed and board, it is permissible for the defendant to set up a cause of action for divorce, either absolute or from bed and board, as a counterclaim or cross demand. *Lockhart v. Lockhart,* 223 N.C. 559, 27 S.E. 2d 444; *Shore v. Shore,* 220 N.C. 802, 18 S.E. 2d 358; *Ellis v. Ellis,* 190 N.C. 418, 130 S.E. 7. Such counterclaim or cross demand may even be based, in whole or in part, upon facts occurring after the institution of the action. *Pettigrew v. Pettigrew,* 172 Ark. 647, 291 S.W. 90; *Von Bernuth v. Von Bernuth,* 76 N.J. Eq. 487, 74 A. 700, 139 Am. S. R. 784; *Weiss v. Weiss,* 135 Misc. 264, 238 N.Y.S. 36; *Ames v. Ames,* 109 Misc. 161, 178 N.Y.S. 177; *Roberts v. Roberts,* 99 W. Va. 204, 128 S.E. 144; *Martin v. Martin,* 33 W. Va. 695, 11 S.E. 12; *Heinemann v. Heinemann,* 202 Wis. 639, 233 N.W. 552. This is true because the statute does not require that a counterclaim must be one existing at the commencement of the plaintiff's action except in the case of a counterclaim arising out of contract. G.S. 1-137; *Smith v. French,* 141 N.C. 1, 53 S.E. 435; McIntosh: North Carolina Practice and Procedure in Civil Cases, Section 467. Hence, Cameron can obtain the relief sought by him in the present action by a counterclaim or cross demand in the prior action pending against him in Sampson County.

Where the wife sues the husband for a divorce from bed and board upon the ground of abandonment under G.S. 50-7 (1), she must prove as an essential part of her case that her husband has wilfully abandoned her. *Brooks v. Brooks,* 226 N.C. 280, 37 S.E. 2d 909. Where the husband sues the wife for an absolute divorce upon the ground of two years' separation under G.S. 50-6, he is not required to establish as a constituent element of his cause of action that he is the injured party. *Taylor v. Taylor,* 225 N.C. 80, 33 S.E. 2d 492. Nevertheless, the law will not permit him to take advantage of his own wrong. Consequently, the wife may defeat the husband's action for an absolute divorce under G.S. 50-6 by showing as an affirmative defense that the separation of the parties has been occasioned by the act of the husband in wilfully abandoning her. *Taylor v. Taylor, supra; Pharr v. Pharr,* 223 N.C. 115, 25 S.E. 2d 471; *Byers v. Byers,* 223 N.C. 85, 25 S.E. 2d 466; *Reynolds v. Reynolds,* 208 N.C. 428, 181 S.E. 338. It follows that a judgment on the merits in favor of Mrs. Cameron in the prior action in Sampson County will operate as a bar to Cameron's prosecution of the subsequent action in New Hanover County. Such judgment will necessarily adjudicate that Cameron has wilfully abandoned Mrs. Cameron.

The conclusion that the pendency of the prior action in Sampson County abates the subsequent action in New Hanover County seems at first blush to be inconsistent with the decision of a divided court in *Cook v. Cook,* 159 N.C. 46, 74 S.E. 639, 40 L.R.A. (N.S.) 83, Ann. Cas. 1914 A, 1137, where the husband unsuccessfully pleaded the pendency of his prior action for an absolute divorce on the ground of separation for ten successive years in abatement of his wife's subsequent action for a divorce from bed and board on the ground of wilful abandonment. The supposed inconsistency is apparent and not real. This becomes plain on consideration of later litigation between the same parties reported in *Cooke v. Cooke,* 164 N.C. 272, 80 S.E. 178, 49 L.R.A. (N.S.) 1034. The majority held that there was no abatement in the *Cook case* because the substantive law governing the grounds of divorce made the issues in the one case utterly irrelevant to the issues in the other. This holding was a perfectly sound deduction from the premise accepted by the majority, *i.e.,* that the statute invoked by the husband permitted an absolute divorce on the ground of separation for ten successive years irrespective of whether the party seeking the divorce or the other party was to blame for the separation. The validity of the reasoning of the majority respecting the question of abatement has not been impaired by the fact that the court subsequently rejected their premise by holding that an action for an absolute divorce on the ground of separation for ten successive years could only be brought by the injured party. *Lee v. Lee,* 182 N.C. 61, 108 S.E. 352; *Sanderson v. Sanderson,* 178 N.C. 339, 100 S.E. 590.

If he so desires, Cameron can apply for leave to set up his alleged cause of action for divorce as a counterclaim or cross demand in the action pending against him in the Superior Court of Sampson County. Such leave would undoubtedly be granted for "right and justice require that an amendment be allowed which will enable the parties to end the . . . controversy in one and the same litigation." *Smith v. French, supra.*

For the reasons given, the judgment overruling the plea in abatement and refusing to dismiss the action is

Reversed.

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

J. R. HARWARD v. GENERAL MOTORS CORPORATION AND SIR WALTER CHEVROLET COMPANY.

(Filed 1 February, 1952.)

1. Negligence § 1—

Negligence is the want of care commensurate with the existing circumstances.

2. Automobiles § 6e—Evidence held insufficient to show that accident was caused by negligence in the manufacture or installation of steering assembly.

Plaintiff's evidence tended to show that he bought a new car from defendant dealer, that there was loose play in the steering wheel which he reported to the dealer's mechanic at the time of the 500 mile inspection and also at the time of the 1,000 mile inspection, that some nine months thereafter plaintiff, himself an experienced mechanic, was traveling at a speed of from fifty to fifty-five miles per hour on a damp, dark day, that the car began "to shimmy" and plaintiff touched his brakes, that immediately there was a loud popping sound and that the car went out of control, resulting in the accident causing the injuries complained of. There was further evidence that the accident resulted from the locking of the steering mechanism, but no substantial evidence that the failure of the steering gear was caused by any defect of materials or assembly or that it was not due to natural wear, hard or fast driving, or lack of lubrication. *Held:* Nonsuit was properly entered both as to the dealer and the manufacturer.

3. Negligence § 17—

There is no presumption of negligence from the mere fact of an accident or injury, but plaintiff has the burden of establishing not only negligence but that such negligence was the proximate cause of the injury complained of.

4. Negligence § 19b (1)—

Evidence that merely raises a conjecture as to the existence of negligence or proximate cause is insufficient to be submitted to the jury.

DEVIN, C. J., and JOHNSON, J., took no part in the consideration or decision of this case.

APPEAL by plaintiff from *Bone, J.*, May 1951 Civil Term, WAKE.

Civil action to recover damages for personal injuries.

Plaintiff alleges that on 14 February, 1948, he purchased from defendant Sir Walter Chevrolet Company, a North Carolina corporation, hereinafter referred to as the dealer, a 1948 Chevrolet coupe automobile, which was manufactured and delivered to the dealer by defendant General Motors Corporation, a Delaware corporation, hereinafter referred to as the manufacturer. Plaintiff asserts that the manufacturer was negligent in the construction and assembly of said automobile in that it used defective material and parts in the steering mechanism and improperly assembled the same. He contends that the dealer sold him the automobile without having properly inspected the same so as to discover defects in the steering mechanism.

Plaintiff's territory as a traveling salesman covered North and South Carolinas and he used this car in his work, driving it approximately 4,000 miles a month for a part of the time. Soon after purchasing the car, plaintiff discovered that there was too much play or lost motion in the steering wheel, especially on left turns. He took the automobile back to the dealer for the 500 mile inspection and checkup and again for the 1,000 mile inspection, and on both occasions told the dealer's head mechanic that there was something wrong with the steering apparatus. The mechanic examined the car, drove it around and reported to the plaintiff that it was "O.K." Plaintiff himself is a mechanic of approximately 25 years experience and as such has personally disassembled and reassembled steering mechanisms on a number of automobiles and has had direct supervision over his mechanics who as a part of their duties examined, disassembled and reassembled automobiles, including steering equipment, so that he was thoroughly familiar with the parts and performance of automobiles, including the mechanics of steering equipment. Plaintiff knew that there was an adjustment at the bottom of the housing on the steering mechanism where the lost motion could be taken up without putting in new parts.

On 22 November, 1948, at about 8:30 in the morning, which was over nine months after the purchase of said automobile, plaintiff was driving the automobile over U. S. Highway No. 421, a hard-surfaced highway, between Liberty and High Point. There was snow on the ground adjacent to the highway and the highway was damp. It was a dark, damp day and mist or fog was falling to the extent that it was necessary for plaintiff to use his windshield wipers and drive with his headlights burning. Plaintiff had just emerged from a curve at a speed of 50 to 55 miles per

hour, when all at once the car began "to shimmy just a little, something it had never done before." Plaintiff touched his brake and something popped which sounded like he had hit a Coca-Cola bottle. The car went out of control, ran off the road, turned completely over landing on the wheels and headed back toward the highway, a distance of about 40 feet from the highway. In this accident the plaintiff received the injuries complained of.

At the close of plaintiff's evidence, judgment of nonsuit was entered as to both defendants, to which plaintiff excepted and appealed, assigning as his only error the entry of the judgment as of nonsuit.

Bunn & Arendell for plaintiff, appellant.

Burgess, Baker & Duncan and Helms & Mulliss for defendant, appellee, General Motors Corporation.

Broughton, Teague & Johnson for defendant, appellee, Sir Walter Chevrolet Company.

VALENTINE, J. The sole question presented upon this appeal is the validity of the judgment of nonsuit. Plaintiff's case turns upon his own testimony and that of a mechanic. If the evidence of these two makes out a case of actionable negligence and proximate cause against either or both defendants, the plaintiff is entitled to a new trial; otherwise, the judgment of nonsuit must be sustained.

The term negligence as used in the law of torts lends itself to a wide use of language, but all the definitions employed by the courts and used by the textwriters revolve around want of due care or commensurate care under the existing circumstances. In *Broughton v. Oil Co.*, 201 N.C. 282, 159 S.E. 321, actionable negligence is defined to be " 'the failure to observe, for the protection of the interest of another person, that degree of care, precaution and vigilance which the circumstances justly demand, whereby some other person suffers injury.' Cooley on Torts (3d Ed.), pp. 1324, 1325."

Plaintiff's right of recovery and defendants' liability for damages in this action are predicated upon allegations that defendant manufacturer failed to exercise due care in the construction, manufacture and installation of the steering assembly in the automobile, and that defendant dealer failed to inspect, discover and warn plaintiff of such defects.

Plaintiff testified that soon after he purchased the automobile and drove it, he discovered the lost motion in the steering wheel; that he waited until time for the 500 mile inspection to report this condition to the dealer and although he thereafter found that the condition was not corrected, he continued to drive the car until time for the 1,000 mile inspection, when he again reported the condition; that although he knew

of the adjustment at the bottom of the steering column and the use for which it was intended, he continued to drive the automobile in his business at the rate of about 4,000 miles per month for a part of the time. With full knowledge of such lost motion as he had discovered in the steering apparatus, plaintiff never manipulated the adjustment at the bottom of the steering column so as to remove this fault, nor does the evidence disclose that he requested anybody else to make that adjustment.

Notwithstanding the mechanical knowledge the plaintiff had of automobiles, including steering assemblies, and notwithstanding his knowledge of the lost motion in the steering wheel, he continued to use the automobile for nine months, and at the time of the accident and injury was driving at a speed of 50 to 55 miles an hour on a damp road while a mist of fog or rain was falling and while atmospheric conditions were so unfavorable as to require the use of headlights and windshield wipers. From this, it would appear that even with the plaintiff's expert knowledge of automobiles, he did not regard this one as dangerously defective or out of repair. It does not clearly appear from what source came the sound resembling the breaking of a Coca-Cola bottle. It does appear, however, that when plaintiff touched his brakes, he got the impression that they locked and that this was responsible for the accident. The mechanic who examined the car after it was taken to the Chevrolet place in Liberty also thought that the difficulty arose from the locking of the brakes, but when the steering gear was disassembled and examined by the plaintiff after the accident, he then concluded that the steering gear in the housing had locked and was responsible for the accident.

Plaintiff's entire evidence, including the testimony of his mechanic, fails to show that there was any defect in the material used in the steering equipment or that any improper parts were used in its assembly or that anything was left out or omitted. The mechanic testified that a steering assembly has too much loose motion "if it don't fit good and tight. If it fits too high, I don't know what it would do." The plaintiff himself said that the steering apparatus was too loose and had too much play on left turns, and that this condition had continued from the time he purchased the car up to the time of the accident.

Upon an examination of the gears before the jury, plaintiff testified that "there is nothing wrong with those gears, but this wheel on the secondary shaft, you can see on that where it ran up on the worm in the steering shaft and bursted that out there. . . . There is an adjustment at the bottom of your housing . . . and when this wears you can take up the lost motion and keep you from having to get new stuff put in, but this one never had been moved; there was too much motion in there on the left turns at the time because it didn't fit the secondary shaft."

Whether the failure of the steering gear to fit as indicated by the plaintiff and his witness was due to natural wear or hard and fast driving or lack of lubrication is left in doubt. There is a complete absence of testimony that any cotter key or other essential part of the mechanism was left out, or that any improper parts were used. There is no substantial evidence that there was anything wrong with the steering equipment of the automobile at the time it was sold to the plaintiff, nor is there substantial evidence in the record which tends to prove that the condition in which the steering mechanism was found after the accident was due to any fault or negligence either of omission or of commission on the part of either of the defendants. *Shroder v. Barron-Dady Mot. Co.*, App. 111 S.W. 2d 66; *O'Hara v. Gen. Motors Corp.*, 35 F. Supp. 319; *Bird v. Ford Motor Co.*, 15 F. Supp. 590; *Supera v. Moreland Sales Corp.*, 56 P. 2d 595; *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050; *Davlin v. Henry Ford & Son, Inc.*, 20 Fed. 2d 317.

Negligence is never presumed from the mere fact of an accident or injury. The plaintiff has the burden of establishing by appropriate proof not only negligence but that such negligence was the proximate cause of the injury complained of. The plaintiff must also establish by his evidence a causal relation between the alleged negligence and the injury upon which a recovery is sought. Evidence that merely takes the matter into the realm of conjecture is insufficient. *Rountree v. Fountain*, 203 N.C. 381, 166 S.E. 329; *Lynch v. Telephone Co.*, 204 N.C. 252, 167 S.E. 847. Plaintiff's evidence at most raises a suspicion or a conjecture, but fails to establish actionable negligence or any causal relation between the condition of the automobile when it was purchased and the accident resulting in plaintiff's injury more than nine months later.

The cases cited and relied on by plaintiff are factually distinguishable.

For the reasons stated, the judgment of the court below must be

Affirmed.

DEVIN, C. J., and JOHNSON, J., took no part in the consideration or decision of this case.

CARL EDWARDS, HUBERT LEROY EDWARDS, AND LAWRENCE RICHARD EDWARDS v. WILLIE EDWARDS.

(Filed 1 February, 1952.)

1. Betterments § 8—

In ascertaining the reasonable rental value of the land as an offset against claim for betterments, the court should instruct the jury that its rental value should be ascertained without taking into consideration the improvements placed upon the land, G.S. 1-341. The indication of date by the use of numerals separated by dashes such as "8-9-19" is disapproved.

2. Appeal and Error § 48—

Where error committed in respect to some of the issues does not affect the verdict on other issues, a partial new trial will be ordered.

APPEAL by defendant from *Frizzelle, J.*, at June Term, 1951, of ORANGE.

Civil action to recover land.

Plaintiffs allege in their complaint that they are the owners in fee simple, and entitled to possession of a certain specifically described lot of land, being a part of what is known as the Claytor place, situate on the northern limits of the town of Chapel Hill, North Carolina; that defendant is wrongfully and unlawfully in possession of said lot of land, and refuses, after demand therefor, to surrender possession of it; that the reasonable rental value thereof amounts to $32.00 per month; and that by reason of defendant's unlawful possession plaintiffs have been damaged to date in the sum of $1,000.00. And thereupon they pray judgment.

Defendant, answering, denies the allegations of the complaint as above set forth. And for further answer and defense, defendant avers in substance: That she acquired title to the lot of land described in the complaint through a commissioner's deed pursuant to judgment of foreclosure of tax lien of Orange County against said property; that she has been in adverse possession of same, under color of title, for more than seven years, which is pleaded as a bar to plaintiffs' recovery; and that this action was commenced more than three years after the youngest of plaintiffs became twenty-one years of age, that is, after removal of disability as a minor, and same is pleaded as a bar to this action.

And defendant, as a cross-action and counterclaim, further avers that she "has expended from her personal funds for direct improvements upon the property in question a sum exceeding $1700, and that the reasonable value of these improvements is $2500 and that the value of the property was enhanced by these improvements and is reasonably worth $2500 more than in its former condition." Thereupon she prays that plaintiffs take nothing of her by way of damages; that she be declared the true and

rightful owner of the property in question; that she recover of plaintiffs the sum of $2500, and that same be declared a specific lien against the property until fully satisfied; and for such other and further relief in law and in equity as the court deems just and proper.

When the case came on for hearing in Superior Court the parties stipulated and agreed as follows:

"(1) That Etta Edwards, wife of Brack Edwards, acquired the fee simple title to the property in controversy by deed recorded in Deed Book 86, page 272.

"(2) That there was born of the marriage of Etta Edwards and Brack Edwards three children, namely, Carl Edwards, born 8-9-19, Lawrence Richard Edwards, born 10-18-22, and Hubert LeRoy Edwards, born 9-3-26.

"(3) That Etta Edwards died 9-29-29, intestate.

"(4) That Brack Edwards died in March 1948.

"(5) That this action was brought 10-20-50, and summons served 10-21-50.

"(6) That Carl, Lawrence Richard, and Hubert LeRoy Edwards are the heirs at law and next of kin of Etta Edwards.

"(7) That the defendant received a deed from Orange County dated 9-6-37 and recorded 9-14-37 in Deed Book 107 at page 102 and that the County of Orange received a deed dated 7-1-36 and recorded 7-23-36 in Deed Book 104 at page 315 from J. Dumont Eskridge, commissioner under tax foreclosure proceedings.

"(8) That a final judgment was entered in the tax foreclosure proceedings on 15th of May 1950 by W. C. Harris, Judge presiding, affirming the judgment entered by E. M. Lynch, C.S.C., Orange County, declaring the deed recorded in Deed Book 104, at page 315, void as to the interests, if any, of the plaintiffs and that said deed did not convey the interests of these plaintiffs, which property is the same property which is the subject of this action.

"(9) That Brack Edwards and his second wife Willie Edwards, resided on the property from the date of their marriage prior to 9-6-37, the date of the defendant's deed to the date of the death of Brack Edwards in March 1948, and the defendant has continued to and now lives on the property in question.

"(10) That on the 12th day of July 1950, notice to vacate this property was served on the defendant, and since that date she has failed and refused to vacate the same."

Thereupon the parties offered evidence tending to support their respective allegations pertaining to the reasonable monthly rental of the premises, and as to the reasonable value of permanent improvements made to and upon the premises by defendant.

And the case was submitted to the jury upon these issues,—the first of which was answered by the court, and the others by the jury, as shown:

"1. Are the plaintiffs the owners in fee simple of the property as alleged in the complaint? Answer: Yes.

"2. What amounts, if any, are the plaintiffs entitled to recover of the defendant as rent for the land? Answer: $625.00.

"3. Did the defendant make permanent improvements upon the land under a title believed by her to be good? Answer: Yes.

"4. If so, did the defendant have reasonable grounds to believe that she had good title to the land when she made such improvements? Answer: Yes.

"5. If so, how much, if any, was the value of the property permanently enhanced by the improvements by the defendant? Answer: $2350.00."

The court signed judgment in which after setting forth the issues, as so answered, it is recited: "And it further appearing to the court that the defendant, Willie Edwards, testified that she had expended $1700 only for the improvements thereon made by her and that therefore the court cannot enter a judgment providing for an enhanced value in the property by reason of the improvements made thereon by the defendant in excess of $1700 for said improvements, and it further appearing that a lien should be granted to the defendant for the amount of this judgment and that the defendant is entitled to remain in possession of said property, the subject of the action, until said lien has been paid and satisfied."

Thereupon the court adjudged that plaintiffs are the owners in fee simple of the property described in the complaint; and that defendant have and recover of plaintiffs jointly and severally the sum of $1075 and costs of this action; that the money judgment as declared to be a specific lien against the said property and that defendant is entitled to remain in possession of the property until said lien has been satisfied, after which plaintiffs are entitled to possession, etc.

Defendant excepted to the signing of the judgment, and appeals to Supreme Court, and assigns error.

No counsel for plaintiffs.

James R. Farlow for defendant, appellant.

WINBORNE, J. Appellant challenges, and properly so, the correctness of the charge of the trial court in respect of the second issue submitted to the jury in that the provisions of the pertinent statute, G.S. 1-341, are not observed. This statute declares that "the jury, in assessing the damages, shall estimate against the defendant the clear annual value of the premises during the time he was in possession, exclusive of the use of the improvements made thereon by himself . . ."

The charge, as given in the present case, failed to instruct the jury that in making the assessment the use of the improvements made on the premises by defendant should be excluded. See *Harrison v. Darden,* 223 N.C. 364, 26 S.E. 2d 860.

It is noted, however, that the first, third and fourth issues are not challenged on this appeal, neither are they affected by the verdict on the second and fifth issues. Hence the verdict on the first, third and fourth issues will stand, and the judgment based thereon is affirmed, but without prejudice to rights of defendant under provisions of G.S. 1-344. However, a new trial in respect to the matters to which the second and fifth issues relate is ordered.

And on new trial attention is directed to the statutes on betterments, Article 30 of Chapter One of the General Statutes. See also issues suggested in addenda to *Pritchard v. Williams,* 176 N.C. 108, 96 S.E. 733.

Moreover, notice is taken of the figures in the stipulation of parties, for instance "8-9-19," presumably indicating "August 9, 1919." This practice in judicial proceedings is not approved.

For error pointed out, let there be a

Partial new trial.

COMMERCIAL FINANCE COMPANY v. WALTER D. HOLDER.

(Filed 1 February, 1952.)

1. Trover and Conversion § 1—

Allegation that defendant salesman sold merchandise for plaintiff and failed to account for the proceeds sets up a cause of action in tort for conversion of funds.

2. Pleadings § 10—

In plaintiff's action in tort for conversion of funds by defendant agent, defendant may not set up a counterclaim in contract which neither is connected with plaintiff's subject of action nor arises out of transactions set forth in the complaint. G.S. 1-137 (1) (2).

3. Same—

In plaintiff's action in tort for conversion of funds by defendant agent, defendant may not set up a counterclaim for the penalty for usury. G.S. 1-137 (1), G.S. 24-2.

4. Same—

In plaintiff's action in tort for conversion of funds by defendant agent, defendant may not set up a counterclaim upon contract to recover the reasonable value of services rendered by defendant to plaintiff.

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

Civil action to recover for alleged conversion of money,—heard upon demurrer by plaintiff to further answer and defense and counterclaim of defendant.

Plaintiff alleges in its complaint, substantially the following: That on each of four certain dates in the years 1948 and 1949, plaintiff and defendant entered into an agreement by the terms of which plaintiff delivered to defendant a certain automobile which he, as agent of plaintiff, might sell to a third person, and, upon such sale, remit immediately to plaintiff a certain amount, and retain any of the proceeds over and above this amount,—it being agreed that in collecting the amount to be so remitted defendant would collect it as plaintiff's agent; that the amounts to be so collected and remitted to plaintiff by defendant are $824, $618, $580 and $812; that defendant sold all of these automobiles, and has collected therefor as agent of plaintiff the sum of $2,834, and after demand by plaintiff, defendant has failed and refused to turn same, or any part of it, over to plaintiff, and has thereby "wrongfully and unlawfully misappropriated, misapplied and converted same to his own use and benefit," etc.

And plaintiff further alleges in its complaint that under similar agreement on 14 January, 1949, as to two other automobiles, defendant received $650 property of plaintiff, and remitted only $400, wrongfully converting to his own use and benefit the remaining amount of $250.

Upon these allegations plaintiff alleges damage sustained by it in the total sum of $3,084, for which it prays judgment.

Defendant, answering, denies in material aspects the allegations of the complaint. And, by way of further answer, further defense and counterclaim, defendant avers, in paragraphs numbered 1 to 14, both inclusive, matters in defense in relation to matters alleged in the complaint. And then defendant further avers:

"15. That in addition to the counterclaim heretofore alleged, this defendant alleges that within three years from this date, he has borrowed considerable sums of money from the plaintiff, financing automobiles, and has repaid said loans. That the amount of said loans, the length of same, and the amount of interest paid are as follows: (Here are listed twenty items, totalling $1,658.53 as interest paid).

"16. That the amount of interest paid upon the various loans above set out is far in excess of the legal rate of interest, and that said interest having been knowingly charged by the plaintiff, and the same having been knowingly received by the plaintiff, the same having been intentionally charged in violation of law, entitles this defendant to recover of the plaintiff double the amount of interest, to wit: $3,317.06.

"17. That in addition to the counterclaims above set out, this defendant was engaged by the plaintiff to make trips and to render services for the benefit of the plaintiff, for which the plaintiff agreed to pay this defendant a reasonable and fair sum. That the trips so made are as follows: (Listed,—no one of which is connected with matters alleged in complaint). That the foregoing services were all rendered to and for, and on behalf of the Commercial Finance Company, and that the reasonable value of said services is $100, and that this defendant, therefore, is entitled to recover of the plaintiff for these services, on this counterclaim, the sum of $100."

(Then follows paragraphs 18 and 19, which, by consent, are stricken from the answer).

"20. That the defendant is entitled to recover upon his various counterclaims the amounts set out in said counterclaims."

Plaintiff demurred to the further answer, further defense and counterclaims of defendant, as set forth above, for the reason that the same constitutes a misjoinder of causes, which cannot be properly used by way of counterclaim or set-off in an action such as brought by plaintiff.

"1. The alleged counterclaim set forth by the defendant in paragraphs 15, 16 and 20 is improperly joined with the other defenses, counterclaims and set-offs alleged for the reason that the claims therein set forth neither are ones arising on contract, nor did they arise out of the transaction set forth in the plaintiff's complaint as is required by the statute. Further, that the claim therein asserted is one for the recovery of a penalty authorized by statute and cannot be urged as a counterclaim except as provided by the statute, no provision having been made for such counterclaim in actions as brought by this plaintiff. . . .

"3. The matters set forth in paragraphs 17 and 20 are improperly joined with other defenses, set-offs and counterclaims, even though arising on contract for the reason that they did not arise out of the same transaction set forth in plaintiff's complaint. . . ."

And, therefore, plaintiff moves that the further answer, further defense and counterclaim of defendant be dismissed.

When the case came on for hearing upon the foregoing demurrer of plaintiff, the presiding judge entered an order separately overruling the demurrer of plaintiff (1) "to the counterclaim of defendant, set forth in paragraphs 15, 16 and 20," and (2) "to the cause of action set forth in paragraphs 17 and 20." Plaintiff excepted to each ruling.

The presiding judge, also, in said order, in his discretion allowed defendant to amend paragraphs 15, 16 and 17 of the answer, "in order to show that said cause of action contained in these paragraphs existed prior to the time of the filing of the complaint." Exception by plaintiff.

Plaintiff appeals to Supreme Court and assigns error.

William S. Mitchell for plaintiff, appellant.
Elledge, Johnson & Browder for defendant, appellee.

WINBORNE, J. The assignments of error presented on this appeal are based upon exceptions to the rulings of the trial court in respect to the demurrer filed by plaintiff, and appear to be well taken. G.S. 1-137 (1) and (2). See also *Hancammon v. Carr,* 229 N.C. 52, 47 S.E. 2d 614; *Smith v. Gibbons,* 230 N.C. 600, 54 S.E. 2d 924.

The answer of a defendant must contain a statement of any new matter constituting a defense or counterclaim . . . etc. G.S. 1-135. Such counterclaim "must be one existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action, and arising out of one of the following causes of action:

"1. A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's complaint, or connected with the subject of the action.

"2. In an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action." G.S. 1-137.

In the light of this statute, it is seen that the cause of action set out in plaintiff's complaint sounds in tort for conversion of funds. *Lumber Co. v. Phosphate Co.,* 189 N.C. 206, 126 S.E. 511; *Hamilton v. Benton,* 180 N.C. 79, 104 S.E. 78; *Smith v. Young,* 109 N.C. 224, 13 S.E. 735; *Bazemore v. Bridgers,* 105 N.C. 191, 10 S.E. 888.

And on the other hand, the causes of action set out by defendant, by way of counterclaim, are in contract, and do not arise out of transactions set forth in the complaint as the foundation of plaintiff's complaint, nor are they connected with the subject of the action.

The cause of action set up by defendant in paragraphs 15 and 16, by way of counterclaim, is for the recovery of penalty for alleged usury. G.S. 24-2. Such an action, being for recovery of a penalty given by a statute, is, under decisions in this State, considered to be an action on contract. *Doughty v. R. R.,* 78 N.C. 22; *Katzenstein v. R. R.,* 84 N.C. 688; *Hodges v. R. R.,* 105 N.C. 170, 10 S.E. 917; *Carter v. R. R.,* 126 N.C. 437; 36 S.E. 14; *Smoke Mount Industries v. Fisher,* 224 N.C. 72, 29 S.E. 2d 128; *Williams v. Gibson,* 232 N.C. 133, 59 S.E. 2d 602.

And the cause of action set up by defendant in paragraph 17 is based expressly upon contract.

Hence, applying the provisions of G.S. 1-137, 1 and 2, neither cause of action set up by defendant may be properly pleaded as a counterclaim to plaintiff's cause of action. Under sub-section 1 of this statute it is not permissible to plead as a counterclaim a cause of action which does not arise out of the transaction set forth in the complaint as the foundation of plaintiff's complaint, or which is not connected with the subject

of the action. And under sub-section 2 of this statute, it is permissible to plead a counterclaim on contract only when the plaintiff's cause of action arises on contract.

Moreover, while the statute, G.S. 24-2, provides that a counterclaim for usury may be set up in an action to recover upon the note or other evidence of debt, on which the alleged usurious interest has been charged, such a counterclaim may not be pleaded in an action based on other cause of action. See *Mortgage Corp. v. Wilson*, 205 N.C. 493, 171 S.E. 783. There this Court held that since the action was to recover possession of real property, the counterclaim was inopportune.

For reasons above stated, the judgment from which appeal is taken is Reversed.

M. T. LINDSEY AND EUNICE LINDSEY, ADMINISTRATRIX OF THE ESTATE OF M. T. LINDSEY, DECEASED, v. E. G. LEONARD AND BURNETTE HOME SUPPLY COMPANY.

(Filed 1 February, 1952.)

1. Automobiles § 24a—

The driver must be the agent or employee at the time of and in respect to the very transaction out of which the injury arose in order to hold the principal or employer liable for his negligent operation of the vehicle.

2. Principal and Agent § 13c—

Allegations in defendant's answer that the driver of the car was under contract with defendant to sell defendant's merchandise on a commission basis does not tend to show the existence of the relationship of principal and agent between defendant and the driver, and is properly excluded from evidence on the ground of irrelevancy.

3. Same: Evidence § 42d—

An admission in the answer of the alleged agent that at the time in question he was a representative of his codefendant is incompetent as evidence against the codefendant, since it amounts to no more than a declaration of the alleged agent as to the fact of agency.

4. Automobiles § 24½c: Principal and Agent § 13c—

Evidence that shortly after the accident, merchandise of defendant was found in the car of the alleged agent who stated that he was selling the articles for defendant, *held* properly excluded.

5. Automobiles § 24½e—

Evidence tending to show a contract under the terms of which goods of defendant were consigned to an individual to be sold on a commission basis, that the individual owned and used his own automobile, that the defendant furnished no transportation and paid no expenses incident to the operation of the car and had no control over the individual or his employees, *held*

insufficient to show the existence of the relationship of principal and agent between defendant and the individual, and nonsuit was proper upon the issue of *respondeat superior*.

APPEAL by plaintiff from *Sharp, Special Judge,* April Term, 1951, ALAMANCE.

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

M. T. Lindsey, who instituted this suit, is now dead and his administratrix has been properly made the plaintiff and has adopted the complaint as filed. The defendant, E. G. Leonard, has also died since this action was commenced and the action as to him has abated, so that the action is now prosecuted by the administratrix of M. T. Lindsey against Burnette Home Supply Company.

The pertinent facts are as follows: On 12 January, 1946, at about 4 o'clock p.m., plaintiff's intestate was driving his Chevrolet coupe automobile in a southerly direction along South Main Street in the town of Graham, North Carolina. At the same time, E. G. Leonard in his Chevrolet automobile approached South Main Street from an easterly direction along Gilbreath Street. Upon entering South Main Street Leonard turned to the right so that his automobile passed across the center line of South Main Street some 3 to 5 feet. At this moment the Lindsey car was within 10 or 15 feet of the Leonard car and Lindsey pulled to the right and off the hard-surfaced portion of the highway, so that he traveled 15 or 20 feet on the muddy shoulder. When he pulled back on the highway, his car skidded some 25 or 30 feet down the highway and went off the road into a ditch on the left. Lindsey was pinned under his car and suffered injuries. Both cars were traveling about 20 to 25 miles per hour. The cars did not make physical contact and Leonard was not seen to stop his car at the scene of the accident. South Main Street and N. C. Highway 87 are identical and straight at the point of the accident.

Plaintiff offered to prove by a witness who went to Leonard's home after the wreck at "about dusky dark" that witness saw a Chevrolet coach at Leonard's home, the back part of which automobile was filled with blankets and bedspreads. Leonard stated to the witness that the merchandise in his car belonged to Burnette Home Supply Company and that he was selling it for the Company. This evidence was excluded by the court and plaintiff excepted.

Plaintiff then offered J. G. Burnette, one of the partners of Burnette Home Supply Company, who testified that the Company was engaged in selling general merchandise by house to house canvass from its place of business in Raleigh; that Leonard was working for the Company on 12 January, 1946, but witness had no record that he had called upon customers on that date; that Leonard made a report to the Company at

no specified time, but generally once a week; that he generally called upon his customers by the use of a car in which he carried samples and goods; that sometimes the salesmen would deliver at the time of the sale, but witness did not know whether Leonard delivered when he made sales or just took orders; that such goods as Leonard had in his car on 12 January, 1946, were, according to witness, consigned to him as samples and belonged to the Company until sold and paid for; that under the contract between Leonard and the Company, Leonard was not restricted to any territory. He could sell anywhere he desired. He was paid strictly on commission. The Company had no control over his hours, nor a right to hire or fire his employees. It had no control over the manner in which he made the sales, and made no requirements as to the number of days he should work in any given space of time. Leonard was authorized to sell the goods and to collect for the same. The Company did not furnish him any kind of transportation nor did it give directions as to the kind of transportation he was to use. The Company did not own the car driven by Leonard, nor did it bear any part of the expense. Leonard was not allowed to charge anything connected with the expense of his car to the Company.

At the close of plaintiff's evidence, a nonsuit was entered from which plaintiff excepted and appealed, assigning errors.

J. Elmer Long, Thos. C. Carter, and Clarence Ross for plaintiff, appellant.

Smith, Sapp, Moore & Smith for defendant, appellee.

VALENTINE, J. There is some evidence of negligence and of causative relation between the operation of the automobile by Leonard and the injury sustained by Lindsey, but the *quantum* of evidence on these points is not the pressing question here.

Plaintiff seeks to recover of the defendant, Burnette Home Supply Company, on the doctrine of *respondeat superior* for injuries sustained by her intestate in the accident. The Company denies all the essential allegations of the complaint. Plaintiff is, therefore, put to proof of every fact necessary to support her cause of action. This raises the question, is there evidence sufficient to warrant a submission of the case to the jury on the theory of liability under the doctrine of *respondeat superior?*

The record discloses that there was a contract between Leonard and the Company under the terms of which goods were consigned to Leonard by the Company to be sold on a commission basis. Leonard owned and used his own automobile. The Company furnished no transportation, paid for no expenses incident to the operation of his car, and had no control over him or his employees. There is no evidence tending to show that at the

time of the injury to plaintiff's intestate Leonard was attempting to sell any goods for himself, the Company, or anybody else.

"The doctrine of *respondeat superior* applies only when the relation of master and servant, employer and employee, or principal and agent is shown to exist between the wrongdoer and the person sought to be charged for the result of the wrong, at the time and in respect to the very transaction out of which the injury arose. This is so well recognized that it may be said to be axiomatic. . . . In *Linville v. Nissen,* 162 N.C. 95, 77 S.E. 1096, the Court, quoting from *Durham v. Straus,* 38 Pa. Sup. Ct. 621, said: 'The plaintiff must not only show that the person in charge was defendant's servant, but the further fact that he was at the time engaged in the master's business.' . . . They settled the question in this jurisdiction. In every case, since decided, in which the question has been at issue, the Court has held that to charge the owner of a motor vehicle for the neglect or default of another there must be some evidence of the agency of the driver at the time and in respect to the transaction out of which the injury arose, and that proof of ownership alone is not sufficient to warrant or support an inference of such agency." *Carter v. Motor Lines,* 227 N.C. 193, 41 S.E. 2d 586.

Plaintiff based an exception upon the court's refusal to receive from the answer of Burnette Home Supply Company the following language: "that during the times alleged in the complaint there was existing between E. G. Leonard and Burnette Home Supply Company a contract whereby the said E. G. Leonard was to sell goods and merchandise for Burnette Home Supply Company on a commission basis." This language does not tend to prove the existence of a relationship of master and servant or employer and employee. *Hayes v. Elon College,* 224 N.C. 11, 29 S.E. 2d 137. It is of no probative value to the plaintiff and therefore irrelevant and properly excluded.

Plaintiff also excepted to the court's failure to allow her to introduce from the answer of Leonard this language: "It is admitted that at this time the defendant was the representative of his co-defendant Burnette Home Supply Company." This was no more than an effort to prove agency by a declaration of an alleged agent and was upon that ground properly excluded. *Hubbard v. R. R.,* 203 N.C. 675, 166 S.E. 802; *Darlington v. Telegraph Co.,* 127 N.C. 448, 37 S.E. 479; *Pangle v. Appalachian Hall,* 190 N.C. 833, 131 S.E. 42; *Howell v. Harris,* 220 N.C. 198, 16 S.E. 2d 829.

The plaintiff offered proof that the back seat of the Chevrolet automobile found at Leonard's home about dusk dark on the day of the accident was filled with blankets and bedspreads and that Leonard there made the statement that he was selling the articles for the Company. This language was also properly excluded by the court. In *Tribble v. Swinson,*

213 N.C. 550, 196 S.E. 820, there was evidence that the car involved in the collision was practically filled with sandwiches and all kinds of cakes, which were the products of the defendant, Swinson Food Products Company, but there was, as in the instant case, no evidence that the driver of the automobile at the time of the collision was the agent or servant or acting within the scope of the employment of the defendant sought to be charged. In the *Tribble case,* the Court said: "The evidence for the plaintiff fails to make out a *prima facie* case on the essential facts necessary under the doctrine of *respondeat superior* to hold the defendant Swinson responsible for the alleged negligent acts or tort of the defendant Vita."

The essential facts necessary for the establishment of liability upon the doctrine here invoked have been stated in a long line of decisions, some of which are: *Linville v. Nissen, supra; Grier v. Grier,* 192 N.C. 760, 135 S.E. 852; *Martin v. Bus Line,* 197 N.C. 720, 150 S.E. 501; *Jeffrey v. Mfg. Co.,* 197 N.C. 724, 150 S.E. 503; *Cole v. Funeral Home,* 207 N.C. 271, 176 S.E. 553; *Van Landingham v. Sewing Machine Co.,* 207 N.C. 355, 177 S.E. 126; *Shoemake v. Refining Co.,* 208 N.C. 124, 179 S.E. 334; *Parrish v. Mfg. Co.,* 211 N.C. 7, 188 S.E. 817; *Liverman v. Cline,* 212 N.C. 43, 192 S.E. 849.

Measuring the plaintiff's evidence by the standard laid down by this Court, plaintiff's evidence was insufficient to take the case to the jury. The judgment of the court below is

Affirmed.

STATE EX REL. EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA v. ANNIE SMITH, CLAIMANT, S. S. No. 244-40-2613, DOCKET No. 1831, AND THE FLI-BACK COMPANY, EMPLOYER.

(Filed 1 February, 1952.)

1. Master and Servant § 60—

Testimony to the effect that claimant was discharged because she was not keeping up with her work as she should, although she was doing the best she could, *is held* to support a finding of the Employment Security Commission that she was fired for inefficiency, notwithstanding other evidence tending to show that she was fired for misconduct.

2. Master and Servant § 62—

The findings of fact of the Employment Security Commission in a proceeding for unemployment compensation are conclusive when supported by any competent evidence. G.S. 96-4 (m).

APPEAL by The Fli-Back Company, employer, from *Sharp, Special Judge,* 12 February, 1951 Term, GUILFORD (High Point Division).

This action arises out of a claim for unemployment compensation filed by Annie Smith, a former employee of The Fli-Back Company.

The Fli-Back Company appeals from the judgment of the Superior Court affirming the findings and judgment of the Employment Security Commission of North Carolina. The proceeding originated before the Commission under G.S. 96-15 for the purpose of determining the eligibility of Annie Smith for unemployment compensation. Her claim was filed on 10 July, 1950.

After the necessary preliminary steps, a formal hearing was held before the full Commission, and upon the evidence taken and considered, the Commission on 21 November, 1950, rendered its findings and judgment, the pertinent parts of which are as follows:

"The facts in this case establish that for eighteen months the claimant has been a slow worker and does not have the dexterity to perform her duties with dispatch. She was assigned to a new type of work on June 26, 1950; namely, stacking paddles. The employer requested her on several occasions during the day to 'speed up.' She informed the supervisor that she was doing the best she could. The next day, the supervisor thought that the claimant was not keeping up with her work like she should; therefore, about 3:00 p.m. on June 27, 1950, he discharged her.

"Mere inefficiency or failure in good performance as the result of inability is not 'misconduct' within the meaning of the statute. In this instant case, the evidence does not disclose that the claimant's acts were willful or that there was a breach of the duties she owed to the employer as an employee. It is concluded that the claimant was discharged for cause but not for misconduct in connection with her work; therefore, no penalty shall be inflicted for the separation.

"The claimant is able to work and available for work. During the life of this claim, she sought work weekly and was successful in securing employment on her own initiative. Having established to the satisfaction of the Commission that she has been actively seeking work, it is further concluded that the claimant shall be paid benefits under this claim.

"It is now, therefore, ordered and determined that the claimant is eligible for benefits under this claim filed on July 10, 1950, and she shall be paid benefits thereon in accordance with her claim record."

A notice of appeal was duly and properly entered by The Fli-Back Company, employer, for review by the Superior Court of Guilford County (High Point Division), and when the matter came on for hearing, the decision of the Commission was in all respects affirmed by the Superior Court. The employer excepted and appealed to the Supreme Court, assigning errors.

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

J. Allen Austin and E. F. Upchurch, Jr., for employer, The Fli-Back Company, appellant.

VALENTINE, J. Did the court below commit error in affirming the findings and judgment of the Employment Security Commission? This is the sole question here presented.

There was testimony that Carter, office manager of the employer, took claimant to the office of the President to discuss her work and that while there she "sassed" Mr. Gibson, the President, pointed her finger at him and dared him to "fire" her. But the claimant denies this and Gibson at one time testified, "I fired her because she didn't do her work." On this conflicting testimony, the Commission found the facts as set out in the record. Since there is competent evidence in the record to support the findings as to the cause of the discharge, the findings are conclusive and binding in this Court.

It is provided by statute that the determination of the Employment Security Commission as to the eligibility of a claimant under the Act is "conclusive and binding as to all questions of fact supported by any competent evidence." G.S. 96-4 (m); *Unemployment Compensation Com. v. Willis,* 219 N.C. 709, 15 S.E. 2d 4; *Graham v. Wall,* 220 N.C. 84, 16 S.E. 2d 691; *Employment Security Com. v. Roberts,* 230 N.C. 262, 52 S.E. 2d 890; *Employment Security Com. v. Distributing Co.,* 230 N.C. 464, 53 S.E. 2d 674.

It is made manifest by an examination of the record that the court below was correct in approving and affirming the findings and decision of the Commission, in view of the fact that such findings and decision were supported by competent evidence. The Commission found from the evidence that the claimant although a slow worker and without sufficient dexterity to perform her work with dispatch was retained by her employer for eighteen months prior to her discharge and that it was only when she was assigned to a new type of work on 26 June, 1950, that her services were sufficiently unsatisfactory to warrant her discharge.

The appellant complains that the Commission and the court below committed error in defining the term "misconduct" as used in the statute. The Commission concluded that "mere inefficiency or failure in good performance as the result of inability is not 'misconduct' within the meaning of the statute." The findings further state that the "claimant's acts were not willful or that there was a breach of the duties she owed to the employer as an employee." The Commission concluded that "the claimant was discharged for cause but not for misconduct in connection with her work," and that "no penalty shall be inflicted for the separation."

Since there was sufficient evidence to support the finding that the claimant was discharged for inefficiency, it is unnecessary for us to define or discuss the meaning of the term "misconduct."

Upon appeal to the Superior Court the findings and conclusions of the Commission were in all respects approved and confirmed and judgment was accordingly rendered. Upon this record, we see no reason to disturb that judgment. Therefore, the judgment of the court below is

Affirmed.

ERWIN MILLS, INC., v. TEXTILE WORKERS UNION OF AMERICA, CIO; TEXTILE WORKERS UNION OF AMERICA, CIO, LOCAL #246, DURHAM, NORTH CAROLINA; HOWARD PARKER, ALBERT PEARCE, RICHARD HALL, ESTHER JENKS, LOIS LEWIS, EDGAR MAYNARD, WILLIAM R. ALLEN, RUFUS LEONARD, VASS TEW, PEARL RASBERRY, DOROTHY MORGAN, MARGARET PARKER, ERDINE COUCH, RUTH MEEKS, GEORGE DUNN, ESTELLE SPELL, ROBERT AIKEN, MAGGIE RAMBEAU, ALONZO HODGES, McCAULEY FIELDS, ELIZABETH HAMLETT DAVIS, DEWEY FIELDS, AND OTHER PERSONS, UNKNOWN TO PLAINTIFF, TO WHOM THIS ACTION MAY BECOME KNOWN.

(Filed 1 February, 1952.)

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, sec. 141, *et seq.*, our State court in the exercise of the State's inherent police power has jurisdiction to restrain acts of violence in connection with a strike to protect the rights of its citizens.

2. Contempt of Court § 5: Removal of Causes § 7—

In a suit to restrain unlawful picketing at a strike bound plant, the filing by defendants of a petition for removal to the U. S. District Court subsequent to the institution of proceedings as for contempt does not prevent a State court from continuing the proceedings in order to maintain respect for its orders and to punish contemptuous violation thereof.

3. Contempt of Court § 4—

While an order to show cause why respondents should not be held in contempt should advise them of the specific charges alleged against them, its failure to do so does not render the proceeding void where their counsel appears and is furnished copies of the affidavits containing the charges in time to present their defense and they subsequently file counter affidavits in detail.

4. Contempt of Court § 5: Appeal and Error § 39e—

Ordinarily, it will be presumed that the court did not consider incompetent averments in the affidavits filed in determining questions of fact, but where at the time of the hearing the incompetent matters are specifically pointed out and objected to and made the subject of motions to strike, and

ruled upon adversely by the court, the presumption cannot obtain and the cause will be remanded.

APPEAL by defendants, Fields, Rasberry, Rambeau, Meeks and Brewer, from *Frizzelle, J.*, in Chambers 7 May, 1951. From DURHAM. Error and remanded.

The appellants were adjudged in contempt of court for violation of a restraining order previously issued in the cause, and from the order imposing punishment therefor they appealed.

Fuller, Reade, Umstead & Fuller and James L. Newsom for plaintiff, appellee.

Robert S. Cahoon for defendants, appellants.

DEVIN, C. J. The action was instituted by plaintiff 27 April, 1951, against the Textile Workers Union of America, an unincorporated association, and the named individual defendants, to restrain them from threatening, abusing and interfering with employees desiring to work in plaintiff's mills during a labor strike. The strike had been in progress since 2 April, 1951. Process was duly served on the defendants. On the same date, 27 April, 1951, upon the verified complaint used as an affidavit, a temporary restraining order was issued by the court restraining defendants from the commission of the threatened acts of violence and intimidation alleged. The restraining order was duly served and copies posted at the mill gates and conspicuous places in the vicinity. Three days later, 30 April, the court issued an order to the individual defendants to show cause why they should not be held in contempt for violation of the court's restraining order. This order recited that the restraining order had been duly served and posted as directed, and that it appeared to the court "from the affidavits" that the defendants (naming them) had "willfully done certain acts and things therein prohibited," and thereupon the respondents were ordered to appear 2 May and show cause why they should not be punished as for contempt of court. On that date, 2 May, counsel for respondents appeared before the judge and moved for a postponement of the hearing. At this time copies of the eight affidavits relied on by plaintiff were delivered to respondents' counsel. Three of these affidavits bore date 30 April, and the others 1 May and 2 May. The hearing was continued to 4 May. On 4 May respondents appeared and demurred, and moved to dismiss the proceeding for that the court was without jurisdiction, and for the further reason that the order as served did not advise them of the nature of the charges against them. The demurrer and motion to dismiss were overruled and respondents excepted.

The matter was then heard on the affidavits filed by plaintiff and those *contra* filed by respondents.

The respondents objected to each of the affidavits offered by plaintiff and moved that certain portions of the plaintiff's affidavits, as indicated and noted, be stricken from the evidence and from the record. The court overruled all of respondents' objections to the competence of matters set out in the plaintiff's affidavits, and upon the evidence afforded by the affidavits made the findings of fact upon which judgment was rendered against the appealing respondents. The judgment stated the acts committed by appellants and found that these acts were done for the purpose of intimidating, threatening and abusing employees of plaintiff and dissuading them from continuing to work, and that the five appellants had wilfully and contemptuously violated the restraining order after notice thereof, and the court thereupon imposed punishment upon each of them.

The appellants interposed plea to the jurisdiction on the ground that the action arose out of a labor dispute between employees and a corporation engaged in interstate commerce, and that exclusive jurisdiction of matters connected therewith was by Act of Congress conferred upon the National Labor Relations Board. But the fact that the acts complained of in this action occurred during a labor dispute would not deprive the state court of the power by appropriate action to protect persons and property from threatened unlawful acts of violence injurious to the rights of its citizens, as was recently decided by this Court in *Erwin Mills, Inc. v. Textile Workers Union of America,* 234 N.C. 321, 67 S.E. 2d 372, and *Cotton Mill Co. v. Textile Workers Union of America,* 234 N.C. 545, 67 S.E. 2d 755. The police power of the state to suppress violence and to preserve order was not superseded by the Act of Congress. Nor would the subsequent filing by the defendants of petition for removal to the U. S. District Court (later remanded) prevent the state court from continuing proceedings to maintain respect for its orders and to punish contemptuous violation thereof. *Green v. Griffin,* 95 N.C. 50; *Herring v. Pugh,* 126 N.C. 852, 36 S.E. 287; *Safie Mfg. Co. v. Arnold,* 228 N.C. 375, 45 S.E. 2d 577; *Elliott v. Swartz,* 231 N.C. 425, 57 S.E. 2d 305; *Gompers v. Buck's Stove & Range Co.,* 221 U.S. 418; 12 A.J. 433.

While the order to respondents to show cause should have advised them of the specific charges alleged against them, this irregularity would not render the proceeding void where counsel for respondents appeared and was furnished copies of the affidavits containing the charges and allegations against them in time to present their defense, and the respondents subsequently filed affidavits in denial. Presumably the affidavits set out in the record which bore the same date as the order were presented to the court and formed the basis upon which the order was issued. G.S.

5-7; *Erwin Mills, Inc. v. Textile Workers Union of America, supra; In re Odum,* 133 N.C. 250, 45 S.E. 569.

But we think the court was in error in overruling respondents' exceptions to incompetent, hearsay and prejudicial evidence contained in plaintiff's affidavits which were being considered by the court.

Ordinarily when a Superior Court Judge hears evidence in the form of affidavits in order to decide questions of fact, he is presumed to eliminate from his consideration immaterial and incompetent averments, and those which in other respects are improperly inserted. *Woodard v. Mordecai,* 234 N.C. 463, 67 S.E. 2d 639; *Cameron v. Cameron,* 232 N.C. 686, 61 S.E. 2d 913. But where at the time of the hearing incompetent matters are specifically pointed out and objected to, and motion made to strike them from the evidence, and the court overrules the motions in each instance, the presumption that the court did not consider the objectionable matters in making his decision would not be available to sustain the findings. For this reason we think the hearing should be remanded for consideration of the competent evidence in passing upon the motion to punish appellants as for contempt.

Error and remanded.

DR. JAMES D. ROYSTER AND DR. R. L. NOBLIN, EXECUTORS OF THE ESTATE OF CHARLES G. ROYSTER, DECEASED, v. F. W. HANCOCK, JR.

(Filed 1 February, 1952.)

1. Bills and Notes § 32—

The fact that a note is under seal raises the presumption of good and sufficient consideration.

2. Evidence § 43f—

The admission in the answer of paragraphs of the complaint containing allegations of germane ultimate facts establishes such facts as effectively as a jury's verdict even though defendant attaches qualifications to his admissions.

3. Bills and Notes § 34—

The introduction in evidence of a note payable to plaintiff, together with defendant's admission of its execution and delivery, makes out a *prima facie* case even though the note is not negotiable.

4. Evidence § 7e—

When plaintiff makes out a *prima facie* case the defendant is put to the election of going forward with proof or taking his chance of an adverse verdict.

5. Trial § 23b—

A *prima facie* case takes the issue to the jury notwithstanding an affirmative defense set up by defendant.

6. Bills and Notes § 33b—

The presumption of good and sufficient consideration arising from the seal on a note is rebuttable, and the maker may show by parol evidence want of consideration, such as that the consideration was a gambling loss and therefore illegal.

7. Bills and Notes § 32—

Where the note sued on is executed long after the repeal of C.S. 2146, and there is no allegation that the note was a renewal of notes executed prior to the repeal of the statute, the burden of proving the defense that the consideration of the note was an illegal gambling transaction (G.S. 16-3) is upon the maker, since the repealed statute does not apply.

8. Bills and Notes § 1—

A promise to pay a sum definite "as per our agreement" does not affect the validity of the note. G.S. 25-9.

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

APPEAL by plaintiffs from *Williams, J.*, July 1951 Term, GRANVILLE.

This is an action upon a promissory note, which is in words and figures as follows:

"Oxford, North Carolina

"Twelve months after date, for value received, I promise to pay to C. G. Royster the sum of Nine Thousand Five Hundred Dollars as per our agreement.

"In Testimony Whereof, I have hereunto set my hand and seal, this January 1, 1941.

F. W. HANCOCK, JR. (SEAL).

"Witness:
RUTH G. DUNN."

The payee is dead and plaintiffs are his executors.

Plaintiffs offered in evidence the first three paragraphs of the complaint and the corresponding paragraphs of the answer. This established the right of action in the plaintiffs and the execution and delivery of the note. Plaintiffs also offered in evidence the original note, the reverse side of which showed a series of payments totaling $600.00. Plaintiffs allege that the entire principal of the note together with interest at 6% per annum, subject to the credits appearing on the back thereof, is due, and that demand for payment has been made on defendant and by him refused.

Defendant's answer admits the demand for payment and the refusal thereof. He sets up as a defense that he and plaintiffs' testator from August, 1927, to December, 1929, were engaged in dealing in cotton futures and other gambling transactions, which resulted in heavy losses, and that the note was executed and delivered by defendant as evidence

of money advanced by plaintiffs' testator to cover defendant's share of the losses so sustained.

From an adverse judgment predicated upon defendant's motion for judgment as of nonsuit, plaintiffs appealed, assigning error.

W. M. Hicks, Ruark & Ruark, and Joseph C. Moore for plaintiffs, appellants.

T. G. Stem, Edward F. Taylor, Marshall T. Spears, and Royster & Royster for defendant, appellee.

VALENTINE, J. The only question presented is, did plaintiffs make out a case sufficient to repel defendant's demurrer to the evidence and motion for judgment as of nonsuit? The facts impel an affirmative answer to this question.

The fact that the note in question is under seal raises the presumption of a good and sufficient consideration. *Angier v. Howard,* 94 N.C. 27; *Wester v. Bailey,* 118 N.C. 193, 24 S.E. 9; *Lentz v. Johnson,* 207 N.C. 614, 178 S.E. 226. The plaintiffs allege execution, delivery and nonpayment of the note. These "issuable facts" are admitted by the defendant and when so admitted become as effective as if established by a jury's verdict. McIntosh, 475, 476; *Leathers v. Tobacco Co.,* 144 N.C. 330, 57 S.E. 11; *McCaskill v. Walker,* 147 N.C. 195, 61 S.E. 46; *Fleming v. R. R.,* 160 N.C. 196, 76 S.E. 212; *Barbee v. Davis,* 187 N.C. 78, 121 S.E. 176. This is true even when the defendant attaches to his admission certain qualifications. *Cook v. Guirkin,* 119 N.C. 13, 25 S.E. 715; *Eames v. Armstrong,* 142 N.C. 506, 55 S.E. 405.

By the introduction of the note, the execution and delivery of which are admitted in the answer, plaintiffs made out a *prima facie* case even though the note is not negotiable. *Stronach v. Bledsoe,* 85 N.C. 473; *Carrington v. Allen,* 87 N.C. 354; *Hunt v. Eure,* 188 N.C. 716, 125 S.E. 484; *Hunt v. Eure,* 189 N.C. 482, 127 S.E. 593; *Roberts v. Grogan,* 222 N.C. 30, 21 S.E. 2d 829. When the plaintiff thus makes out a *prima facie* case, the defendant is put to the election of going forward with proof or take his chance of an adverse verdict. *Speas v. Bank,* 188 N.C. 524, 125 S.E. 398; *Webster v. Trust Co.,* 208 N.C. 759, 182 S.E. 333; *Warren v. Insurance Co.,* 215 N.C. 402, 2 S.E. 2d 17; *Russ v. Telegraph Co.,* 222 N.C. 504, 23 S.E. 2d 681.

The defendant in this case seeks to avoid liability upon the claim that the note is based on a gambling transaction and therefore there is a failure of consideration. This is a matter requiring the defendant to offer proof, or take his chance with the jury upon plaintiffs' *prima facie* case. G.S. 25-33; *Lentz v. Johnson, supra.* He is permitted to show, if he can, a failure of consideration by parol evidence, for the presumption of fact

arising in favor of plaintiff upon an introduction of a sealed note is rebuttable. *Patterson v. Fuller,* 203 N.C. 788, 167 S.E. 74; *Chemical Co. v. Griffin,* 202 N.C. 812, 164 S.E. 577; *Taft v. Covington,* 199 N.C. 51, 153 S.E. 597; *Farrington v. McNeill,* 174 N.C. 420, 93 S.E. 957.

The defendant invokes as a matter of avoidance and defense the principle set forth in C.S. 2144 (1919), (now G.S. 16-3), which provides that certain transactions, including trading in cotton futures and stocks where actual delivery is not intended, are illegal and void, and C.S. 2146 (1919) which provided that when the defendant in any action pending should allege specifically in his verified answer that plaintiff's cause of action was founded upon a contract made void by C.S. 2144, the burden of proof should be upon the plaintiff to show by proper evidence that the contract sued upon is a lawful contract. The defendant contends that the note sued upon arose out of transactions condemned by C.S. 2144 and that his verified answer setting up that fact has the effect of putting on the plaintiffs the duty of proving the validity of the transaction upon which the note is based. There would be force in this argument, except for the fact that C.S. 2146, the statute relied upon, was repealed by Chapter 236, Public Laws of 1931, and the further fact that the note sued upon is a contract executed and delivered on 1 January, 1941, more than nine years after the repeal of said statute.

Defendant cites and relies upon *Fenner v. Tucker,* 213 N.C. 419, 196 S.E. 357, to support the position taken by him in this particular respect, but he apparently overlooks the fact that the contract sued upon in the *Fenner case* antedated the repeal of the statute. This distinction is clearly pointed out in the *Fenner case* and again in *Cody v. Hovey,* 216 N.C. 391, 5 S.E. 2d 165.

It will be noted that the defendant makes no averment of any gambling or stock market transactions between himself and plaintiffs' testator after December, 1929, nor does he make the assertion that the note upon which this suit is based is a renewal of any prior note. He does, however, admit the execution and delivery of the very contract upon which this suit is prosecuted, which contract postdates Chapter 236, Public Laws of 1931. Hence, plaintiffs' suit is completely relieved of the burden formerly imposed under C.S. 2146.

The language "as per our agreement" appearing in the note is merely "a statement of the transaction which gives rise to the instrument" and in nowise affects the validity of the note. G.S. 25-9.

It is clear from the prevailing principles of law applicable to the facts here presented that the pleadings and plaintiffs' evidence make out a *prima facie* case sufficient to repel defendant's demurrer to the evidence and withstand his motion for judgment as of nonsuit.

The judgment of the court below is
Reversed.

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

R. W. GAINEY AND WIFE, EFFIE GAINEY, v. ROCKINGHAM RAILROAD COMPANY, A CORPORATION.

(Filed 1 February, 1952.)

1. **Railroads § 7—Evidence that engine set fire in inflammable material negligently permitted to remain on right of way takes case to jury.**

Evidence tending to show that defendant railroad company allowed its right of way to become foul with weeds, broomstraw, etc., that immediately after the passage of defendant's coal-burning engine a fire started in the inflammable material on the right of way and spread to plaintiff's house and destroyed it, with further evidence that cinders and hot ashes were found on the right of way at the point where defendant's engine had stopped, *is held* sufficient to be submitted to the jury on the issue of defendant's negligence in permitting its right of way to become and remain in such dangerous condition, and it is immaterial whether such negligence caused the injury through sparks from the smokestack or live coals or clinkers from the engine.

2. **Trial § 22a—**

On motion to nonsuit, every reasonable inference and intendment arising from the evidence must be resolved in favor of plaintiff.

3. **Trial § 20—**

The weight of the evidence and the credibility of the witnesses are exclusively within the province of the jury, and on motion to nonsuit the sole duty of the court is to determine whether there is any evidence upon which the jury can properly base a verdict.

APPEAL by defendant from *Clement, J.*, June Term, 1951, RICHMOND.

Civil action to recover damages for the destruction of plaintiffs' home by fire as a result of defendant's negligence.

Plaintiffs charge defendant with negligence in the operation of its locomotive and in allowing inflammable and combustible matter to accumulate and remain on its right of way.

Plaintiffs offered evidence tending to show substantially these facts:

Plaintiffs' residence was located approximately 100 yards east of defendant's track. Defendant had allowed its right of way to become foul with bushes, weeds, grass, broomstraw and broom sedge, which had grown "waist-high . . . right up to the crossties. The weeds and grass was dry when the house burned." The fire started about six inches or a foot on

the side next to plaintiffs' house and went from that point to the plaintiffs' house. Defendant's train, consisting of a coal-burning locomotive, two empty cars and a caboose, passed plaintiffs' home at about 10:30 o'clock on the morning of 25 March, 1950. The train was stopped a short distance from the tracks of the Seaboard Air Line Railroad for the switchman to make the necessary rail adjustment to allow defendant's train to cross. Immediately after defendant's train proceeded across the Seaboard tracks, fire was discovered by plaintiffs' son and some other boys within six inches or a foot of the crossties of defendant's track. Some of defendant's crossties were also burned. This fire ignited the dry weeds, grass and broom sedge which had been allowed to accumulate on defendant's right of way and was fanned by a 40 to 50 mile an hour westerly wind so that it spread through an uncultivated field which was overgrown with combustible material to the plaintiffs' house, where it kindled a blaze in the dry hens' nests under plaintiffs' house and completely consumed plaintiffs' residence and its contents. Plaintiff had the aid of witnesses who testified that hot embers, coals and ashes were seen on the right of way at the point where defendant's train stopped before crossing the Seaboard track. One witness testified: "The fire did not burn back over toward the Seaboard right of way that day. I saw cinders and ashes that were hot, just been let out. Started shifting and let them out of the engine; that is where I first saw the fire. That is where I saw the hot embers. The fire burned from there continuously up to the house." Sparks from the fire were blown a distance of 200 yards toward and past plaintiffs' house. There was no fire in the neighborhood before the train passed.

Defendant offered evidence largely in contradiction of that of plaintiffs. Upon this contradictory evidence, the jury rendered a verdict in favor of plaintiffs, and from the judgment entered on the verdict, defendant appealed, assigning errors.

Jones & Jones for plaintiffs, appellees.

Bynum & Bynum and McLean & Stacy for defendant, appellant.

VALENTINE, J. This appeal challenges the correctness of the court's action in overruling defendant's demurrer to the evidence and motion for judgment as of nonsuit.

Plaintiffs' evidence was abundantly sufficient to raise the reasonable inference that defendant had negligently allowed combustible material to gather and remain in large quantities on its right of way near its track in the vicinity of plaintiffs' property and that this inflammable material was ignited by sparks, coals and embers emitted from defendant's engine. This evidence makes out a case for the plaintiffs and was correctly submitted to the jury under proper instructions of the court and under the

rules established by many decisions of this Court. *Moore v. R. R.*, 124 N.C. 338, 32 S.E. 710; *Williams v. R. R.*, 140 N.C. 623, 53 S.E. 448; *Knott v. R. R.*, 142 N.C. 238, 55 S.E. 150; *McRainey v. R. R.*, 168 N.C. 570, 84 S.E. 851; *Broadfoot v. R. R.*, 174 N.C. 410, 93 S.E. 932; *Betts v. R. R.*, 230 N.C. 609, 55 S.E. 2d 76.

Our duty here is limited to the single question of determining whether there is any evidence for the jury to consider and upon which it could properly base a verdict. This requires an interpretation of the plaintiffs' evidence in the light most favorable to them. Every reasonable inference and intendment arising from the evidence must be resolved in favor of the plaintiffs before a nonsuit is in order. *Henderson v. R. R.*, 159 N.C. 581, 75 S.E. 1092; *Powell v. Lloyd*, 234 N.C. 481, 67 S.E. 2d 664.

Whether the fire originated from sparks emitted from the smokestack or from the live coals or clinkers dropped or thrown from the fire box is of no consequence. If the defendant permitted its right of way to become and remain in a dangerous condition and if the combustible material on its right of way caught fire from sparks or live clinkers blown, thrown or dropped from defendant's engine and if the fire so ignited burned through the inflammable material on defendant's right of way and from there spread to other combustible material so that it passed or was blown to and burned the plaintiffs' residence, the defendant was guilty of such negligence as renders it liable for the damage sustained by plaintiffs. *Knott v. R. R., supra; Aycock v. R. R.*, 89 N.C. 321; *Phillips v. R. R.*, 138 N.C. 12, 50 S.E. 462; *Simpson v. Lumber Co.*, 133 N.C. 95, 45 S.E. 469; *Betts v. R. R., supra.*

The evidence of the plaintiffs tended to show negligence in that the combustible material which defendant had allowed to accumulate and remain on its right of way was ignited by the live embers, coals and cinders dropped from defendant's locomotive, which fire spread directly to and destroyed plaintiffs' residence and its contents. The weight and sufficiency of this evidence as well as the credibility of the witnesses are questions exclusively within the province of the jury. *In re Will of Morrow*, 234 N.C. 365, 67 S.E. 2d 279.

Measuring the evidence of plaintiffs by the rules laid down by the court, we reach the conclusion that plaintiffs' evidence made out a case for the jury and the motion for judgment as of nonsuit was properly overruled. The other exceptions are formal and require no discussion.

In the trial of the case in the court below, we find

No error.

STATE v. CHRISTINE WARREN.

(Filed 1 February, 1952.)

1. Criminal Law § 33—

An extrajudicial confession of guilt by an accused is admissible against him when, and only when, it is in fact voluntarily made.

2. Same—Evidence held not to support finding that confession was voluntary.

Where the uncontradicted evidence on the *voir dire* tends to show that defendant was arrested for theft without a warrant by an officer having no reasonable ground to believe her guilty, that she was taken to the police station, twice searched without finding any incriminating property, badgered with accusations and questions for five hours, during all of which time she consistently denied her guilt, but that after she was told she could not go back to her job or her home until she acknowledged her guilt, she confessed, *is held* to show that the confession was involuntary, and the admission of the confession in evidence upon the court's finding that it was freely and voluntarily made entitles defendant to a new trial.

APPEAL by defendant from *Hatch, Special Judge,* and a jury, at the May Special Term, 1951, of ALAMANCE.

Criminal prosecution upon three consolidated indictments charging the defendant with the larceny of these moneys on these occasions: $100.00 on 15 September, 1949; $300.00 on 1 December, 1949; and $95.00 on 26 February, 1951.

According to the State's evidence, the sums mentioned disappeared from the home of their owner, Zacharias Toupoulas, in Burlington, North Carolina, on the days named. There was no testimony connecting the defendant, a Negro woman, with their disappearance except a confession allegedly made by her to W. P. Hilliard, a white police officer of Burlington.

When the State offered the confession in evidence, the defendant objected to its admission on the ground that it was involuntary. The presiding judge excused the jury, and heard Hilliard, a witness for the prosecution, and the defendant, a witness in her own behalf, testify as to the circumstances under which the confession was made. Except for a general assertion by Hilliard that he "did not make any threats against the defendant, or offer her any hope of reward, or put her in fear," there was no substantial conflict between the testimony given by these witnesses on the preliminary inquiry before the judge. It disclosed these occurrences:

On 27 February, 1951, Hilliard visited a private residence in Burlington where the defendant was employed as a maid, and charged her with taking the moneys from the home of Toupoulas. She stoutly protested her innocence. Although he had no warrant for her arrest and no reason-

able ground to believe her guilty, Hilliard thereupon compelled the defendant to accompany him to the police station in Burlington for the purpose, as he frankly conceded on the trial, of procuring from her a confession that she was guilty of the supposed larcenies. Upon their arrival at the station, Hilliard forced the defendant to submit to two searches of her person, one of which involved the removal of all her clothes in the presence of a female employee of the police department. The searches revealed that the defendant had no money in her custody except a single penny. Hilliard thereafter detained the defendant in a small room at the police station for five hours while he badgered her with accusations and questions relating to the alleged larcenies. The defendant persisted in her denial of guilt throughout this ordeal. Finally, however, Hilliard told the defendant, in substance, that she could not "go back on the job or home" until she acknowledged her guilt. The defendant thereupon confessed "that she had stolen money from Toupoulas on three different occasions: September 15, 1949, $100.00; December 1, 1949, $300.00; February 26, 1951, $95.00."

The presiding judge "found as a fact that the confession was made freely and voluntarily," and admitted it in evidence.

The defendant presented testimony before the jury tending to show that she was not connected in any way with the supposed larcenies.

The jury returned this verdict: (1) Guilty of larceny of $100.00 on September 15, 1949; (2) guilty of larceny of $95.00 on February 26, 1951; and (3) not guilty of larceny of $300.00 on December 1, 1949.

The court pronounced judgment against the defendant on the two indictments whereon she was adjudged guilty, and she appealed, assigning the admission of her confession as error.

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

C. J. Gates and M. E. Johnson for the defendant, appellant.

ERVIN, J. An extrajudicial confession of guilt by an accused is admissible against him when, and only when, it is in fact voluntarily made. *S. v. Rogers,* 233 N.C. 390, 64 S.E. 2d 572. When the circumstances surrounding the confession in issue are appraised at their true probative value, they engender an abiding conviction that the confession was wrung from the defendant by coercion on the part of the officer, and particularly by his threat to deprive her of her personal liberty until she acknowledged her guilt. This being so, the confession was involuntary, and should have been excluded. *S. v. Brown,* 233 N.C. 202, 63 S.E. 2d 99; *S. v. Stevenson,* 212 N.C. 648, 194 S.E. 81; *S. v. Crowson,* 98 N.C. 595, 4 S.E. 143; *S. v. Parish,* 78 N.C. 492; *S. v. Dildy,* 72 N.C. 325; *S. v. Whitfield,* 70 N.C. 356; *S. v. George,* 50 N.C. 233.

Ministers of the law ought not to permit zeal for its enforcement to cause them to transgress its precepts. They should remember that where law ends, tyranny begins.

The admission of the involuntary confession constitutes prejudicial error, and necessitates a

New trial.

RUTH SNYDER v. KENAN OIL COMPANY, THEODORE R. KEEN AND MARY P. DIXON.

(Filed 1 February, 1952.)

1. Compromise and Settlement § 2—

A completed settlement of a claim arising out of a collision bars either party from thereafter asserting any liability against the other arising out of any negligence proximately causing the collision.

2. Automobiles § 21: Torts § 6: Pleadings § 31—

In an automobile guest's action against the driver and owner of the truck involved in a collision with the car, defendants had the driver of the car joined for the purpose of enforcing contribution, G.S. 1-240. *Held:* The driver of the car is entitled to set up a previous settlement of her claim against the truck owner and driver as a bar, but is not entitled to set up settlement of the claims of her children, also passengers in the car, arising out of the collision, and motion to strike should be ruled upon accordingly.

APPEAL by original defendants from *Williams, J.*, September Term, 1951, ALAMANCE.

Civil action in tort to recover compensation for personal injuries sustained in an automobile-truck collision, heard on motion to strike allegations contained in the answer of defendant Mary P. Dixon, additional party defendant.

Plaintiff was a passenger on an automobile operated by defendant Dixon. The automobile collided with a truck owned by the corporate defendant and being operated at the time by defendant Keen. The original defendants filed an answer in which they allege negligence on the part of the defendant Dixon. On the allegations thus made, they moved the court that she be made a party defendant as joint tort-feasor for the purpose of enforcing contribution as provided by G.S. 1-240. Defendant Dixon was duly made a party defendant and filed her answer in which she admits the collision between her automobile and the truck of corporate defendant and alleges (1) the negligence of the driver of the truck as the proximate cause of the collision; (2) the resulting injuries sustained by her and the passengers on her automobile and damages to the automobile; (3) settlement by the corporate defendant with her and her

husband for personal injuries and property damages to the automobile and also settlement for personal injuries inflicted upon her two minor children who were passengers on said automobile at the time of the collision. She specifically pleads "such settlements and payments in bar of the right of the defendant, Kenan Oil Company, to recover against this defendant by contribution or otherwise by cross-action herein."

The original defendants appeared and moved to strike paragraphs 2 and 4 of the cross answer which contains said allegations in reference to said settlements. The motion was denied and defendants appealed.

Long & Long for appellants, Kenan Oil Company and Theodore R. Keen.

Carroll & Pickard for appellee, Mary P. Dixon.

BARNHILL, J. The settlement by the corporate defendant of the claim of defendant Dixon against it for personal injuries and property damages resulting from the collision of the truck being operated by Keen, the agent and employee of the oil company, and the automobile being operated by defendant Dixon, as effectually adjusted and settled all matters which arose or might arise out of said collision, as between the oil company and Dixon, as would a judgment duly entered in an action between said parties. By said compromise settlement each party bought his peace respecting any liability created by the collision. The adjustment of said claim by the payment of the amount agreed constituted an acknowledgment, as between the parties, of the liability of the oil company, and the nonliability, or at least a waiver of the liability, of the defendant Dixon.

Neither party thereafter had any right to pursue the other in respect to any liability arising out of any alleged negligence proximately causing the collision which is the subject matter of this suit.

"A concluded agreement of compromise must, in its nature, be as obligatory, in all respects, as any other, and either party may use it whenever its stipulations or statements of fact become material evidence for him." *Sutton v. Robeson,* 31 N.C. 380; *Peyton v. Shoe Co.,* 167 N.C. 280, 83 S.E. 487; *Armstrong v. Polakavetz,* 191 N.C. 731; *Bohannon v. Trotman,* 214 N.C. 706. "Accord is a satisfaction agreed upon between the party injuring and the party injured, which, when performed, is a bar to all actions upon the same account." *Hinson v. Davis,* 220 N.C. 380, 17 S.E. 2d 348.

Herring v. Coach Co., 234 N.C. 51, is, by analogy, in point and is controlling here. There the settlement was effected by a consent judgment entered in a suit pending, but the principle is the same.

But settlement with other passengers on the automobile was in no sense an acknowledgment of the nonliability of Dixon as a joint tort-

feasor. While the passengers, by making settlement with one joint tort-feasor, waived any right they might have possessed to seek compensation from the other, *King v. Powell*, 220 N.C. 511, 17 S.E. 2d 659; *Holland v. Utilities Co.*, 208 N.C. 289, 180 S.E. 592, the tort-feasor making settlement with them waived no right it possessed to assert its claim to contribution against the other alleged joint tort-feasor in an action by a passenger with whom no settlement has been made.

It follows that the court erred in denying the motion in respect to allegations of settlement with passengers on the automobile. All reference to any adjustment of any claim other than that of the operator and owner of the automobile should be stricken as requested by the original defendants. The judgment entered must be so modified.

Modified and affirmed.

IN THE MATTER OF CURTIS LEE FERGUSON AND BOBBY MILLER.

(Filed 1 February, 1952.)

1. Robbery § 3—

Where, on a charge of robbery with firearms, the jury returns a verdict of "guilty of robbery" sentence of not less than ten nor more than fifteen years is in excess of that permitted by law.

2. Criminal Law §§ 62a, 83—

Where the court imposes a sentence in excess of the limit prescribed by law the judgment will be vacated and the cause remanded for proper sentence.

3. Arrest and Bail § 5—

Where a cause is remanded to the Superior Court for proper judgment because the sentence for the felony of which defendants were convicted was excessive, defendants are not entitled, as a matter of right, to their release on bail for their appearance at the next term of Superior Court of the county.

PETITION for writ of *certiorari*.

Petitioners were put on trial in Mecklenburg County at the May Term, 1951, before *Sink, J.*, on bills of indictment charging each of the defendants with robbery with firearms or other dangerous weapons and common law robbery. The charge against the defendants grew out of the same alleged facts, and the cases were consolidated for trial. The jury returned a verdict of "guilty of robbery" against each of the defendants, and the court sentenced each of the defendants to confinement in the State Prison for a term of not less than ten (10) years and not more than fifteen (15) years, to be assigned to work at hard labor.

The petitioners bring the cause to this Court on petition for writ of *certiorari* contending that they were convicted only of common law robbery and that the sentences imposed are in excess of that provided by law.

The respondent concedes that the sentences imposed are excessive and that the cause should be remanded to the Superior Court for proper judgments.

Marshall B. Hartsfield for petitioners.

R. Brookes Peters, Jr., L. J. Beltman and E. O. Brogden, Jr. for respondent.

PER CURIAM. The judgments heretofore pronounced are vacated and the cause is remanded to the Superior Court of Mecklenburg County on authority of *In re Sellers*, 234 N.C. 648, to the end that judgments may be imposed as provided by law.

After this opinion has been certified to the Superior Court, the proper officials of the State's prison are hereby directed to deliver custody of the petitioners to the sheriff of Mecklenburg County in order that proper sentences may be imposed on the defendants at the next term of the Superior Court convening for the trial of criminal cases.

The petitioners contend that if or when this cause is remanded they will be entitled to their release on bail for their appearance at the next term of the Superior Court of Mecklenburg County, citing *S. v. Silvers*, 230 N.C. 300, 52 S.E. 2d 877; *S. v. Walters*, 97 N.C. 489, 2 S.E. 539. This contention is without merit.

In each of the above cited cases, the court was dealing with a misdemeanor. G.S. 15-183. The petitioners have been convicted of a felony and whether they are released on bail, pending the entry of proper judgments, is a question that must rest in the sound discretion of the court below. After a defendant is convicted of a felony, there is no constitutional or statutory right to bail. *S. v. Parker*, 220 N.C. 416, 17 S.E. 2d 475; *S. v. Bradsher*, 189 N.C. 401, 127 S.E. 349.

Error and remanded.

E. E. CHESSON v. B. B. COMBS AND JULIAN L. POSTON.

(Filed 1 February, 1952.)

Appeal and Error § 38—

Where the Supreme Court is evenly divided in opinion, one Justice not sitting, the judgment of the lower court will be affirmed without becoming a precedent.

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

APPEAL by plaintiff from *Morris, J.*, at February Term, 1951, of TYRRELL.

Civil action to recover damages for alleged false imprisonment.

The defendants' motion for judgment of nonsuit, made at the close of the plaintiff's evidence and renewed at the conclusion of all the evidence, was allowed, and from judgment based on such ruling the plaintiff appealed, assigning errors.

W. L. Whitley and J. C. Meekins, Jr., for plaintiff, appellant.
Bailey & Bailey and H. L. Swain for defendants, appellees.

PER CURIAM. This Court being evenly divided in opinion as to the correctness of the ruling of the court below, Justice Valentine not sitting, the judgment of the Superior Court is affirmed, without becoming a precedent.

Affirmed.

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

D. J. TODD, SR., ADMINISTRATOR OF D. J. TODD, JR., v. E. J. SMATHERS.

(Filed 1 February, 1952.)

Trial § 4: Appeal and Error § 37—

A motion for continuance is addressed to the discretion of the trial judge, and, in the absence of manifest abuse, his ruling thereon is not reviewable.

APPEAL by plaintiff from *Pless, J.*, at 17 September Term, 1951, of FORSYTH.

Civil action to recover damages for alleged wrongful death, heard upon motion of plaintiff to continue trial of this cause until a certain witness for plaintiff, who is now in the Armed Services of the United States, be available.

The trial judge, upon facts found as appear of record, ordered that the cause be not calendared for trial or tried before or during the October Term, 1951, of the court, and that subsequent thereto defendant shall be at liberty to calendar same for trial.

Plaintiff appeals to Supreme Court, and assigns error.

Fred S. Hutchins for plaintiff, appellant.

Ratcliff, Vaughn, Hudson, Ferrell & Carter for defendant, appellee.

PER CURIAM. A motion for continuance is addressed to the discretion of the trial judge, and, in the absence of manifest abuse, his ruling thereon is not reviewable. *S. v. Parker,* 234 N.C. 236, and cases cited.

And on the facts presented on this record, we are of opinion that no such abuse has been made to appear. Hence this appeal will be, and it is hereby

Dismissed.

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1952

NORTH CAROLINA STATE ART SOCIETY, INC., AND NORTH CAROLINA STATE ART COMMISSION, DR. ROBERT LEE HUMBER, CHAIRMAN, KATHERINE PENDLETON ARRINGTON, DR. CLARENCE POE, DR. CLEMENS SOMMER AND EDWIN GILL, MEMBERS, v. HENRY L. BRIDGES, STATE AUDITOR OF NORTH CAROLINA.

(Filed 16 February, 1952.)

1. Statutes § 5a—

Whether a particular provision in a statute is mandatory or directory must be determined in accordance with the legislative intent as ascertained not only from the phraseology of the statute but also from the nature and purpose of the act and the consequences which would follow its construction one way or the other.

2. Same—

When literal compliance with a nonessential provision of a statute has become impossible, a substantial compliance suffices.

3. Taxation § 45—Provision in statute naming person to make appraisals before payment for works of art held directory.

The intent of Chap. 1097, Session Laws 1947, and Chap. 1168, Session Laws 1951, is that works of art selected by the State Art Commission be appraised by a competent and qualified art critic before payment should be made. This provision is mandatory, but the provision naming the person to make the appraisals is directory, and it appearing that the person named could not serve, appraisal by an equally qualified and competent art critic chosen by the State Art Commission and the Directors of the State Art Society is a substantial compliance with the statute, and judgment upon appropriate findings is sufficient to authorize and empower the State Auditor to issue warrants for such paintings.

4. Constitutional Law § 8a—

The determination of public policy within limitations imposed by the constitution is the exclusive province of the Legislature, and its exercise poses no judicial question.

APPEAL by defendant from *Hatch, Special Judge,* in Chambers, 16 January, 1952, WAKE. Affirmed.

The plaintiffs instituted this action under the Declaratory Judgment Act (G.S. 1-254) to determine a question which has arisen in the interpretation of a provision in Chapter 1168, Session Laws 1951, authorizing the purchase of works of art by the State Art Commission.

There is a provision in this Act that before any purchases of works of art shall be made "such purchases shall be approved by the board of directors of the executive committee of the North Carolina State Art Society, and appraised by the director or chief curator of the National Gallery of Art, Washington, D. C., as to value, fitness and desirability."

After negotiations had been entered into by the State Art Commission looking to the purchase under authority of the Act of one hundred and fifty-seven paintings, and after options had been obtained thereon and the purchase of the selected paintings approved by the board of directors of the State Art Society, it was learned that neither the director nor the curator of the National Gallery of Art could or would undertake the appraisals. The persons holding the positions named in the Act were not permitted by the trustees of the National Gallery to make the appraisals and it became impossible to secure their services for this purpose, though it had been understood when the Act was passed that one or the other of the persons named would make the appraisals.

In view of the impossibility of obtaining appraisal of the paintings selected for purchase by the persons named in the Act, the State Art Commission secured appraisals of these paintings by Dr. William R. Valentiner whom they found to be "an art critic, scholar and author of world-wide renown and recognized competence." His selection for this purpose and his appraisals were by proper resolution approved by the State Art Commission, and also by the board of directors of the State Art Society.

Having complied with all the provisions and requirements of the Act, including appraisals of the selected works of art by a competent and well-known art critic, the plaintiffs applied to the defendant State Auditor for warrants to enable them to complete the purchase of the paintings selected, but the defendant in view of the language of the Act and in the absence of authoritative judicial interpretation, under the advice of the Attorney-General, declined to issue the warrants.

The purpose of the General Assembly in making the appropriation for the purchase of works of art appears from the 1947 and 1951 Acts (Chap. 1097 Session Laws 1947, and Chap. 1168 Session Laws 1951). By the

Act of 1947 the North Carolina State Art Society, a nonprofit corporation declared to be under the patronage and control of the State, was authorized and empowered to inspect, appraise, obtain attributions and to purchase works of art, and to acquire by gift works of art or other property for the promotion of the purposes of the Art Society. An appropriation of one million dollars was made for this purpose, but this appropriation was not to be made available for expenditure until a like sum should be secured through gifts and paid into the state treasury to the credit of the State Art Society fund. It was provided, however, if this condition should be complied with, the amount appropriated, together with amount so given, would be expendable for the purchase of works of art, such expenditure to be made by a commission of five members appointed by the Governor known as "The State Art Commission."

The appropriation conditionally made by the General Assembly at its Session in 1947 was further implemented by the Act of 1951. This later Act recited in the preamble an agreement on the part of the Samuel H. Kress Foundation whereby the Kress Foundation agreed to include Raleigh, North Carolina, in the Foundation's program for the establishment of art galleries, "to receive a Samuel H. Kress collection of paintings consisting of outstanding Italian Renaissance Art and other similar paintings of value of at least one million dollars." Thereupon the State Art Society was authorized to accept the offer of the Samuel H. Kress Foundation "which said offer shall be considered as in full compliance with the conditions attached to the appropriation made by Chap. 1097, Session Laws 1947, to the North Carolina State Art Society, and the said appropriation shall become available for expenditure by the State Art Society in the manner provided in said Act when the Attorney-General shall certify to the State Treasurer and Director of the Budget that a valid and binding obligation has been properly executed by the Samuel H. Kress Foundation carrying out the proposals set forth in the preamble of the Act in the form approved by the board of directors of the State Art Society, and also approved by the Governor and Council of State."

To this was added the provision hereinbefore quoted that before any purchase of works of art be made they should be appraised as to value, fitness and desirability by the director or chief curator of the National Art Gallery of Washington, D. C.

Pursuant to the provisions of this Act the Attorney-General has certified that a valid and binding obligation has been properly executed by the Kress Foundation, and the form, substance and contents of the contract carrying out the proposals set out in the preamble have been approved and confirmed by the Governor and the Council of State.

It appears that in the correspondence containing the proposals of the Kress Foundation it was insisted by the donor that adequate building be

provided for the accommodation, care and exhibition of the works of art and adequate arrangements made for safekeeping. The preamble of the Act recites that it is desirable for the benefit of all the people of the State the gift of the Kress Foundation be housed in a structure in the City of Raleigh "when such structure may be available at some time in the future when world conditions become more normal and the financial condition of the state would be considered as justifying such expenditure."

The State Art Commission was created by the Act of 1947 and charged with the responsibility of expending the appropriation for the purposes declared. The five members of this Commission appointed by the Governor were Robert Lee Humber, Chairman, Mrs. Katherine Pendleton Arrington, President of the North Carolina State Art Society, Dr. Clemens Sommer, Professor of History of Art at the University of North Carolina, Dr. Clarence Poe, Editor, and Mr. Edwin Gill, Collector of Internal Revenue.

It appears from the evidence offered at the hearing that the members of the Commission went to New York and spent some time in the inspection and examination of paintings. They had the assistance of Mr. Carl W. Hamilton, who was a connoisseur and who had possessed a great private collection of paintings. The Commission selected by unanimous choice the paintings they wished to purchase and obtained options thereon at the total price of eight hundred thousand dollars. Subsequently the Commission joined in the selection and approval of Dr. Wm. R. Valentiner as the art critic to make the appraisals required by the statute.

It was stipulated and agreed that the judge should hear the case upon the pleadings, affidavits and oral evidence offered, and that the findings of fact by the judge should be in all respects binding upon the parties to the same effect as if found by the jury.

In addition to the pleadings and affidavits oral testimony of each of the members of the State Art Commission was heard, and also that of a member of the General Assembly who recalled that in enacting the questioned proviso in the statute consideration was given to having a competent appraiser rather than having in mind any certain person to make the appraisals.

No evidence was offered by the defendant.

The court found the facts to be as set out in the complaint and as shown by the evidence offered. The court specifically found that Dr. Valentiner was in all respects qualified by education, training and experience to appraise the paintings as to value, fitness, desirability and other features which should be considered in connection with such purchases, and appended a statement of Dr. Valentiner's accomplishments and career as appears in Who's Who in America (1949 ed.). The court found that Dr. Valentiner had given in detail his opinion, views and appraisals

as to the value and fitness of each of the paintings for the purpose intended, approving 157 of the 174 which had been selected, leaving seventeen reserved for further consideration. The court also found from the evidence that each member of the Art Commission was well qualified to serve on this Commission and by reason of education, training and experience was competent to understand and appraise the value of the paintings offered and inspected by the Commission.

Upon the facts so found the court was of opinion that the provision in the Act of 1951 that appraisals of the works of art selected for purchase be made by the director or curator of the National Gallery, in so far as it named the particular person or persons to make the appraisal, was directory and not mandatory, and that following discovery of the impossibility of securing the services of the persons named, the selection of Dr. Valentiner, who was in all respects qualified to make the appraisals, and his appraisals of the paintings selected constituted a full compliance with the purposes and intent of the statute. Thereupon it was adjudged that by virtue of the statute as so interpreted in the light of the facts found the State Auditor was authorized and empowered and directed to issue warrants for the payment of the purchase prices of the paintings which had been selected by the State Art Commission and approved by the directors of the State Art Society.

The defendant excepted and appealed.

R. L. McMillan and R. Mayne Albright for plaintiffs, appellees.

Attorney-General McMullan and Assistant Attorneys-General Bruton and Love for defendant, appellant.

DEVIN, C. J. There was no controversy as to the facts. There was no exception to any of the findings of fact upon which the court below rendered judgment. The refusal of the defendant State Auditor to issue warrants for the purchase of works of art selected by the State Art Commission and his defense to plaintiffs' action were based solely on the view that before any payment could lawfully be made the purchases must have been appraised by the director or chief curator of the National Art Gallery of Washington, D. C., and that the Act did not authorize the substitution of any person however well qualified in lieu of those holding the positions named. There was no other ground alleged for denying the expendability of the legislative appropriation.

Therefore, the single question presented for our determination is whether the validity of the appropriation conditionally made by the General Assembly at its 1947 Session (Chap. 1097), and reaffirmed and implemented in 1951 (Chap. 1168) for the purposes declared in those Acts, depends upon the appraisal of selected works of art being made by

the particular persons named in the 1951 Act, or whether, upon the refusal of such persons to act, the appraisals by another competent and qualified art critic chosen and approved by the State Art Commission and the directors of the State Art Society, shall be regarded as a substantial compliance with the purposes and intent of the General Assembly as expressed in the Acts of 1947 and 1951. In other words, is the proviso in the Act of 1951 naming the person to make the appraisals mandatory or directory?

It is apparent from an examination of the pertinent statutes in the light of the facts found, that it was the intent of the General Assembly that before payment should be made for the works of art selected for purchase by the State Art Commission appraisal of their value, fitness and desirability should be made by a competent and qualified art critic to prevent imposition and to guard against the purchase of the spurious. The provision in the statute to that extent was manifestly mandatory. But it does not follow that it was considered essential that the appraisals should be made by the particular person holding the position named in the Act, in the event it became impossible for him to serve. It would seem that the employment of an equally qualified art critic to make the appraisals would accord with the expressed purpose of the Act. Whether a particular provision in a statute is to be regarded as mandatory or directory depends more upon the purpose of the statute than upon the particular language used. As expressed by the Apostle Paul in his Second Epistle to the Corinthians, "The letter killeth, but the spirit maketh alive." 2 Cor. 3:6. It is a general rule of statutory construction that when literal compliance with a nonessential provision of a statute has become impossible, compliance as near as may be, conformable to the general purpose and intent of the act, will be permitted. 50 A.J. 36, *et seq.;* 59 C.J. 963; Black's Interpretation of Laws, 534; *Deibert v. Rhodes,* 291 Pa. 550. In such case a substantial compliance will be deemed sufficient. The Legislature will be presumed not to have intended compliance with a provision incapable of performance. *Dalzell v. Kane,* 321 Pa. 120, 104 A.L.R. 619. In determining whether a particular provision in a statute is to be regarded as mandatory or directory the legislative intent must govern, and this is usually to be ascertained not only from the phraseology of the provision, but also from the nature and purpose, and the consequences which would follow its construction one way or the other. *Smith v. Davis,* 228 N.C. 172 (179), 45 S.E. 2d 51; *Machinery Co. v. Sellers,* 197 N.C. 30, 147 S.E. 674; *Spruill v. Davenport,* 178 N.C. 364 (368), 100 S.E. 527; *S. v. Earnhardt,* 170 N.C. 725, 86 S.E. 960; 59 C.J. 1073. The heart of a statute is the intention of the lawmaking body. *S. v. Humphries,* 210 N.C. 406, 186 S.E. 473. The legislative purpose in providing machinery to attain a definite object may

not be defeated by the inability of an individual to perform an expected function incidental to that purpose. *State ex inf. Atty. Gen. v. Bird,* 295 Mo. 344. By analogy a court of equity will not permit a trust to fail for want of a trustee. *Moore v. Quince,* 109 N.C. 85, 13 S.E. 872. And when it is made to appear that the use of specific property for the accomplishment of the purposes of a trust has been rendered impracticable or impossible as result of changed conditions, courts of equity will sanction the substitution of one form of property in lieu of another. *Johnson v. Wagner,* 219 N.C. 235, 13 S.E. 2d 419; *Hospital v. Comrs. of Durham,* 231 N.C. 604, 58 S.E. 2d 696. The substantial intention should not be defeated by some insufficiency in the manner of accomplishment. *Brooks v. Duckworth,* 234 N.C. 549, 67 S.E. 2d 752.

We think the court below correctly ruled on the facts found, that the naming of the director or curator of the National Gallery of Art in Washington as the person to make the appraisal of the works of art selected by the State Art Commission should be regarded as directory only, that the person of the appraiser was not essential to the Act, and that the substitution by competent authority of Dr. Wm. R. Valentiner found to be an equally qualified art critic constituted a substantial compliance with the provision in the Act requiring technical appraisal of the paintings selected for purchase. The paintings having been properly appraised and approved, and all other conditions essential to validate expenditure of the appropriation having been complied with, judicial sanction of the substitution of Dr. Valentiner would be sufficient to authorize and empower the State Auditor to issue warrants for the payment of the paintings purchased by the State Art Commission.

In considering and deciding this case the Court has been concerned only with the legal question presented. The wisdom or unwisdom of the Legislature in enacting the statutes construed is not before us. The Legislature sets the standard of public policy and its control over taxation and the spending of public funds is restrained only by constitutional limitations. The question, whether the purpose of promoting cultural education and encouraging an appreciation of artistic productions as tending to develop spiritual elements for the benefit of all the people as recited in the Act has been wisely implemented by the manner, method, and to the extent prescribed, is not presented for our determination.

On the record before us the judgment of the court below is

Affirmed.

E. W. HODGE AND WIFE, BESSIE L. HODGE, v. RUTH MURPHY McGUIRE AND THE FIDELITY BANK, EXECUTORS OF THE ESTATE OF J. P. McGUIRE, DECEASED (FORMERLY J. P. McGUIRE, TRADING AND DOING BUSINESS AS McGUIRE CONSTRUCTION COMPANY),

and

MRS. DORIS MAY FINGLETON (FORMERLY MRS. DORIS MAY TURNER) v. RUTH MURPHY McGUIRE AND THE FIDELITY BANK, EXECUTORS OF THE ESTATE OF J. P. McGUIRE, DECEASED (FORMERLY J. P. McGUIRE, TRADING AND DOING BUSINESS AS McGUIRE CONSTRUCTION COMPANY).

(Filed 27 February, 1952.)

1. Master and Servant § 22d—

Where a mechanical instrumentality is rented with operator for the performance of a particular job, the question of whether the operator is the employee of the owner of the machine or the person renting it is to be determined by whether the owner retains the right to direct and control the manner in which the work shall be performed, and it is immaterial whether such right of control is actually exercised or not.

2. Same—Evidence held for jury on question of whether operator of bulldozer rented to plaintiff was employee of owner of machine.

The evidence tended to show that defendant contractor, in the course of his regular business, rented a bulldozer, with the experienced operator requested by plaintiff, to plaintiff to clear land for agricultural purposes, the operator being instructed by defendant's manager to clear the land and do anything plaintiff "wanted him to do." The evidence further disclosed that defendant sent no one to supervise the work, that plaintiff pointed out to the operator where he wished trees removed, but was away most of the time in his own employment, that the day before the clearing of the tract was to be completed, plaintiff showed the operator, in addition, trees which he wished removed from his yard, and that the following day, in plaintiff's absence, the operator negligently felled a tree in the yard in such manner that it struck plaintiff's house, causing damage. There was no evidence that plaintiff ever gave any instructions as to the mechanical operation of the bulldozer, and after the accident, defendant sent out a crane and had the tree removed from the house and thereafter the operator continued to work in the yard and removed another tree. *Held:* The evidence considered in the light most favorable to plaintiff is sufficient to be submitted to the jury on the issue of *respondeat superior.*

APPEAL by defendants from *Hatch, Special Judge,* at April Civil Term, 1951, of DURHAM.

Civil actions to recover damages for injuries to property caused by a tree falling on the dwelling house in which plaintiffs resided, due to the alleged negligence of the defendants' testator, J. P. McGuire. In one action, the plaintiffs E. W. Hodge and wife, Bessie L. Hodge, as owners of the house, sue to recover for damage to the house and personal property therein. The other action is brought by their daughter, Mrs. Doris May Fingleton, to recover for personal property of hers in the house,

alleged to have been damaged when the housetop was crushed by the falling tree. By consent the two actions were consolidated for trial.

The record discloses these background facts: At the times laid in the complaint the plaintiffs E. W. Hodge and wife, Bessie L. Hodge, owned a tract of land out in the country from the City of Durham, upon which was located a two-story frame dwelling house occupied by them as their home. They were desirous of clearing for cultivation a portion of woodland some distance from the house at a place called "up on the mountain." The defendants' testator, J. P. McGuire (hereinafter referred to as McGuire), was engaged in the general construction and contracting business, under the trade name of McGuire Construction Company, and owned and operated in his business a number of tractors and bulldozers, and other machinery. B. G. Proctor was the manager of the business operated by McGuire, and William Haley was an employee of McGuire and operated one of his bulldozers. In pursuance of arrangements made between the plaintiff E. W. Hodge (hereinafter referred to as Hodge) and the manager of McGuire Construction Company, the latter furnished to Hodge on the premises at his home a tractor-bulldozer, designed and equipped to remove trees and clear land. Hodge was to pay a rental of $10.00 per hour for the bulldozer, which included wages of the operator and fuel. Proctor sent Haley out to the Hodge place with a bulldozer, and "told him to go out there and clear the land and do anything that Mr. Hodge wanted him to do." When Haley reported, he was put to work by Hodge clearing land at the place called "up on the mountain," where some large trees were to be bulldozed out. Haley worked at this project three or four weeks and, as Hodge put it, "we cleared about 9 acres . . ." Hodge worked in Durham daily. He had no one supervising the land-clearing work, but when he came home in the evenings "he would often go where Haley was," and Hodge further testified: "I instructed him (Haley) only the area to be cleared . . . In telling him . . . I told him to bulldoze the trees down to that area, . . . If there were old stumps there, I would tell him to bulldoze them."

On the afternoon before the land-clearing project "up on the mountain" was to be completed the next day, Hodge, without further negotiations with McGuire, assigned Haley some trees down in the yard at the house to be taken out next day. Hodge said: "I had gone out and looked at the trees and had shown him which ones I wanted out." The next morning, after Hodge left home for his work in Durham, Haley started working on the project of removing the trees in the yard. While working on a big red oak that stood 40 or 50 feet from the house, it fell across the top of the house, causing the damage in suit. The evidence about whether Haley was negligent in causing the tree to fall on the house is conflicting. The details are omitted as not being pertinent to the appeal as presented.

The defendants' motion for judgment of nonsuit, first made when the plaintiffs rested their case and renewed at the conclusion of all the evidence, was overruled, after which issues of negligence, contributory negligence, and damages were submitted to the jury and answered in favor of the plaintiffs.

From judgment entered upon the verdict, the defendants appealed, assigning errors.

Spears & Hall and Marshall T. Spears, Jr., for plaintiffs, appellees.

R. M. Gantt and Fuller, Reade, Umstead & Fuller for defendants, appellants.

JOHNSON, J. The only exceptions brought forward on this appeal relate to the refusal of the trial court to allow the defendants' motion for judgment of nonsuit. (G.S. 1-183.)

It is not necessary for us to discuss the evidence bearing on the question of negligence as to Haley, the operator of the bulldozer. This is so for the reason it seems to be conceded, and rightly so, that while the evidence was sharply conflicting on this phase of the case, nevertheless there was substantial evidence tending to support the inference that Haley was chargeable with actionable negligence. With the issue of negligence thus eliminated, the single question presented by this appeal is whether the evidence was sufficient to support the inference that Haley was the servant of McGuire, the owner of the bulldozer, at the times laid in the complaint, so as to fix McGuire with liability under application of the principle of *respondeat superior.*

The question thus presented has to do with the doctrine of lent or hired servant,—and specifically with the principles governing the fixing of liability where the general employer furnishes to a third party a mechanical instrumentality, manned by operator, and damage ensues as a result of the negligence of the operator under circumstances which raise the question of liability as between the original master and the hirer. In such cases, the usual test of liability is whether in the mechanical operation of the instrumentality the servant continues subject to the control or right of control of his general employer, or becomes subject to that of the person to whom he is hired. 57 C.J.S., Master and Servant, Section 566. This is so for the reason that the controlling characteristic of the master and servant relation is the possession by the employer of the right to direct and control the manner in which the work shall be performed, *i.e.,* the right to determine not merely the result sought, but the right to direct and control the physical methods and processes by which such result is to be accomplished. 56 C.J.S., Master and Servant, Section 2; Restatement of the Law, Agency, Sections 220 and 227. And by the

decided weight of authority the retention of the right or power to exercise such control is quite as determinative of the relation of master and servant as is the actual exercise of control. 56 C.J.S., Master and Servant, Section 2; 57 C.J.S., Master and Servant, Section 566; Restatement of the Law, Agency, Sections 220 and 227; *Standard Oil Co. v. Anderson,* 212 U.S. 215, 53 L. Ed. 480; *Bartolomeo v. Charles Bennett Contracting Co.,* 245 N.Y. 66, 156 N.E. 98; *Peters v. United Studios,* 98 Cal. App. 373, 277 P. 156; *Pennsylvania Smelting & Refining Co. v. Duffin,* 363 Pa. 564, 70 A. 2d 270; *Driscoll v. Towle,* 181 Mass. 416, 63 N.E. 922; *Little v. Hackett,* 116 U.S. 366, 29 L. Ed. 652; 35 Am. Jur., Master and Servant, Sections 18 and 541; 60 C.J.S., Motor Vehicles, Section 436, pp. 1089 and 1090. See also *Leonard v. Transfer Co.,* 218 N.C. 667, 12 S.E. 2d 729.

An examination of the record discloses conflicting evidence bearing on the crucial question of whether the general employer, McGuire, retained control or right of control over Haley, the operator of the bulldozer. It may be conceded that the evidence favorable to the defendants was sufficient to have sustained a jury-finding in their favor. However, as bearing upon the question of nonsuit, these phases of the evidence, tending to support the plaintiffs' theory of the case, come into focus: (1) The bulldozer was owned by McGuire. (2) It was furnished by him, manned by operator. (3) Haley, the operator, was in the general employ of McGuire, and had been for 25 years, during which time he gained considerable experience in removing trees and clearing land with bulldozers. (4) McGuire was engaged in the general construction and contracting business, in which he owned and operated a number of bulldozers, and on two previous occasions his bulldozers had cleared land for Hodge under similar arrangements. (5) Proctor, manager of McGuire's contracting business, testified that in sending Haley with the bulldozer to the Hodge farm, he told him "to go out there and clear the land and do anything that Mr. Hodge wanted him to do." (6) The work had been under way on the Hodge farm three or four weeks when the mishap occurred. During this time Haley cleared about nine acres of land, and Hodge had no one supervising or directing the work. He himself worked in Durham daily and went back and forth mornings and evenings. While the work was in progress, sometimes he would come home early in the afternoon and go where Haley was working. He would point out to Haley where he wished trees removed and land cleared, but there is no evidence tending to show he gave Haley any directions as to the mechanical operation of the bulldozer. (7) Hodge was not present when the mishap occurred. The previous afternoon he pointed out to Haley the trees he wished removed from the yard, but he left early the next morning for his office in Durham before Haley started work. (8) After the tree fell on the

house, Haley phoned the office "and Mr. McGuire sent" one of his foremen out with a crane and with it the tree was removed from the house. (9) Thereafter, Haley continued to work in the yard and removed another tree.

This evidence, when considered with the rest of the evidence in the case, is sufficient to justify these inferences: (1) that the work which was being performed by Haley at the time of the mishap was in McGuire's regular line of business; (2) that Hodge was neither qualified to direct mechanical operations of the bulldozer, nor assumed to do so; whereas Haley was an experienced, skilled operator; and (3) that it was contemplated by the parties when the rental contract was made that the operator of the bulldozer furnished by McGuire should remain subject to his exclusive control in the performance of the work on the Hodge premises, and that the operator did in fact so remain subject to his control while the work was in progress.

It is true the record discloses that no one from the McGuire organization visited the premises in the role of supervisor while the work was in progress (with the exception of a trip by Manager Proctor to arrange for fuel). This, however, is not of controlling importance on the question of nonsuit, especially so since it was made to appear that Haley was a trained bulldozer operator, with considerable previous experience in removing trees and clearing land. In this respect the evidence is sufficient to support the inference that McGuire deemed Haley qualified to perform the work at hand without special supervision; and the fact that none was exercised by McGuire or any of his foremen does not preclude the inference that full right of control over the mechanical operation of the bulldozer by Haley still reposed in McGuire. In fact, this phase of the evidence is illustrative of the soundness of the rule that possession of the right to exercise control over the servant may be quite as determinative of the relation of master and servant as is the actual exercise of such control. Here it is readily inferable that Haley, having attained, in the service and under the tutelage of his regular master, a degree of skill that caused the master to entrust to him the operation of the bulldozer without special supervision, remained at all times while on the Hodge job under the regular employer's power of control.

Also, we have given consideration to the evidence tending to show that Hodge spent considerable time on the premises while the land-clearing project was under way, and that he pointed out to Haley trees and stumps to be removed and directed him regarding the areas to be cleared. Here, however, it is significant that Hodge gave no direction or instruction as to the mechanical operation of the bulldozer. And, by the great weight of authority, it is held that "a servant of one employer does not become the servant of another for whom the work is performed merely because

the latter points out to the servant the work to be done, or supervises the performance thereof, or designates the place and time for such performance, or gives the servant signals calling him into activity, or gives him directions as to the details of the work and the manner of doing it, . . ." 57 C.J.S., Master and Servant, Section 566, pp. 287 and 288.

The following cases illustrate the practical soundness of the doctrine of right of control over the servant, as distinguished from the actual exercise of such control by the master, as a criterion for establishing the existence of the relation of master and servant in fixing tort liability under the principle of *respondeat superior. Standard Oil Co. v. Anderson, supra; Driscoll v. Towle, supra; Pennsylvania Smelting & Refining Co. v. Duffin, supra; Peters v. United Studios, supra; Bartolomeo v. Charles Bennett Contracting Co., supra; Little v. Hackett, supra.* These cases also illustrate the necessity of discriminating between acts of the hirer which denote authoritative control over the servant, as distinguished from mere suggestions in respect to details which amount to no more than incidental or necessary co-operation, such as pointing out the work to be performed.

In *Standard Oil Company v. Anderson, supra* (212 U.S. 215, 53 L. Ed. 480), the plaintiff Anderson sued the oil company for personal injuries alleged to have resulted from the negligent operation of a steam winch used in loading a vessel. The plaintiff was a longshoreman employed by a master stevedore. The stevedore, under contract with the oil company, was loading the vessel for it. The ship was alongside a dock belonging to the oil company. Cases of oil were conveyed by the winch from the dock to the hatch by hoisting them from the dock to a point over the hatch, whence they were guided and lowered into the hold of the ship, where the plaintiff was working, out of sight of the operator of the winch. The tackle and ropes used with the winch were furnished by the stevedore, but the winch and drum were owned by the oil company and stationed on its dock by the side of the ship. All the work of loading was done by the employees of the stevedore, except the operation of the winch. This was done by a winchman in the general employ of the oil company, who paid his wages. The stevedore paid the oil company $1.50 a thousand for this hoisting service. The winchman in hoisting and lowering a load of cases received signals by an employee of the stevedore. The plaintiff was struck by a load of cases of oil which was unexpectedly lowered into the hold where the plaintiff was working. The negligence consisted in lowering the load of cases before receiving a signal. The crucial question presented was whether the winchman, at the time the plaintiff was injured, was the servant of the oil company or of the stevedore. In the trial court it was found that the winchman remained the servant of the oil company, and the verdict and judgment were upheld on

appeal. It was insisted by the defendant that since the winchman was engaged in work essential to the performance of the stevedore's contract to load the vessel, he was necessarily under the direction and control of the stevedore rather than the oil company, and particularly so since the winchman was operating under specific signals given him by an employee of the stevedore. However, in answer to this contention, *Mr. Justice Moody,* speaking for the Court, said in part: "Here we must carefully distinguish between authoritative direction and control, and mere suggestion as to details or the necessary cooperation . . . The giving of signals under the circumstances of this case was not the giving of orders, but of information; and the obedience to those signals showed cooperation rather than subordination, and it is not enough to show that there had been a change of masters."

The case of *Driscoll v. Towle, supra* (181 Mass. 416, 63 N.E. 922), is also an early leading case which illustrates the distinction between authoritative control over a servant and merely pointing out to him the work to be performed. In the *Driscoll case* the defendant was engaged in a general teaming business. He furnished a horse, wagon, and driver to the Boston Electric Light Company. The driver, who was paid by the defendant, reported each morning to the light company and received directions from an employee of that company about what to do and where to go, but at night returned the horse and wagon to the defendant's stable. While traveling to carry out an order received from the light company, the driver negligently injured the plaintiff, who brought an action against the owner to recover damages, alleging that the driver was the owner's servant. It was held that there was evidence which would warrant the jury in finding that the driver continued to be defendant's servant. There, the fact that the driver had "exclusive management of the horse" seems to have been the determinative factor. *Holmes, C. J.,* speaking for the Massachusetts Court, said in part: "But the mere fact that a servant is sent to do work pointed out to him by a person who has made a bargain with his master does not make him that person's servant. More than that is necessary to take him out of the relation established by the only contract which he has made and to make him a voluntary subject of a new sovereign,—as the master sometimes was called in the old books."

Factually distinguishable are the decisions of this Court cited by the defendants (*Liverman v. Cline,* 212 N.C. 43, 192 S.E. 849; *Shapiro v. Winston-Salem,* 212 N.C. 751, 194 S.E. 479; and *Wadford v. Gregory Chandler Co.,* 213 N.C. 802, 196 S.E. 815). More nearly in point is the decision in *Leonard v. Transfer Co., supra* (218 N.C. 667).

The fact that Hodge expressly requested McGuire to send Haley with the bulldozer was a circumstance for the jury to consider as bearing on the question of who had the right of control over Haley. But it may not

be treated as controlling or decisive on the question of nonsuit. *Joslin v. Grand Rapids Ice Co.*, 50 Mich. 516, 15 N.W. 887.

The defendants emphasize their contention that the contractual arrangement between McGuire and Hodge contemplated that the bulldozer should be used only for ordinary land-clearing operations, and that when this work was completed and the operator moved to the house and began removing the trees from the yard as requested by Hodge, the operator then became for all intents and purposes the servant of Hodge in the performance of this particular work, which the defendants insist was out of and beyond the scope of Haley's general employment with McGuire. We have considered this contention with care. While it may be conceded there was evidence sufficient to have sustained a jury-finding in support of the defendants' contention, nevertheless, on this record, it also appears there was ample evidence to sustain the jury in finding that in removing the trees from the yard Haley continued to be the servant of McGuire. Of controlling importance as bearing on this phase of the case is the evidence showing (1) that when McGuire's manager sent Haley to the Hodge premises, he told him "to go out there and clear the land and do anything that Mr. Hodge wanted him to do"; (2) that in response to Haley's phone message, McGuire sent one of his foremen with a crane to the Hodge premises and removed the tree from the house; and (3) that thereafter Haley resumed work in the yard and removed another tree. This evidence, we think, when considered with the rest of the relevant circumstances in the case, was sufficient to take the case to the jury and support the inference that Haley in removing the trees from the yard was acting within the scope of his authority as employee of McGuire. 57 C.J.S., Master and Servant, Sections 563 and 570; Restatement of the Law, Agency, Sections 228 and 229. See also: *Bruce v. Flying Service*, 231 N.C. 181, top p. 185, 56 S.E. 2d 560; *Cole v. Atlantic Coast Line R. Co.*, 211 N.C. 591, 191 S.E. 353; *Adams v. Foy*, 176 N.C. 695, 97 S.E. 210; *Peters v. United Studios, supra.*

It thus appears that the court below properly submitted the case to the jury. The defendants have had their day in court, not only upon the controverted issue of whether Haley was McGuire's servant in respect to the removal of the trees from the yard, but also on the issue of whether Hodge was contributorily negligent. The jury answered both issues contrary to the defendants' theories of the case in a trial in which we find

No error.

H. L. SPRINKLE AND WIFE, OLIE SPRINKLE; H. C. SPRINKLE AND WIFE, SIBIL SPRINKLE; J. T. SPRINKLE AND WIFE, LULA SPRINKLE, v. CITY OF REIDSVILLE, A MUNICIPAL CORPORATION, AND MRS. MINNIE V. PETTIGREW, WIDOW; B. F. SPRINKLE, UNMARRIED; R. L. SPRINKLE AND WIFE, LILLIAN SPRINKLE; MRS. JUANITA KIMSEY, WIDOW; REGINALD F. SPRINKLE AND WIFE, ANNIE YOUNG SPRINKLE, AND PHILIP E. SPRINKLE AND BENJAMIN F. SPRINKLE, EXECUTORS OF THE ESTATE OF IDA A. SPRINKLE.

(Filed 27 February, 1952.)

1. Appeal and Error § 6c (3)—

The sufficiency of the evidence to support the court's findings of fact is not presented when there are no exceptions to any of the findings.

2. Appeal and Error § 6c (1)—

Review is limited to those questions presented by appropriate exceptions duly taken and preserved.

3. Appeal and Error § 39e—

An exception to certain testimony of a witness is lost when the witness thereafter gives virtually the same testimony without objection.

4. Appeal and Error § 40i: Trial § 21½—

Where motion to nonsuit is not renewed after defendant introduces evidence, the question of the sufficiency of the evidence is not presented for review. G.S. 1-183.

5. Appeal and Error § 6c (2)—

An exception to the signing of the judgment does not bring up for review the findings of fact or the evidence upon which they are based, but only whether error appears on the face of the record.

6. Deeds § 13b—

A deed to a married woman for life or widowhood, remainder in fee to the "heirs" of her husband does not convey a fee to the first taker, but only a life estate with remainder to the children of the marriage, theretofore and thereafter born, who become entitled to actual enjoyment immediately upon the death of the wife, G.S. 41-6, "heirs" being construed as children in such instance.

7. Estoppel § 1—

Where land is conveyed to a person for life, remainder to her children, a deed in fee with full warranty executed by the life tenant does not bar the claim of the remaindermen who, in such instance, take by purchase and not by descent. G.S. 41-8.

8. Adverse Possession § 4i—

The statute of limitations cannot begin to run against remaindermen until the death of the life tenant. G.S. 1-38.

9. Deeds § 17—

In an action involving title to land, a defendant asserting title under a deed, but praying for an alternative judgment against its grantor for dam-

ages for breach of covenant of title in the event the question of title is adjudicated against it, but not alleging that its grantor was without title or facts showing an ouster or a cross-action or counterclaim for breach of the covenant of warranty and without anything before the court indicating damages recoverable, may not complain, upon adjudication of title adverse to it, of the ruling of the trial court that its claim for breach of covenant of warranty could not be determined in the cause.

APPEAL by defendant, City of Reidsville, from *Rousseau, J.*, at the October Term, 1951, of the Superior Court of ROCKINGHAM County.

Civil action involving title to a parcel of land in Reidsville, Rockingham County, North Carolina.

For convenience of narration, H. L. Sprinkle, H. C. Sprinkle, and J. T. Sprinkle, are herein called the plaintiffs, and Mrs. Minnie V. Pettigrew, B. F. Sprinkle, R. L. Sprinkle, Mrs. Juanita Kimsey, and Reginald F. Sprinkle are herein designated as the individual defendants.

The plaintiffs and the individual defendants, on the one side, and the corporate defendant, the City of Reidsville, on the other, make conflicting claims to fee simple ownership of the land in dispute. Although its answer alleges with positiveness that it is the absolute owner of the land in controversy and seeks judgment accordingly, the City of Reidsville prays for an alternative judgment against the executors of its grantor, Ida A. Sprinkle, for damages for breach of the covenants of title in its deed in the event the court adjudges title to the land in question "is vested in the heirs of B. F. Sprinkle and not in the City of Reidsville." The executors, who have been made parties defendant at the instance of the City of Reidsville, answered, praying "that they go without day."

When the cause came on for hearing on its merits, the parties waived trial by jury and presented their testimony to the presiding judge, who made extensive findings of fact. The essential findings are epitomized in the eight numbered paragraphs set forth below.

1. The land in dispute consists of 3.42 acres, and is a composite of parts of a four acre tract formerly owned by Sallie A. Brent and Mary A. Payne, and a five acre tract formerly owned by William Lindsey and his wife, Eugenia Lindsey.

2. The respective former owners made deeds on 24 May and 8 October, 1900, conveying the four and five acre tracts to Ida A. Sprinkle for life or widowhood with remainder over in fee simple "to the heirs of B. F. Sprinkle," the then living husband of Ida A. Sprinkle. All of the children of B. F. Sprinkle hereinafter named, except two, were born prior to the execution of these deeds.

3. On 2 September, 1919, Ida A. Sprinkle and her husband, B. F. Sprinkle, made a deed to the City of Reidsville, whereby they purported to convey the land in dispute and an additional .38 of an acre to the

City of Reidsville in fee simple with covenants of seizin, right to convey and warranty, and whereby they acknowledged receipt of $1,500.00 from the City of Reidsville as the consideration for the deed. All parties concede that this deed vested absolute ownership of the additional .38 of an acre in the City of Reidsville.

4. The City of Reidsville has had exclusive and uninterrupted possession of the land in dispute under its deed from Ida A. Sprinkle and husband, B. F. Sprinkle, since 2 September, 1919.

5. B. F. Sprinkle died on 16 February, 1938, leaving him surviving his widow, Ida A. Sprinkle, and his nine children, namely: H. L. Sprinkle, H. C. Sprinkle, J. T. Sprinkle, Mrs. Minnie V. Pettigrew, B. F. Sprinkle, R. L. Sprinkle, Philip E. Sprinkle, Mrs. Juanita Kimsey, and Reginald F. Sprinkle.

6. Ida A. Sprinkle died testate on 4 April, 1949, without having remarried. Her executors are Philip E. Sprinkle and Benjamin F. Sprinkle.

7. On 10 March, 1950, Philip E. Sprinkle conveyed whatever interest he had in the land in dispute to his sister, Mrs. Minnie V. Pettigrew.

8. This action was commenced on 7 December, 1950.

The presiding judge drew conclusions of law from the facts found by him, and entered a final judgment consonant with his legal conclusions. The judgment makes these adjudications: (1) That the plaintiffs and the individual defendants own the land in dispute in fee simple and are entitled to its immediate possession; (2) that the claim of the corporate defendant, the City of Reidsville, against the executors of Ida A. Sprinkle cannot be determined in this cause, but the corporate defendant is at liberty to assert such claim against the executors in another action; and (3) that the executors are liable for the costs of the present action.

The defendant, the City of Reidsville, excepted to the judgment and appealed to the Supreme Court, assigning errors as set forth in the opinion.

Rufus W. Reynolds and J. C. Johnson, Jr., for plaintiffs, appellees.

Scurry & McMichael for corporate defendant, the City of Reidsville, appellant.

P. T. Stiers for individual defendants and executors, appellees.

ERVIN, J. In its written brief and oral argument, the appellant follows the precedent set by the Walrus in Lewis Carroll's pleasing fantasy entitled "Through the Looking-Glass."

> "The time has come," the Walrus said,
> "To talk of many things:
> Of Shoes—and Ships—and sealing-wax—

Of cabbages—and Kings—
And why the sea is boiling hot—
And whether pigs have wings."

As a consequence, the appellant debates many intriguing legal propositions not sanctioned by the exceptions noted by it at the trial. For example, it asserts with much earnestness and eloquence that the testimony of the plaintiffs does not suffice to support the findings of fact of the presiding judge. This interesting question is not before us. The appellant did not except to any of the findings. *Burnsville v. Boone,* 231 N.C. 577, 58 S.E. 2d 351; *Smith v. Davis,* 228 N.C. 172, 45 S.E. 2d 51, 174 A.L.R. 643; *Wilson v. Robinson,* 224 N.C. 851, 32 S.E. 2d 601; *Riddick v. Farmer's Life Association,* 132 N.C. 118, 43 S.E. 544. Moreover, as hereafter appears, the assignment of error based on the denial of its motion for a compulsory nonsuit is legally ineffectual.

Under the rules of practice in this Court, the questions arising on an appeal are those defined by appropriate exceptions taken by the appellant in the Superior Court. Rules 19 (3) and 21, 221 N.C. 554, 558; *Wilson v. Beasley,* 192 N.C. 231, 134 S.E. 485; *Harrison v. Dill,* 169 N.C. 542, 86 S.E. 518.

The City of Reidsville noted exceptions in the court below to the admission of certain testimony tendered by the plaintiffs, to the denial of a motion for a compulsory nonsuit made by it at the close of the plaintiffs' evidence, and "to the rendering and signing of the judgment."

An examination of the record shows that there can be no reasonable doubt of the propriety of any of the challenged rulings admitting testimony except those permitting the plaintiffs' surveyor, A. N. Mattocks, to testify as to the location of the parcels of land mentioned in the findings of fact. The appellant lost the benefit of the exceptions covering the receipt of this particular evidence, however, by allowing the same witness to give virtually the same testimony without objection in other portions of his examination. *Price v. Whisnant,* 232 N.C. 653, 62 S.E. 2d 56; *Spivey v. Newman,* 232 N.C. 281, 59 S.E. 2d 844; *White v. Disher,* 232 N.C. 260, 59 S.E. 2d 798.

A somewhat similar observation applies to the exception to the denial of the motion for compulsory nonsuit. The appellant moved to nonsuit at the close of the plaintiffs' evidence, the motion was refused, and the appellant noted the exception in question. The appellant thereafter introduced evidence, and neglected to renew its motion for nonsuit at the conclusion of all the evidence. The statute expressly provides that "if the defendant introduces evidence he thereby waives any motion for dismissal or judgment as of nonsuit which he may have made prior to the introduction of his evidence and cannot urge such prior motion as

ground for appeal." G.S. 1-183 as rewritten by Chapter 1081 of the Session Laws of 1951.

The remaining exception, *i.e.*, the exception "to the rendering and signing of the judgment," does not bring up for review the findings of fact or the evidence upon which they are based. *Russos v. Bailey,* 228 N.C. 783, 47 S.E. 2d 22. It presents for decision the solitary question whether error appears on the face of the record. *Brown v. Truck Lines,* 227 N.C. 65, 40 S.E. 2d 476; *King v. Rudd,* 226 N.C. 156, 37 S.E. 2d 116; *Crissman v. Palmer,* 225 N.C. 472, 35 S.E. 2d 422.

B. F. Sprinkle was alive at the time of the execution of the deeds of 24 May and 8 October, 1900. Seven of his nine children were then living. His other two children were born between that time, and the termination of Ida A. Sprinkle's precedent life estate. Since the statute codified as G.S. 41-6 prescribes that "a limitation by deed, will, or other writing to the heirs of a living person, shall be construed to be to the children of such person, unless a contrary intention appear by the deed or will," the deeds of 24 May and 8 October, 1900, operated as a conveyance of the remainder in the land in controversy to the nine children of B. F. Sprinkle as a class. *Cooley v. Lee,* 170 N.C. 18, 86 S.E. 720; *Condor v. Secrest,* 149 N.C. 201, 62 S.E. 921. As a consequence, these nine children became entitled to the actual enjoyment of the land in question immediately after the death of Ida A. Sprinkle, the life tenant. Subsequent to that event one of them, namely, Philip E. Sprinkle, transferred his interest in the property to another, namely, Mrs. Minnie V. Pettigrew. These things being true, the presiding judge did not err in adjudging that the plaintiffs and the individual defendants own the land in dispute in fee simple and are entitled to its immediate possession. His findings of fact support and require that adjudication.

In reaching this conclusion, we necessarily reject the contentions of the appellant on this phase of the case. Two of these contentions merit some elaboration.

It is asserted that the plaintiffs and the individual defendants are the heirs at law of the life tenant, Ida A. Sprinkle, and her husband, B. F. Sprinkle, and that as such heirs at law their action for the land in controversy is barred or rebutted by the warranty in the deed from their ancestors to the appellant. This contention meets full refutation in the statute embodied in G.S. 41-8, which is a re-enactment of the Statute of 4 Anne, Chapter 16, Section 21, and is couched in this language: "All collateral warranties are abolished; and all warranties made by any tenant for life of lands, tenements or hereditaments, the same descending or coming to any person in reversion or remainder, shall be void; and all such warranties, as aforesaid, shall be deemed covenants only, and bind the covenanter in like manner as other obligations." Under this statute, a warranty in a deed of a life tenant does not bar or rebut the

claim of heirs who can connect themselves with the outstanding remainder. *Starnes v. Hill,* 112 N.C. 1, 16 S.E. 1011; *Hauser v. Craft,* 134 N.C. 319, 46 S.E. 756; *Southerland v. Stout,* 68 N.C. 446; *Moore v. Parker,* 34 N.C. 123. This is so because such heirs take by purchase, *i.e.,* as remaindermen, and not by descent, *i.e.,* as heirs. *Hauser v. Craft, supra.*

The appellant also insists that it has acquired a good title to the land in controversy by seven years adverse possession under color of title, and that this proposition has been established by the fourth finding of fact of the presiding judge. This contention runs afoul of the well settled rule that possession by the grantee of a life tenant is not adverse to the rights of the remainderman during the life of the life tenant. *Eason v. Spence,* 232 N.C. 579, 61 S.E. 2d 717. The seven-year statute of limitation prescribed by G.S. 1-38 did not begin to run against the plaintiffs and the individual defendants until 4 April, 1949, when the life tenant died.

The City of Reidsville is in no position to complain of the refusal of the presiding judge to pass on its claim against the executors of Ida A. Sprinkle in the instant action. The answer of the city does not allege that its grantor was without title, or the right to convey. Consequently, it does not state a counterclaim or cross-action against the executors for breach of the covenants of seizin and right to convey. *Pridgen v. Long,* 177 N.C. 189, 98 S.E. 451. The answer likewise fails to assert a counterclaim or cross-action against the executors for breach of the covenant of warranty. It does not aver facts showing an ouster or its equivalent. *Cedar Works v. Lumber Co.,* 161 N.C. 603, 77 S.E. 770; *Wiggins v. Pender,* 132 N.C. 628, 44 S.E. 362, 61 L.R.A. 772; *Ravenel v. Ingram,* 131 N.C. 549, 42 S.E. 967. Furthermore, there was nothing before the court indicating the damages recoverable for any unalleged partial breach of any of the covenants of title. *Lemly v. Ellis,* 146 N.C. 221, 59 S.E. 683; *Dickens v. Shepperd,* 7 N.C. 526.

For the reasons given, the judgment of the superior court is

Affirmed.

ELIZA H. DUCKETT v. R. L. HARRISON (AND DORA HARRISON AND LILLIE HARRISON, ADDITIONAL PARTIES DEFENDANT).

(Filed 27 February, 1952.)

1. Partition § 6: Adverse Possession § 4a: Frauds, Statute of, § 9—

A parol partition among tenants in common comes within the statute of frauds and may not be enforced unless each tenant goes into possession of his share in accordance with the agreement and holds same under known and visible boundaries openly, notoriously and adversely for twenty years,

and a holding for a shorter period, even though the respective tenants collect the rents from and pay taxes upon their respective shares, does not alter this result or create an estoppel.

2. Frauds, Statute of, § 4—

The doctrine of part performance is not recognized in this jurisdiction.

APPEAL by defendant, R. L. Harrison, from *Rousseau, J.,* October Term, 1951, of CASWELL.

This is a proceeding for the partition of land. Eliza H. Duckett, the plaintiff, and the defendants, Dora Harrison and Lillie Harrison, are sisters, and the defendant, R. L. Harrison, is their half brother.

William S. Harrison (a whole brother of R. L. Harrison), devised the lands in controversy to R. L. Harrison and Dora Harrison. He also devised that portion of an eight acre tract of land known as the homeplace of T. S. Harrison, lying on the north side of the highway leading to Blanch, North Carolina, to R. L. Harrison, and that portion of the tract lying on the south side of the highway to Dora Harrison. Dora Harrison conveyed her portion of this tract to her sisters, Annie Harrison and Lillie Harrison, on 2 November, 1936. Thereafter, Annie Harrison died leaving a last will and testament in which she devised her interest in this tract of land to her sister, Lillie Harrison.

The tract in controversy was devised to R. L. Harrison and Dora Harrison as tenants in common and described as containing eighty acres, more or less, and being the tract of land acquired by the testator from R. L. Harrison. With respect to the division of this tract of land, the following language appears in the Seventh Item of the will of William S. Harrison: "It is my wish, and I so Will that in the division of the tract of land bequeathed as 'eighty acres,' more or less, acquired from Ro. L. Harrison, . . . due consideration be had as to the value of the part allotted to each R. L. Harrison and Dora Harrison, and that each of them may have the land most convenient to the dwelling houses herein bequeathed to them, trusting that they may arrange this between themselves in a satisfactory manner."

On 2 August, 1950, Dora Harrison, who is and was at the time an invalid, and Lillie Harrison, both of Danville, Virginia, for a consideration of $8,000, of which sum $1,000 was paid in cash and the balance to be paid in monthly installments of $100 each, executed a warranty deed to their sister Eliza H. Duckett of Alexandria, Virginia, for that portion of the eight acre tract of land devised to Dora Harrison, then owned by Lillie Harrison, and for a one-half undivided interest in the tract containing eighty acres, more or less. Thereafter, on 21 November, 1950, the plaintiff, Eliza H. Duckett, instituted this proceeding against the defendant, R. L. Harrison, for partition of the eighty acre tract of land.

The defendant, R. L. Harrison, set up a counterclaim in the nature of a cross-action against the plaintiff in his answer, alleging that an oral division of the land was made in 1934 and that each party entered into possession of their respective shares. It is admitted in plaintiff's reply that it was agreed between Dora Harrison and R. L. Harrison that the land should be divided in accordance with the will of William S. Harrison, and that three disinterested parties should be appointed to divide the same, but it is denied that a division was made according to the will and it is alleged in the reply that the plat made by a surveyor in 1950, showing a purported division of the land, was the first information that Dora Harrison had as to how the land was divided.

On motion of the defendant, R. L. Harrison, Dora Harrison and Lillie Harrison were made additional parties defendant. These additional defendants adopted as their own the petition and reply filed by the plaintiff.

The defendant, R. L. Harrison, assumed the burden of proving his cross-action. It was conceded by all parties that no deeds were executed between the tenants in common; that there is not now and never has been any writing in existence between R. L. Harrison and Dora Harrison as to the division of the land; and that no survey of the premises was made in 1934. According to the survey made in 1950, the tract of land actually contains 89.94 acres, and purports to show 44.97 acres allotted to R. L. Harrison, and 44.97 acres to Dora Harrison.

At the close of the evidence offered by the defendant, R. L. Harrison, the plaintiff moved for judgment as of nonsuit, and the motion was allowed. Whereupon, the court remanded the cause to the Clerk of the Superior Court of Caswell County and directed him to proceed in accordance with the petition of the plaintiff for a partition of the lands.

From the judgment entered below, the defendant, R. L. Harrison, appeals to the Supreme Court and assigns error.

D. Emerson Scarborough for appellant, R. L. Harrison.
Sharp & Robinson and P. W. Glidewell, Sr., for plaintiff, appellee.
No counsel for appellees, Dora Harrison and Lillie Harrison.

DENNY, J. In order for tenants in common to perfect title to the respective shares of land allotted to them by parol, it is necessary for them to go into possession of their respective shares in accordance with the agreement and to hold possession thereof under known and visible boundaries, consisting of lines plainly marked on the ground at the time of the partition, and to continue in possession openly, notoriously and adversely for twenty years. *Rhea v. Craig*, 141 N.C. 602, 54 S.E. 408; *Collier v. Paper Corp.*, 172 N.C. 74, 89 S.E. 1006; *Lewis v. Lewis*, 192 N.C. 267, 134 S.E. 486.

However, if prior to the expiration of the adverse possession for twenty years, the statute of frauds is invoked by one or more of the tenants in common, the parol partition may not be enforced. "It is well settled that a parol partition of lands is a contract within the purview of the statute of frauds, and is not binding." *Fort v. Allen*, 110 N.C. 183, 14 S.E. 685; *Medlin v. Steele*, 75 N.C. 154.

In the case of *Winstead v. Woolard*, 223 N.C. 814, 28 S.E. 2d 507, *Justice Winborne*, in speaking for the Court, said: "It is a well settled and long established principle of law in this State that the possession of one tenant in common is in law the possession of all his co-tenants unless and until there has been an actual ouster or a sole adverse possession of twenty years, receiving the rents and profits and claiming the land as his own from which actual ouster would be presumed," citing numerous authorities. See also *Parham v. Henley*, 224 N.C. 405, 30 S.E. 2d 372; *Hardy v. Mayo*, 224 N.C. 558, 31 S.E. 2d 748; *Whitehurst v. Hinton*, 230 N.C. 16, 51 S.E. 2d 899.

Moreover, adverse possession, even under color of title, will not ripen title as against a tenant in common under twenty years. *Peel v. Calais*, 224 N.C. 421, 31 S.E. 2d 440; *Bradford v. Bank*, 182 N.C. 225, 108 S.E. 750.

Furthermore, if it be conceded, as contended by the defendant, R. L. Harrison, that there was a parol division of the lands in controversy in 1934 and that Dora Harrison entered into possession of the premises allotted to her, collected rents therefrom, paid the taxes thereon, this would not be sufficient to prevent the operation of the statute of frauds, since we do not recognize the doctrine of part performance in this jurisdiction, and twenty years have not elapsed since the defendant, R. L. Harrison, contends the property was divided. *Albea v. Griffin*, 22 N.C. 9; *Allen v. Chambers*, 39 N.C. 125; *Barnes v. Teague*, 54 N.C. 277; *Rhea v. Craig, supra; Ballard v. Boyette*, 171 N.C. 24, 86 S.E. 175; *Grantham v. Grantham*, 205 N.C. 363, 171 S.E. 331.

The case of *Thomas v. Conyers*, 198 N.C. 229, 151 S.E. 270, upon which the appellant is relying, is not controlling on the facts presented on this appeal. There, David E. Thomas, Sr., prior to his death on 27 January, 1925, joined by his wife, Emma C. Thomas, executed fourteen deeds of gift whereby he attempted to convey to his several children certain tracts or lots of land which he owned. None of the deeds was delivered prior to his death but all of them were kept in a lock box in a bank in Greensboro. David E. Thomas, Sr., left a will, and a few days after his death his executrices filed all the deeds for record in the office of the register of deeds and took them from the office after registration and delivered or mailed them to the several grantees. The children received these deeds and went into possession of the respective tracts therein described and immediately began to collect rents from the ten-

ants. About two years thereafter, one of the children instituted an action which involved the title to a parcel of the land described in one of the deeds in which she was the designated grantee. The court held that although the deeds were void, the fact that they were paper writings definitely describing the respective tracts of land set out by metes and bounds, and since the children retained the deeds, after the registration thereof by the executrices, and took possession of the parcels or tracts of land described in the respective deeds to them, paying taxes on their respective tracts or parcels of land, renting, leasing, and collecting rents from the respective tracts or parcels of land, and selling and conveying some of the parcels allotted to them, they had adopted, affirmed, ratified, and acquiesced in the parol partition and had each and all mutually estopped themselves from claiming any of the tracts or parcels of land described in any of the deeds in which any of the other children were named as grantees.

However, there is no deed or other writing involved in the present appeal describing the respective tracts of land alleged to have been allotted to R. L. Harrison and Dora Harrison which the parties have ratified and affirmed. Therefore, we find nothing in the record to sustain the doctrine of estoppel against either Dora Harrison or her successor in title, Eliza H. Duckett.

The judgment of the court below is

Affirmed.

HARVEY MIDKIFF, EMPLOYEE, v. NORTH CAROLINA GRANITE CORPORATION, SELF-INSURER, EMPLOYER.

(Filed 27 February, 1952.)

1. Statutes § 5a—

A statute is to be construed to effect its intent.

2. Statutes § 5d—

Statutes *in pari materia* are to be construed together.

3. Master and Servant § 40f—

An employee who has become affected by silicosis to such extent that, though not actually disabled, his continued employment in an occupation subjecting him to silica dust would be hazardous to his health, and who has therefore been ordered removed from such hazardous employment by the Industrial Commission, is not entitled to compensation under G.S. 97-61 when he has not been exposed to inhalation of silica dust for as much as two years in this State within ten years prior to his last exposure. G.S. 97-63.

MIDKIFF *v.* GRANITE CORP.

APPEAL by defendant from *Rousseau, J.*, September Term, 1951, of SURRY County.

The claimant, Harvey Midkiff, is 41 years of age, and has been an employee in the granite industry from time to time for a total of about eighteen years.

The parties hereto are subject to and bound by the provisions of the North Carolina Workmen's Compensation Act. The employer is a self-insurer and the employee's claim was filed within the time required by statute.

The hearing Commissioner found the following facts:

1. That on 8 June, 1940, and for some time prior thereto, the claimant was employed by the Newport News Shipbuilding and Dry Dock Company at its facilities in Portsmouth, Virginia, as a burner and sheet metal worker; that he continued in this employment in such capacity until 1945; and that while so employed he did not work at any time in the State of North Carolina.

2. That in 1948 the claimant entered the employment of the Hilton Refrigeration Company where he worked as a refrigeration mechanic or as a helper to a refrigeration mechanic; and remained in this employment until March, 1949, and was not exposed to the hazards of free silica dust while in this employment.

3. In March, 1949, the claimant entered the employment of the defendant; that he continued in this employment until May, 1949, when he entered the employment of the Colonial Granite Company; that he remained in the employment of the Colonial Granite Company until September, 1949, when he was re-employed by the defendant; that he continued to work for the defendant until 9 June, 1950; that from March, 1949, until 9 June, 1950, the claimant was exposed to the hazards of free silica dust while employed in this State.

4. That claimant was exposed to dust containing free silica as much as thirty working days or parts thereof within seven consecutive calendar months while in the defendant's employment and that he was last exposed to the hazards of silicosis while in the employment of the defendant.

5. That the claimant has not been exposed to the inhalation of dust of silica or silicates in employment for a period of two years in this State, within ten years prior to 9 June, 1950.

6. That the claimant now has silicosis in the first or early stages; that he is not incapacitated by reason thereof from performing normal labor in the last occupation in which he was remuneratively employed as a stone cutter.

7. That the claimant is actively affected by silicosis to such a degree as to make it hazardous for him to continue in his employment and that he would be benefited by being taken out of employment which would expose him to the hazards of silicosis.

8. The plaintiff has skill as a metal burner, sheet metal worker, and refrigeration mechanic for which trade he owns his own tools; that he is married and has two children; that his wife and children are totally dependent upon him for their support; and that no special training is required in order to properly readjust the claimant by reason of his removal from the employment in which he would be exposed to the hazards of silicosis.

Upon the foregoing findings of fact, the hearing Commissioner concluded as a matter of law that since the claimant was not exposed to inhalation of dust of silica or silicates for as much as two years in the ten years prior to his last injurious exposure while employed by the defendant, he could not recover compensation even if he were disabled, but that the provisions of G.S. 97-63 do not preclude the payment of rehabilitation benefits under the provisions of G.S. 97-61.

An award was entered directing the defendant to pay rehabilitation benefits as provided by G.S. 97-61, for a period not exceeding forty weeks from 1 January, 1951, at the weekly rate of sixty per cent of the difference between $70.00, the average weekly wage which the claimant was earning when last injuriously exposed, and the wage which he is able to earn after 1 January, 1951, in any other employment; provided, however, that such payments shall not exceed $24.00 per week.

The defendant appealed to the full Commission which affirmed the findings of fact, the conclusions of law, and the award of the hearing Commissioner by a majority decision, one Commissioner dissenting.

The defendant then appealed to the Superior Court of Surry County where the majority opinion of the Industrial Commission was affirmed. The defendant thereupon appealed to the Supreme Court, assigning error.

Woltz & Barber and Folger & Folger for defendant, appellant.

J. H. Blalock for plaintiff, appellee.

DENNY, J. The sole question for decision is whether an employee is entitled to compensation under the provisions of G.S. 97-61, which provides for compensation for an employee not actually disabled but found to be affected by silicosis, when such employee has not been exposed to inhalation of dust of silica or silicates for as much as two years in this State, within ten years prior to his last exposure.

This precise question has not been presented heretofore for our consideration and determination. And we know of no decision from any other jurisdiction where statutory provisions similar to those involved herein have been construed. We have been unable to find such a decision and counsel for the respective parties cited none in their briefs. This necessitates a construction of the statutory provisions involved.

In construing a statute, it is the duty of the Court to find the legislative intent. *Mullen v. Louisburg,* 225 N.C. 53, 33 S.E. 2d 484. "The heart of the statute is the intention of the law-making body." *Trust Co. v. Hood,* 206 N.C. 268, 173 S.E. 601; *Dyer v. Dyer,* 212 N.C. 620, 194 S.E. 278.

Our statute, with respect to occupational diseases, was enacted by the General Assembly in 1935, Chapter 122, now codified as G.S. 97-52 through G.S. 97-76. Section 1, sub-section (j) of the original act, as amended, now codified as G.S. 97-61, reads in pertinent part as follows: "Where an employee, though not actually disabled, is found by the industrial commission to be affected by asbestosis and/or silicosis, and it is also found by the industrial commission that such employee would be benefited by being taken out of his employment and that such disease with such employee has progressed to such a degree as to make it hazardous for him to continue in his employment and is in consequence removed therefrom by order of the industrial commission, or where an employee affected by asbestosis and/or silicosis as hereinbefore set forth is unable to secure employment by reason of such disease; he shall be paid compensation as for temporary total or partial disability, as the case may be, until he can obtain employment in some other occupation in which there are no hazards of such occupational disease: Provided, however, compensation in no such case shall be paid for a longer period than twenty weeks to an employee without dependents, nor for a longer period than forty weeks to an employee with dependents . . ."

Section 1, sub-section (k) of the original act, codified as G.S. 97-62, defines silicosis as "the characteristic fibrotic condition of the lungs caused by the inhalation of dust of silica or silicates." However, section 1, sub-section (l) of the original act, now codified as G.S. 97-63, contains the following provisions: "Compensation shall not be payable for disability or death due to silicosis and/or asbestosis unless the employee shall have been exposed to the inhalation of dust of silica or silicates or asbestos dust in employment for a period of not less than two years in this state, provided no part of such period of two years shall have been more than ten years prior to the last exposure."

It is conceded by all parties to this proceeding, and so held by the Industrial Commission, that the claimant by reason of the provisions contained in G.S. 97-63, as set out herein, would not be eligible for compensation for disability due to silicosis, if he were actually disabled therefrom, since he has not been exposed to inhalation of dust of silica or silicates, for as much as two years in this State, within ten years prior to his last exposure.

Statutes *in pari materia* are to be construed together. *Duncan v. Carpenter,* 233 N.C. 422, 64 S.E. 2d 410; *S. v. Humphries,* 210 N.C. 406, 186 S.E. 473; *Cameron v. Highway Commission,* 188 N.C. 84, 123 S.E.

465. And in our opinion the Legislature, in dealing with the occupational disease known as "silicosis," which disease ordinarily requires from ten to fifteen years before its symptoms develop (*Young v. Whitehall Co.*, 229 N.C. 360, 49 S.E. 2d 797), did not intend to provide rehabilitation benefits for an employee under the provisions of 97-61 who had not been exposed to the dust of silica or silicates for as much as two years in this State, within ten years prior to his last exposure.

To hold otherwise would necessitate a finding to the effect that the Legislature intended to be more considerate of and liberal toward an employee who becomes affected by silicosis, but not disabled, than of an employee who becomes disabled or dies due to silicosis. Manifestly, this was not the intention of the Legislature.

This opinion has no bearing upon the authority of the Industrial Commission to remove an employee from hazardous employment in the manner provided by G.S. 97-61, but relates only to the question of compensation or rehabilitation benefits provided therein. Obviously, if the claimant herein had been exposed to inhalation of dust of silica or silicates for as much as two years in this State, within ten years prior to his last exposure, he would be eligible for rehabilitation benefits within the purview of the statute.

For the reasons stated, the judgment of the court below is

Reversed.

FRANK ELLIOTT, JERRY LEA ELLIOTT, JERLINE ELLIOTT, REGINALD ELLIOTT, HARRY LEON ELLIOTT AND DONNELL ELLIOTT, MINORS, BY THEIR NEXT FRIEND, GEORGIANA ELLIOTT, v. ROBERT ELLIOTT, EXECUTOR OF THE ESTATE OF HENRY ELLIOTT, DECEASED.

(Filed 27 February, 1952.)

1. Common Law—

So much of the common law as has not been abrogated or repealed by statute is in full force and effect in this State. G.S. 4-1.

2. Parent and Child § 5: Executors and Administrators § 15g—

The common law obligation of a father to support his minor children is not a property right but is a personal duty which is terminated by the death of the father, and cannot be made the basis of a claim against the estate of the father who has disposed of his property by will without providing for the support of his minor children.

3. Constitutional Law § 10c—

The Supreme Court does not make the law, this being the province of the General Assembly.

ELLIOTT *v.* ELLIOTT.

APPEAL by plaintiffs from *Rousseau, J.*, at October Term, 1951, of CASWELL.

Civil action in behalf of plaintiffs, minors under the age of eighteen years, children of Henry Elliott, deceased, to recover against his estate for their reasonable necessary support until they reach the age of eighteen years, respectively, heard upon demurrer filed by defendants to complaint of plaintiffs.

In the complaint these facts, summarily stated, are alleged:

I. Henry Elliott, a Negro, resident of Caswell County, North Carolina, was married twice. To the first union six children were born. To the second twelve children were born, eleven prior to his death, and the twelfth, Donnell Elliott, being then *in ventre sa mere.*

II. At the time of the death of Henry Elliott (1) all of the children of his first marriage were adults,—five of them residing in Washington, D. C., and the other in Massachusetts; (2) six of the children of the second marriage were over the age of eighteen years; and (3) the other five children then born of the second marriage ranged in age from approximately fifteen years down to approximately two years, and they, with the youngest child, Donnell Elliott, then unborn, are now plaintiffs in this action.

III. Henry Elliott, at the time of his death, was residing with his second wife, Georgiana Elliott, and their children, the plaintiffs, at Leasburg in said Caswell County. He was seized of 78.3 acres of land of approximate value of $5,000, and possessed of personal property, bank, and postal savings and other miscellaneous items, of total value of approximately $5,400.

IV. Henry Elliott left a will, with witnesses, which has been duly probated and recorded in the office of Clerk of Superior Court of Caswell County. In this will (a) he devised all of his land he owned "except the two acres I now live and make my home" to the six children, naming them, of his first marriage; and "the two acres I now live" to the youngest son of the first marriage and the next oldest child, and daughter of the second marriage; and (b) he bequeathed to his wife, and to each of the three of the first six children of the second marriage over 18 years of age and to the third oldest of the children of the second marriage under 18 years of age the sum of $5.00, and to each of the other children of the second marriage, both those over 18 years of age, as well as those under that age, the sum of $1.00; and (c) lastly he made this bequest, "after all my claims have been settled all of my personal property be equally divided among the first named set of children viz"—naming those of the first marriage.

V. Defendant is the duly qualified and acting executor of the estate of Henry Elliott.

VI. The mother of plaintiffs, 44 years of age, of the Negro race, is without property and without means, by reason of her age, and inadequate training for gainful occupation, to support plaintiffs, and plaintiffs have no property or means of support and by reason of their ages are unable to provide themselves with support.

Upon these allegations of fact, plaintiffs say that the natural and legal duty of the father to support his infant children extends beyond his death to his estate.

And plaintiffs pray judgment that they have and recover of defendant such sums as may be reasonable and necessary for their support until they become 18 years of age, and costs, and attorney's fee.

Defendant demurred to the complaint for that "the complaint does not state facts sufficient to constitute a cause of action against the defendant in that the estate of a parent is not liable under the laws of the State of North Carolina for the support and maintenance of the parent's infant children other than the provision made under the statute providing for a widow's year's allowance."

The court being of opinion that the complaint does not state a cause of action, entered judgment sustaining the demurrer. However, the court stated in the judgment that "this judgment is rendered without prejudice to any rights which Donnell Elliott, one of the plaintiffs, may have in the estate of his late father, Henry Elliott, under the provisions of Sec. 31-45 of the General Statutes of North Carolina."

To the signing of the judgment sustaining the demurrer, plaintiffs object and except, and appeal to the Supreme Court, and assign error.

D. Emerson Scarborough for plaintiffs, appellants.

Burns & Long for defendant, appellee.

WINBORNE, J. Whether the facts and circumstances alleged in the complaint, if supported by competent evidence, be basis on which may be founded a challenge to the validity of the will of Henry Elliott, *In re Will of Redding,* 216 N.C. 497, 5 S.E. 2d 544; *In re Will of West,* 227 N.C. 204, 41 S.E. 2d 838, is not presented by this appeal. Such question would be for another forum.

The question here is this: Under the laws of the State of North Carolina does the obligation of a father to provide necessary support for his minor children terminate at his death? The effect of the ruling of the court from which this appeal is taken is that on the facts alleged in the complaint of plaintiffs such obligation does terminate with that event. And we concur.

While the duty or obligation of a father to support his children during minority has been the subject of decision in opinions of this Court, *Wells*

v. Wells, 227 N.C. 614, 44 S.E. 2d 31, 1 A.L.R. 2d 905, the question above stated has not been presented or decided by this Court.

Indeed, in brief of attorney for plaintiffs, the appellants, filed on this appeal, the argument is opened with this statement: "It does not appear that this particular situation is covered by statutory law in North Carolina, or that the question has been previously presented to this Court. Therefore, it becomes necessary for the plaintiffs to rely upon the common law to support their cause."

Hence, and rightly so, we look to the common law,—for so much of the common law as has not been abrogated or repealed by statute is in full force and effect within this State. G.S. 4-1, formerly C.S. 970. Among other cases, see *S. v. Hampton,* 210 N.C. 283, 186 S.E. 251; *Merrell v. Stuart,* 220 N.C. 326, 17 S.E. 2d 458; *S. v. Batson,* 220 N.C. 411, 17 S.E. 2d 511; *S. v. Emery,* 224 N.C. 581, 31 S.E. 2d 858; *Hoke v. Greyhound Corp.,* 226 N.C. 332, 38 S.E. 2d 105; *Moche v. Leno,* 227 N.C. 159, 41 S.E. 2d 369; *S. v. Sullivan,* 229 N.C. 251, 49 S.E. 2d 458; *Scholtens v. Scholtens,* 230 N.C. 149, 52 S.E. 2d 350; *Ionic Lodge v. Masons,* 232 N.C. 648, 62 S.E. 2d 73.

In this connection, we find in American Jurisprudence this statement: "By the rules of the common law, a father is under no obligation to provide for the support of his infant children after his death; his liability for their support is held to terminate with that event, and no claim therefor survives against his estate." 39 Am. Jur. at 647, Parent and Child, Sec. 40.

And in Corpus Juris Secundum, referring to duration of father's duty, and death of father, the writer states: "The duty of the father to support and maintain his child . . . is a continuing one and endures until legally terminated. In the absence of an agreement, the father's duty to furnish support to his children ordinarily ceases on his death, and thereafter at common law . . . the duty of supporting the child devolves on the mother, except in certain instances . . ." 67 C.J.S., Parent and Child, Sec. 15, citing these cases: *Rice v. Andrews,* 217 N.Y.S. 528, 127 Misc. 826; *Haimes v. Schonwit,* 50 N.Y.S. 2d 717, modified on other grounds, 52 N.Y.S. 2d 272, 268 App. Div. 652; *Silberman v. Brown,* Com. Pl. 72 N.E. 2d 267; *Robinson v. Robinson,* 50 S.E. 2d 455.

In *Rice v. Andrews, supra,* a case where in a divorce proceeding the father had been given the custody of his son, the New York Court said: "The obligation under the decree is still a personal one, and does not constitute a debt of the parent. It cannot, therefore, be made operative upon his estate after his death."

In *Silberman v. Brown, supra,* the Court recognizes the principle, epitomized in headnote, that "In absence of any agreement, a father's liability for support of a minor child ordinarily terminates at father's death."

And in *Robinson v. Robinson, supra,* the Supreme Court of West Virginia considered the question as to whether the force and effect of a decree in a divorce proceeding, for maintenance and support of infant children, operated beyond the death of their father against whom the decree was entered, and rested decision on the case of *Blades v. Szatai,* 151 Md. 644, 135 A. 841, 50 A.L.R. 232. *Fox, J.,* writing for the Court, quotes from the *Blades case* the following: "A father is under the common-law obligation to support his child during the latter's minority without regard to a divorce decree prescribing the amount and to whom payable, unless it orders that the child be supported by another," and "A father's obligation to support his child during the latter's minority ceases at the father's death, no matter what the child's age may be, and his estate is not liable for payments accruing thereafter under a divorce decree." And the writer, continuing, said: "This decision is founded upon the theory that the common-law obligation of a father to support his child ceases upon his death, and that, upon that event, the interest of the child in his estate is based upon the statutory right of inheritance, where the father dies intestate, but, subject, of course, to the right of a father to disinherit a child by the execution of a will; and upon the further theory that, to hold otherwise would be to disrupt the general theory of inheritance, prefer one child over another, and interfere with the common rules firmly established by statute law, governing the descent and distribution of the property of a decedent." And the Court declared that the common law obligation is one which, under all the authorities, ceases at the death of the father.

While these authorities are not controlling on this Court, yet they point out with convincing effect the common law rule that the obligation of a father to support his minor children ceases upon his death,—a rule which has not been abrogated or repealed by statute in North Carolina. And hence is still in effect. G.S. 4-1.

This rule is consonant with general statutes enacted by the General Assembly of North Carolina pertaining to (1) Administration of estates, Chapter 28, including Article 17 thereof prescribing rules as to distribution; (2) Rules of descent, Chapter 29; (3) Widow's year's allowance, Chapter 30, Article 4, and (4) Wills, Chapter 31.

The relation of parent and child is a status, and not a property right. 67 C.J.S. 628, Parent and Child 2. Indeed, this Court, in the case of *Ritchie v. White,* 225 N.C. 450, 35 S.E. 2d 414, in opinion by *Stacy, C. J.,* had this to say: "It is the public policy of the State that a husband shall provide support for himself and family . . . This duty he may not shirk, contract away, or transfer to another . . . It is not 'a debt' in the legal sense of the word, but an obligation imposed by law, and penal sanctions are provided for its willful neglect or abandonment . . ." See also

Article 40 of Chapter 14 of General Statutes entitled "Protection of the family." These statutes are personal ones.

Finally it may be said that this Court does not make the law. This is the province of the General Assembly. *Roberts v. Roberts,* 185 N.C. 566, 118 S.E. 9; *Scholtens v. Scholtens, supra.* And the General Assembly has not seen fit to modify the common-law rule that the obligation of a parent to support his children during minority terminates on the death of the parent.

Hence the judgment, sustaining the demurrer to the complaint, is Affirmed.

W. H. ROWE AND HERMINE S. ROWE v. CITY OF DURHAM, A MUNICIPAL CORPORATION.

(Filed 27 February, 1952.)

1. Dedication § 4—

Sale of lots by deeds referring to a registered plat showing streets is but an offer of dedication as far as the public is concerned and is not a completed dedication to the municipality until such offer is accepted.

2. Dedication § 6—

An offer of dedication by sale of lots with reference to a registered plat may be withdrawn at any time before acceptance as far as the rights of the municipality are concerned, and sale of the land by the dedicator without reference to streets or lots is a withdrawal.

3. Dedication § 4—

A municipality is without power to accept an offer of dedication of a street which lies beyond its territorial limits.

4. Dedication § 6—

The owner of land subdivided same and sold lots therein with reference to a registered plat showing streets. Thereafter the owner sold a parcel of the land on the outskirts of the tract without reference to streets or the registered plat. Later all the land was incorporated into the city by an extension of its limits. *Held:* The offer of dedication as to the parcel sold without reference to streets was withdrawn by the dedicator before the dedication could have been accepted by the municipality, and therefore the municipality may not assert any rights in streets in such parcel.

APPEAL by plaintiffs from *Hatch, Special Judge,* April 1951 Civil Term, DURHAM.

Civil action to determine the rights of the parties with respect to a strip of land now situate in the corporate limits of the City of Durham.

A statement of the pertinent facts is as follows: On and prior to March, 1918, Mrs. S. K. Hester owned 70⅔ acres of land situate beyond

the western limits of the city of Durham. In March, 1918, Mrs. Hester caused the tract of land to be subdivided and platted into the "Hester Subdivision," plat of which was made by J. B. Harding, engineer, and is of record in Plat Book 5, at page 61, Durham County Registry. On said plat there appear the outlines of several streets, some of which run generally east and west, while others run generally north and south. Of the streets running generally north and south, Alabama Street is farthest west, and of those running generally east and west, Woodrow Street is most southerly. The parcel of land in question is 50 feet wide and 150.5 feet long lying between the border lines of Woodrow Street if extended west of Alabama Street.

On 30 April, 1918, Mrs. Hester by power of attorney appointed W. D. Hester her attorney-in-fact with full authority to sell any and all of said 70⅔ acres of land upon such terms and conditions as he deemed advisable, which power of attorney was duly recorded and is of record in Book 54, at page 412. Pursuant to such authority, W. D. Hester conveyed a number of lots by number and reference to said plat to various persons, all of which deeds are duly and properly recorded. Each of the lots conveyed by W. D. Hester, attorney-in-fact, lies east of Alabama Street.

On 10 June, 1918, Mrs. Hester conveyed to W. D. Hester by metes and bounds description and without reference to any plat or subdivision a tract containing 3.28 acres, being all of that portion of the 70⅔ acres lying west of Alabama Street as shown on the "Hester Subdivision." The parcel of land in question was included in this 3.28 acre tract. This deed was duly recorded on 21 March, 1919, and is of record in Book 56, at page 151.

In December, 1922, W. D. Hester caused to be made and recorded in Plat Book 3, at page 190, a plat of a 14.65 acre tract of land lying west of and adjacent to Alabama Street, which tract includes the said 3.28 acre parcel. This plat shows Woodrow Street intersecting Alabama Street from the east but not crossing to the west thereof, and does not designate the land in question as a part of Woodrow Street.

On 11 December, 1922, W. D. Hester conveyed to George B. Whitted without reference to the plat of the "Hester Subdivision" the said 14.65 acre tract. The Whitted deed is of record in Book 67, at page 259.

In December, 1923, George Whitted subdivided the said 14.65 acre tract, thereby showing the 3.28 acre tract as lots numbered 1 to 19, inclusive. The plat of this subdivision is known as the "Geo. B. Whitted Home Place" and is recorded in Plat Book 3, at page 3. The street appearing as Alabama Street on the "Hester Subdivision" is designated as Alabama Avenue on the Whitted plat. This plat makes no reference to the "Hester Subdivision," nor does it show the outline of any street extending west of

Alabama Avenue. It is admitted that Lot No. 19 on the Whitted plat is the lot in dispute.

It is also admitted that none of the land hereinbefore referred to was within the corporate limits of the city of Durham until the fall of 1925, when the City limits were extended westward. The plaintiff claims the lot in question as a successor in title under Mrs. S. K. Hester. Alabama Avenue was paved after the property shown on the "Hester Subdivision" was included in the corporate limits of the city of Durham.

A trial by jury was waived and by consent the presiding judge found the facts. The court held that the recordation of the plat of the "Hester Subdivision" constituted a dedication of the lot in question for street purposes and that the conveyance of all the property lying west of Alabama Street as shown on the plat of the "Hester Subdivision" by Mrs. Hester did not constitute a withdrawal of said lot from her offer of dedication.

From the judgment rendered accordingly, plaintiff appealed, assigning errors.

Brawley & Brawley for plaintiffs, appellants.
Claude V. Jones for defendant, appellee.

VALENTINE, J. This litigation, stripped to its essentials, questions the right of Mrs. S. K. Hester to withdraw the lot in question from her offer of dedication arising from the recordation of the plat of the "Hester Subdivision." Only the city of Durham is attempting to assert any rights against the plaintiffs with respect to the property in question.

It is true that a purchaser of a lot which has been sold by reference to a subdivision, a plat of which has been recorded, acquires the equitable right to have the street appearing on the map opened for his benefit. *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; *Broocks v. Muirhead,* 223 N.C. 227, 25 S.E. 2d 889.

However, "as between an owner of land and the public, the mere sale of lots with reference to a map or plat showing streets is not alone sufficient to constitute an irrevocable dedication to the public. Acceptance by the public is necessary." Thompson on Real Property, Vol. 2, section 493.

An offer to dedicate property as a street or park is revokable until the offer is accepted. Neither burden nor benefits may be imposed upon the public unless some agency authorized to do so has assumed responsibility under the offer of dedication. *Irwin v. Charlotte,* 193 N.C. 109, 136 S.E. 368.

An offer of dedication is revokable as far as a municipality is concerned, unless there has been an acceptance of the offer prior to the withdrawal thereof. An offer of dedication is withdrawn if before the acceptance of the offer the dedicator sells the land including the alleys or streets appearing on the plat as a tract of land without reference to the streets or lots. *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,* 169 N.C. 606, 86 S.E. 695; *Wittson v. Dowling, supra; Irwin v. Charlotte, supra; R. R. v. Ahoskie,* 202 N.C. 585, 163 S.E. 565; *Gault v. Lake Waccamaw,* 200 N.C. 593, 158 S.E. 104; *Lee v. Walker,* 234 N.C. 687, 68 S.E. 2d 664.

Speaking to the identical question here presented, this Court has said: "We think there is a distinction between land that is in a municipality mapped and platted and deeds made to the lots in which streets, squares and commons are dedicated and accepted by the municipality, and land that is mapped or platted and deeds made to the lots in which streets, squares and commons are dedicated outside a municipality. . . . 'The intention of the owner to dedicate and acceptance thereof by the public are the essential elements of a complete dedication. . . . The general rule, however, seems to be that the platting of land and the sale of lots pursuant thereto constitute a dedication, if it may be so called, of the public places delineated upon the plat only as between the grantor and purchaser, and that, so far as the municipality is concerned, such acts amount to a mere offer of dedication, and there is no complete dedication without an acceptance of some kind by the municipality.'" *Gault v. Lake Waccamaw, supra* (pp. 598, 599).

A municipality is without power to accept an offer of dedication of a street which lies without its territorial limits. *St. Louis v. St. Louis University,* 88 Mo. 155, 159. "In Elliott on Roads and Streets, Vol. 1, 4th Ed., part sec. 122, at p. 140, is the following: 'Dedication is the setting apart of land for the public use. It is essential to every valid dedication that it should conclude the owner, and that, as against the public, it should be accepted by the proper local authorities or by general public user.'" *Gault v. Lake Waccamaw, supra* (bottom p. 600).

When the map of the "Hester Subdivision" was placed on record, it constituted an offer to dedicate as a part of a public street the lot of land in question, but, when on 10 June, 1918, the dedicator conveyed all the land west of Alabama Avenue by metes and bounds description without reference to any streets or lots or plat, she, by this action, withdrew her offer of dedication. At that time the city of Durham had no jurisdiction over the land covered by the "Hester Subdivision" and therefore had no authority to accept the offer of dedication at the time it was made or at any time before it was withdrawn. Nothing done or attempted by the

city of Durham can have the effect of reviving the offer of dedication, which was effectively withdrawn long before the territorial limits of the municipality were extended to include the "Hester Subdivision." It follows, therefore, and we hold that the city of Durham acquired no rights by virtue of the offer of dedication in the land west of Alabama Street situate between the parallel lines of Woodrow Street as shown on the plat of the "Hester Subdivision."

The judgment of the court below is set aside and the cause is remanded for judgment in accord with this opinion.

Reversed.

W. C. MORRISETTE v. THE A. G. BOONE COMPANY, THE GREAT ATLANTIC & PACIFIC TEA COMPANY AND VANCE WOODS.

(Filed 27 February, 1952.)

1. Negligence § 19c—

Nonsuit on the ground of contributory negligence is proper only when the plaintiff's own evidence, considered in the light most favorable to him, establishes contributory negligence as the only reasonable conclusion deducible therefrom.

2. Automobiles § 8i—

A driver on a servient highway before entering upon an intersection with a dominant highway is under duty to exercise due care to see that such movement can be made in safety, and it is not sufficient for him to stop and look at a point too distant from the intersection to see oncoming traffic if from a nearer point before entering the intersection he can see whether traffic is approaching along the dominant highway, since his looking must be timely so that his precaution may be effective. G.S. 20-158.

3. Same: Automobiles § 18h (3)—

Plaintiff's own evidence tended to show that he was traveling along the servient highway, stopped at the stop-sign some thirty feet from the intersection and looked in both directions without seeing a vehicle approaching or hearing any warning, and then drove upon the intersection at the rate of ten or twelve miles per hour without again looking to either side, and struck the side of defendant's trailer-truck, which approached the intersection from plaintiff's right along the dominant highway. *Held:* Plaintiff's evidence discloses contributory negligence barring recovery as a matter of law.

APPEAL by plaintiff from *Sharp, Special Judge,* October Term, 1951, of PASQUOTANK. Affirmed.

This was an action to recover damages for injury to person and property growing out of a collision between plaintiff's automobile and the motor truck of defendant Boone Company at an intersection of highways. Plaintiff alleged negligence on the part of the defendants. The defend-

ants denied the allegations of negligence and pleaded the contributory negligence of the plaintiff.

At the close of all the evidence defendants' renewed motion for nonsuit was allowed, and from judgment dismissing the action plaintiff appealed.

Wayland P. Britton and John H. Hall for plaintiff, appellant.

McMullan & Aydlett for defendants, appellees.

DEVIN, C. J. The judgment of nonsuit as to the defendant Atlantic & Pacific Tea Co. was not challenged, but plaintiff assigns error in the ruling of the court below in allowing the motion to nonsuit as to defendant Boone Company and its driver, defendant Woods. The material facts were these:

On 10 July, 1950, about 3:30 p.m. plaintiff was driving his automobile in a westward direction on Highway 264. A slight rain was falling. Approaching the intersection with North-South Highway 59, plaintiff observed the highway stop-sign and stopped his automobile opposite the sign 30 feet from the intersection. After looking in both directions along Highway 59 and seeing no vehicle approaching and hearing no signal, he drove into the intersection and had reached the center of the intersection when a car or truck, which he afterward learned was the trailer-truck of defendant Boone Company, traveling south on 59 suddenly appeared in front of him, and his automobile struck the side of the trailer about midway, resulting in the injuries complained of. Plaintiff testified he drove from his stopped position at the rate of 10 or 12 miles per hour and had driven 30 or 35 feet when the collision took place in the intersection just over the center line; that he did not see the truck before he ran into it. Both highways are paved and practically level, the paved surface of Highway 59 being 21 feet wide, with shoulders 6 to 8 feet wide. Looking north from the intersection Highway 59 is straight. From the stop-sign plaintiff had an unobscured vision to his right of 200 to 250 feet. He testified that after looking to right and left, up and down Highway 59, he did not look again after starting into the intersection but looked only in the direction he was traveling.

Defendants' evidence was sharply contradictory. It tended to show that the truck was being driven at the rate of 30 miles per hour, that the stop-sign was 50 feet east of the intersection, and that from that point there was an unobstructed view north along Highway 59 of a mile or more, and that plaintiff drove his automobile into the intersection at the rate of 45 or 50 miles per hour without slowing or stopping.

As there were inferences reasonably deducible from plaintiff's evidence indicating negligence on the part of defendant Boone Company and its driver, proximately causing the injuries complained of, the propriety of

the judgment of involuntary nonsuit must depend on whether the evidence offered by plaintiff established such contributory negligence on his part as to justify the ruling of the court below on that ground.

In determining this question we are governed by the rule that the plaintiff's evidence must be considered in the light most favorable for him, and that a judgment of nonsuit on the ground of contributory negligence may be rendered only when a single inference leading to that conclusion can reasonably be drawn from the evidence. *Donlop v. Snyder,* 234 N.C. 627, 68 S.E. 2d 316; *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; *Graham v. Gas Co.,* 231 N.C. 680, 58 S.E. 2d 757; *Bundy v. Powell,* 229 N.C. 707, 51 S.E. 2d 307; *Barlow v. Bus Lines,* 229 N.C. 382, 49 S.E. 2d 793; *Hampton v. Hawkins,* 219 N.C. 205, 13 S.E. 2d 227; *Diamond v. Service Stores,* 211 N.C. 632, 191 S.E. 358.

Under the circumstances described by the plaintiff, it was his duty before starting from his position on a subservient highway into a dominant highway to exercise due care to see that such movement could be made in safety. G.S. 20-154; *Matheny v. Motor Lines,* 233 N.C. 673, 65 S.E. 2d 361; *S. v. Hill,* 233 N.C. 61, 62 S.E. 2d 532; *Cab Co. v. Sanders,* 223 N.C. 626, 27 S.E. 2d 631; *Reeves v. Staley,* 220 N.C. 573, 18 S.E. 2d 239. "The purpose of highway stop-signs is to enable the driver of a motor vehicle to have opportunity to observe the traffic conditions on the highways and to determine when in the exercise of due care he might enter upon the intersecting highway with reasonable assurance of safety to himself and others." *Matheny v. Motor Lines, supra; S. v. Satterfield,* 198 N.C. 682, 153 S.E. 155.

The only evidence offered by the plaintiff as to the circumstances of the collision was his own testimony. He said: "I stopped abreast of the stop-sign, and I was about 30 feet from the intersection. . . . From the point where I stopped by the stop-sign you could see approximately 250 feet up the highway to the north. After I looked to the right and left up and down Highway 59 I did not look to the right or left any more after I started into the intersection. . . . I just stopped and looked and went ahead." Was the plaintiff exercising reasonable prudence in driving for a distance of 30 or 35 feet toward and into a dominant highway without again looking, after once looking at the time he stopped, to see if a vehicle was approaching along the road he intended to cross? If by again looking he could have seen the truck in time to have stopped before striking it, the obligation of due care for his own safety required that he do so. According to his testimony he never saw the truck at all but violently collided with an object which he learned afterwards was defendant's truck. *Powers v. Sternberg,* 213 N.C. 41, 195 S.E. 88. This was in the midafternoon of a summer day. The light rain was insufficient to obscure

his vision. According to the evidence the truck and trailer were 42 feet long, and the trailer 11 or 12 feet high. It was plaintiff's duty to look and see what was in plain sight. It is not sufficient for the driver of a motor vehicle on approaching an intersection of highways to content himself with looking once from a point whence he cannot see oncoming traffic, if from a nearer point before entering the intersection another look would reveal the danger of collision. His looking must be timely so that his precaution may be effective. *Godwin v. R. R.*, 220 N.C. 281, 17 S.E. 2d 137; *McRoy & Co. v. R. R.*, 234 N.C. 672, 68 S.E. 2d 405. In *Parker v. R. R.*, 232 N.C. 472, 61 S.E. 2d 370, the plaintiff looked for the train and did not see it, but did not look at a nearer point from which he could have seen it in time to have stopped and avoided injury. In holding plaintiff barred by his contributory negligence *Justice Barnhill*, speaking for the Court, said: ". . . the plaintiff having looked one time, looked no more."

A careful examination of plaintiff's testimony leads to the conclusion that in driving into the highway he failed to look at a time when by looking he could have seen defendant's truck in time to have stopped and avoided the collision. *Harrison v. R. R.*, 194 N.C. 656, 140 S.E. 598; *Bailey v. R. R.*, 223 N.C. 244, 25 S.E. 2d 833; *Carruthers v. R. R.*, 232 N.C. 183, 59 S.E. 2d 782; *Matheny v. Motor Lines, supra; Bergendahl v. Rabeler*, 133 Neb. 699; *Hittle v. Jones*, 217 Iowa 598. Unquestionably the truck was moving on the dominant highway toward the intersection. The plaintiff by looking, after he had moved up to or had entered into Highway 59, could and should have seen so large an object as defendant's truck approaching, and, as plaintiff was moving at a speed of 10 miles per hour, undoubtedly he could then have stopped before he crossed the center line of the highway and struck the truck. His failure to look when by looking he could have seen and avoided injury must be held to bar his recovery therefor.

We conclude that the ruling of the court below allowing the motion to nonsuit must be upheld and judgment

Affirmed.

W. H. BARTLETT v. C. R. HOPKINS.

(Filed 27 February, 1952.)

1. Constitutional Law § 22: Jury § 7—

The constitutional right to trial by jury in controversies at law respecting property may be waived. Art. IV, Sec. 13.

2. Same: Reference § 14a—

A compulsory reference does not deprive a litigant of his constitutional right to trial by jury, but he may waive such right by failing to follow the procedural requirements to preserve it.

3. Reference § 14a—Procedure to preserve right to jury trial in compulsory reference.

In order for a party to a compulsory reference to preserve his right to trial by jury he must (1) object to the order of compulsory reference at the time it is made; (2) file specific exceptions to particular findings of fact within thirty days after the referee's report is delivered to the clerk, G.S. 1-195; (3) formulate appropriate issues of fact raised by the pleadings and based on the facts pointed out in his exceptions, and tender such issues with his exceptions; (4) set forth in his exceptions to the referee's report a definite demand for jury trial on each issue so tendered; and failure to comply with any one of these requirements waives his right to jury trial.

4. Trial § 31a—

An instruction to the effect that it was the province, privilege, and prerogative of the jury to answer the issues in a certain manner must be held for reversible error, since the jury does not have arbitrary power to answer the issues irrespective of the evidence but must declare the truth as to the issues of fact submitted to them.

APPEAL by plaintiff from *Halstead, Special Judge,* and a jury, at September Term, 1951, of PASQUOTANK.

Civil action involving an express contract for the construction of a building.

The plaintiff sued to recover the remainder of the contract price for work done and materials furnished by him in the construction of a building for the defendant on a lot in Elizabeth City, and to enforce a contractor's lien against the property. The defendant denied liability, and pleaded two counterclaims, one for money paid by him to the defendant in excess of the contract price, and the other for damages for defective work in the construction.

Since the trial of the issues of fact required the examination of long accounts on both sides, the Honorable Leo Carr, the presiding judge at the June Term, 1949, of the Superior Court of Pasquotank County, entered an order of compulsory reference under G.S. 1-189 (1), directing J. N. Pruden, Esquire, as referee, to hear and decide all the issues. The defendant duly excepted to the order of reference at the time it was made.

The referee heard the testimony of the parties in support of their respective allegations, and made a report wholly favorable to the plaintiff. The defendant forthwith filed exceptions to the referee's findings of fact and conclusions of law. He tendered six issues of fact with his exceptions to the referee's report, but he did not set forth in such exceptions any demand for a jury trial on any of the issues.

When the cause came on for hearing before the Honorable W. I. Halstead, the presiding judge at the September Term, 1951, of the Superior Court of Pasquotank County, the plaintiff asserted, in substance, that the defendant had waived his right to trial by jury, and moved the judge, in essence, to pass upon the defendant's exceptions to the referee's findings of fact himself. The judge denied the plaintiff's motion on the ground that the defendant had duly preserved his right to trial by jury, and proceeded to try the cause before a jury upon the evidence taken before the referee.

The judge submitted the following two issues to the jury in lieu of those tendered by the defendant with his exceptions to the referee's report:

1. Is the defendant C. R. Hopkins indebted to the plaintiff W. H. Bartlett, and, if so, in what amount?

2. Is the plaintiff W. H. Bartlett indebted to the defendant C. R. Hopkins, and, if so, in what amount?

The jury answered both issues "Nothing," and the judge entered a judgment adjudging that neither party was entitled to recover anything of the other and taxing the plaintiff with the costs. The plaintiff excepted to the judgment and appealed to the Supreme Court, assigning errors.

John H. Hall for plaintiff, appellant.

J. Henry LeRoy for defendant, appellee.

ERVIN, J. The Constitution of North Carolina guarantees to every litigant the right of trial by jury in controversies at law respecting property. Art. I, sec. 19. But such right can be waived. Art. IV, sec. 13.

Under the code of civil procedure, the court has discretionary power to order a compulsory reference in any case falling within the purview of the statute now codified as G.S. 1-189. *Veazey v. Durham,* 231 N.C. 354, 57 S.E. 2d 375. Such reference does not deprive a litigant of his constitutional right to have the issues of fact raised by the pleadings and the evidence offered in support thereof determined by a jury if proper steps are taken to preserve such right. *Cherry v. Andrews,* 229 N.C. 333, 49 S.E. 2d 641; *Chesson v. Container Co.,* 223 N.C. 378, 26 S.E. 2d 904; *Brown v. Broadhurst,* 197 S.E. 738, 150 S.E. 355; *Brown v. Buchanan,* 194 N.C. 675, 140 S.E. 749; *Bradshaw v. Lumber Co.,* 172 N.C. 219, 90 S.E. 146; *Yelverton v. Coley,* 101 N.C. 248, 7 S.E. 672; *Carr v. Askew,* 94 N.C. 194. But a party to a compulsory reference waives his right to a jury trial by failing to take the proper steps to save it. *Cheshire v. First Presbyterian Church,* 225 N.C. 165, 33 S.E. 2d 866; *Baker v. Edwards,* 176 N.C. 229, 97 S.E. 16; *Robinson v. Johnson,* 174 N.C. 232, 93 S.E. 743; *Drug Co. v. Drug Co.,* 173 N.C. 502, 92 S.E. 376.

In order to preserve his right to a jury trial in a compulsory reference where the referee's report is adverse to him, a party must comply with each of these procedural requirements:

1. He must object to the order of compulsory reference at the time it is made. *Brown v. Clement Co.*, 217 N.C. 47, 6 S.E. 2d 842; *Booker v. Highlands*, 198 N.C. 282, 151 S.E. 635; *Trust Co. v. Jenkins*, 196 N.C. 428, 146 S.E. 68; *Story v. Truitt*, 193 N.C. 851, 138 S.E. 121; *Drug Co. v. Drug Co., supra; Wynn v. Bullock*, 154 N.C. 382, 70 S.E. 637; *Roughton v. Sawyer*, 144 N.C. 766, 56 S.E. 480; *Belvin v. Raleigh Paper Co.*, 123 N.C. 138, 31 S.E. 655; *Driller Co. v. Worth*, 117 N.C. 515, 23 S.E. 427, 118 N.C. 746, 24 S.E. 517; *Grant v. Hughes*, 96 N.C. 177.

2. He must file specific exceptions to particular findings of fact made by the referee within thirty days after the referee delivers his report to the clerk of the court in which the action is pending. G.S. 1-195; *Brown v. Clement Co., supra; Booker v. Highlands, supra; Wilson v. Featherstone*, 120 N.C. 446, 27 S.E. 124.

3. He must formulate appropriate issues of fact raised by the pleadings and based on the facts pointed out in his exceptions, and tender such issues with his exceptions to the referee's report. *Simmons v. Lee*, 230 N.C. 216, 53 S.E. 2d 79; *Cheshire v. First Presbyterian Church, supra; Brown v. Clement Co., supra; Bank v. Fisher*, 206 N.C. 412, 173 S.E. 907; *Cotton Mills v. Maslin*, 200 N.C. 328, 156 S.E. 484; *Booker v. Highlands, supra; Burroughs v. Umstead*, 193 N.C. 842, 137 S.E. 581; *Jenkins v. Parker*, 192 N.C. 188, 134 S.E. 419; *Ziblin v. Long*, 173 N.C. 235, 91 S.E. 837; *Alley v. Rogers*, 170 N.C. 538, 87 S.E. 326; *Keerl v. Hayes*, 166 N.C. 553, 82 S.E. 861; *Simpson v. Scronce*, 152 N.C. 594, 67 S.E. 1060; *Taylor v. Smith*, 118 N.C. 127, 24 S.E. 792.

4. He must set forth in his exceptions to the referee's report a definite demand for a jury trial on each issue so tendered. *Brown v. Clement Co., supra; Texas Co. v. Phillips*, 206 N.C. 355, 174 S.E. 115; *Cotton Mills v. Maslin, supra; Booker v. Highlands, supra; Ziblin v. Long, supra; Alley v. Rogers, supra; Mirror Co. v. Casualty Co.*, 153 N.C. 373, 69 S.E. 261; *Ogden v. Land Co.*, 146 N.C. 443, 59 S.E. 1027; *Roughton v. Sawyer, supra; Driller Co. v. Worth, supra.*

Since he made no demand in his exceptions to the referee's report for a jury trial on the issues tendered by him, the defendant waived his constitutional right to have a jury determine the controverted issues of fact. In consequence, the trial judge committed error in adjudging that the defendant had preserved his right of trial by jury, and in refusing on that ground to pass upon the exceptions to the referee's findings of fact himself.

Although the trial judge advised the jury in earlier portions of his charge that it should try the case according to the law and the facts, he

ended his instructions to the jury with this emphatic statement: "Gentlemen of the jury, it is your province and your privilege and your prerogative to answer both issues 'nothing.'"

The plaintiff's exception to this instruction must be sustained. An ancient legal maxim asserts that "a verdict is, as it were, the saying of the truth, as the judgment is the saying of the law." A verdict is supposed to be, and ought to be, a declaration of the truth as to the issues of fact submitted to the jury. *Mars. v. State,* 163 Ga. 43, 135 S.E. 410; *Groves v. State,* 162 Ga. 161, 132 S.E. 769; *Anthony v. Anthony,* 103 Ga. 250, 29 S.E. 923; *Wright v. Illinois & Mississippi Tel. Co.,* 20 Iowa 195; *State v. Blue,* 134 La. 561, 64 So. 411; *State v. Forrester,* 14 N.D. 335, 103 N.W. 625; *Vaughan v. Cade,* 31 S.C.L. 49; *Clark v. State,* 170 Tenn. 494, 97 S.W. 2d 644; *McBean v. State,* 83 Wisc. 206, 53 N.W. 497; *Shenners v. West Side St. R. Co.,* 78 Wis. 382, 47 N.W. 622. The instruction under scrutiny gave the jury to understand that it had the arbitrary power to answer both issues "nothing," irrespective of whether it thereby pronounced the truth.

The trial judge submitted the issues to the jury because of his erroneous view that the defendant had duly preserved his right to such mode of trial. The verdict and judgment are set aside, and the cause is remanded to the Superior Court to the end that the judge may review the defendant's exceptions to the referee's report in conformity with the procedure which obtains in references where trial by jury is waived. *Smith v. Hicks,* 108 N.C. 248, 12 S.E. 1035.

Error.

IN THE MATTER OF ORVILLE (ARVIL) V. J. SMITH.

STATE v. ORVILLE (ARVIL) V. J. SMITH.

(Filed 27 February, 1952.)

1. Criminal Law § 62e—

The presumption that sentences imposed in the same jurisdiction to be served in the same place or prison run concurrently does not obtain when the intent that the sentences are to be served consecutively appears in the judgment without resort to evidence *aliunde,* provided the time of the commencement of the second sentence is sufficiently definite.

2. Same—

Two sentences, in order to run concurrently, must be sentences to the same place of confinement.

3. Same—

While serving a single sentence of confinement in the State Prison defendant was sentenced for another offense to be confined in the common

jail of a county, "to take effect at the expiration of the sentence the defendant is now serving in the State Prison." *Held:* The intent that the second sentence should be served consecutively appears from the judgment itself and the time of the commencement of the second sentence is sufficiently definite, and further the two sentences are not to the same place of confinement, and therefore the sentences are to be served consecutively.

PETITION for writ of *certiorari.*

At the July Term 1944, Haywood County Superior Court, respondent pleaded guilty to a bill of indictment charging the crime of larceny and was sentenced to the State's prison. While serving this term he was put on trial in Jackson County on the charge of assault with a deadly weapon, which assault was committed after he had escaped from prison and before his recapture. He entered a plea of guilty and the court pronounced judgment that defendant be confined in the common jail of Jackson County for a term of eighteen months to be assigned to work on the State highways under the supervision of the State Highway and Public Works Commission, said sentence "to take effect at the expiration of the sentence the defendant is now serving in the State Prison."

Due to numerous escapes and other breaches of prison discipline, respondent did not complete the service of his first term until 11 September, 1951, at which time he was held in custody under a detainer notice for the purpose of serving the second sentence imposed in the Jackson County Superior Court. On 25 September he obtained a writ of *habeas corpus* on the allegation that under the law his two sentences were concurrent and not cumulative and therefore he has completed the service of both sentences and his present detention is unlawful.

On the return of the writ, Armstrong, J., on 8 October 1951, found the facts and concluded that the two sentences were concurrent and not consecutive and that the applicant "has completed the total time of service for which he could be lawfully imprisoned under said sentences and is now illegally restrained of his liberty." He thereupon entered his order discharging the prisoner from custody. The Attorney-General petitions this Court for a writ of *certiorari.*

Attorney-General McMullan, Assistant Attorney-General Moody, R. Brookes Peters, Laurence J. Beltman, and E. O. Brogden, Jr., for petitioner.

Wright T. Dixon, Jr., for respondent appellee.

BARNHILL, J. Has the respondent, in contemplation of law, completed the service of the sentence imposed in the Jackson County Superior Court on his plea of guilty to the charge of assault with a deadly weapon; or, stated differently, did that sentence and the sentence he was then

serving in the State prison for larceny run concurrently? This is the question posed for decision.

The respondent stressfully contends that the provision in the judgment last pronounced that said sentence was "to take effect at the expiration of the sentence the defendant is now serving in the State Prison" is ambiguous and too indefinite to evidence an intent on the part of the judge that the two sentences were to be served consecutively and therefore, under the general rule, they were to be served concurrently.

In support of his position he relies primarily on the case of *In re Parker,* 225 N.C. 369, 35 S.E. 2d 169. But the decision in that case, when correctly interpreted, can afford him little comfort. The only questions there decided were: (1) The attempted postponement of the beginning date of the second sentence was indefinite and uncertain and therefore incapable of enforcement; and (2) since defendant was confined in the same place of imprisonment under two separate commitments, and the attempted postponement of the beginning date of the sentence last imposed was void, the presumption that the two sentences were concurrent prevailed.

It is true the Court, in discussing the case, listed some of the acceptable *indicia* of an intent to make two or more sentences consecutive. Yet it must not be understood that this Court intended the list to be all-inclusive or to say all are required to evidence that intent. There are other *indicia* such as an order that defendant be incarcerated in a different place of confinement. And, in any event, all that is required is that the intent of the judge that the sentences are to be served consecutively shall be made to appear without resort to evidence *aliunde.*

"In the absence of a statute to the contrary, and unless it sufficiently appears otherwise in the sentence itself, it is generally presumed that sentences imposed in the same jurisdiction, to be served *at the same place or prison,* run concurrently, although imposed at different times, and by different courts and upon a person already serving sentences." (Italics supplied.) *In re Parker, supra; In re Black,* 162 N.C. 457, 78 S.E. 273; *S. v. Duncan,* 208 N.C. 316, 180 S.E. 595; 15 A.J. 123; 24 C.J.S. 1236; Anno. 70 A.L.R. 1511.

In applying this rule, due emphasis must be accorded the phrase "to be served at the same place or prison." It limits the universality of the rule and clearly demonstrates its inapplicability to the facts here presented.

The intent of the judge that the sentence in the assault case should begin at the expiration of the sentence in the larceny case is evidenced both by the language used and the fact the incarceration was to be at a different place of imprisonment. Certainly the two circumstances considered together are sufficient to disclose clearly that it was intended that the two sentences should run consecutively and not concurrently.

"When a term of imprisonment is still unexpired, the prisoner being in custody, the proper course at common law is to appoint the second imprisonment to begin at the expiration of the first, to be specifically referred to in the sentence; and a sentence to this effect, when the prior imprisonment is specified, is sufficiently exact." Whart. Criminal Law, 10th Ed., p. 2307; 24 C.J.S. 107; 15 A.J. 123; Anno. 70 A.L.R. 1511 *et seq.; In re Black, supra; S. v. Cathey,* 170 N.C. 794, 87 S.E. 532; *S. v. Duncan, supra; In re Parker, supra.*

Had the defendant been serving more than one term at the time he was sentenced in the assault case, the attempted postponement of the sentence in that case would be incapable of enforcement by reason of the uncertainty as to which one of the prior sentences reference was had. But such is not the case here. The respondent at the time was serving one and only one sentence in the State prison. There can be no reasonable doubt therefore as to the imprisonment to which the court had reference.

But we may concede, *arguendo,* that this provision in the assault case judgment is not sufficiently clear to work a postponement of the beginning date of that sentence. Even so, it is made to appear that the two sentences were to be cumulative in nature.

Two sentences, in order to run concurrently, must be sentences to the same place of confinement. *People v. Kennay,* 63 N.E. 2d 733; Anno. 70 A.L.R. 1512; 15 A.J. 123.

"Ordinarily sentences to different institutions are, in the very nature of things, cumulative and not concurrent." *Anthony v. Kaiser,* 169 S.W. 2d 47. "A sentence in the penitentiary and one adjudging that a man shall spend a certain time in the county jail cannot be served out concurrently." *Story v. State,* 27 S.W. 2d 204.

"Servitude in the United States penitentiary at Atlanta did not answer the requirement to serve one year in Mercer County Jail in New Jersey. The petitioner could not serve the term fixed for Mercer County jail until after he finished his term at Atlanta, Georgia." *Ex parte Lamar,* 274 F. 160, 24 A.L.R. 864, affirmed 260 U.S. 711, 67 L. Ed. 476.

At the time judgment was pronounced in the assault case, respondent was confined in the State prison. The court was without authority to require him to serve his sentence in the assault case in that institution. His incarceration there under a judgment in the assault case would have constituted an unlawful imprisonment. It was impossible for him to be in two places at one and the same time. It follows that the service of the prison term did not constitute a service of his sentence of imprisonment in the county jail. Therefore, respondent must be committed to the custody of the keeper of the common jail of Jackson County to the end that he may serve the sentence imposed or until he is otherwise discharged in some manner provided by law.

Petition allowed.

STATE v. REGINALD CUTHRELL.

(Filed 27 February, 1952.)

1. Criminal Law § 53f—

An instruction to the jury may not assume as true the existence or nonexistence of any material fact in issue. G.S. 1-180.

2. Arson § 2—

A "building" within the meaning of the arson statute (G.S. 14-62) is a structure which has arrived at such a stage of completion as to be usable for some useful purpose.

3. Same—

"Used" as employed in the arson statute (G.S. 14-62) means put to use in the occupation or business, and a single isolated instance may be sufficient. "Trade" as used in the arson statute embraces any ordinary occupation or business.

4. Arson § 8—

In a prosecution of defendant for willfully and feloniously procuring another to burn a building used in carrying on a trade, upon evidence permitting an inference that the structure had not been completed or used in the trade at the time of the fire, the court should submit to the jury the question of whether the structure had been completed within the meaning of the statute and whether it had been put to use in the occupation or business for which it was intended, and an instruction which assumes each of these facts must be held for prejudicial error.

5. Statutes § 11—

A statute creating an offense unknown to the common law must be construed as written.

APPEAL by defendant from *Crisp, Special Judge,* and a jury, at August Term, 1951, of CAMDEN.

Criminal prosecution tried upon a bill of indictment charging the defendant with the statutory felony of willfully and feloniously procuring Bobby Gene Bowers to burn a building located at a beach in Camden County and used by R. B. Cuthrell in carrying on a trade. (G.S. 14-62.)

The case was here on former appeal and was sent back because of error in the admission of evidence, 233 N.C. 274, 63 S.E. 2d 549.

On retrial, the State introduced Bobby Gene Bowers as a witness. He testified he burned the structure upon the procurement and counsel of the defendant and for a reward promised him by the defendant. R. B. Cuthrell then testified concerning the nature and condition of the structure when it was burned on 5 May, 1950. He said it was a frame structure about four or five feet above the water's edge at the beach, with entrance from the shore, and a terrace-porch out on the water side. It was a restaurant,—confectionary type of business, intended for organization

suppers like church and Sunday school picnics. It was a new building. The fixtures and equipment were new. Some of the fixtures and equipment were in the building, but all had not been uncrated at the time of the fire. The building was "practically built." It lacked "about two weeks for two carpenters for painting, adding on banisters and some work from the inside that needed to be done."

The State's witness, Cuthrell, further testified: "It was about a week before the fire that I had the opening night. . . . I had one college dance that used it without any sales, only for the floor. . . ."

There was a verdict of guilty as charged, and from judgment thereon the defendant appealed.

Attorney-General McMullan, Assistant Attorney-General Love, and R. B. Broughton, Member of Staff, for the State.

John A. Wilkinson and H. S. Ward for defendant, appellant.

JOHNSON, J. Throughout the charge the trial court seems to have assumed that the structure alleged to have been burned was "a building . . . used in carrying on . . . trade . . ." within the meaning of the statute (G.S. 14-62), whereas this involved disputed questions of fact which should have been determined by the jury under proper instructions by the court.

This statute makes it a felony to ". . . wantonly and wilfully . . . cause to be burned, or . . . procure the burning of (description of several types of building not pertinent to this case) or *any building or erection used in carrying on any trade or manufacture, . . .* " (Italics added).

The indictment in the instant case charges, among other things, that the defendant wilfully and feloniously procured Bobby Gene Bowers to set fire to and burn *"a certain building used in carrying on a trade,* to wit: a building in which was operated a restaurant and used for the sale of soft drinks and various confectionaries under the name of Texaco Beach, . . . said building being . . . in the possession of R. B. Cuthrell . . ." (Italics added).

Therefore, the burden rested on the State to prove that the defendant unlawfully procured the burning of (1) a structure that answered to the description of a "building" within the meaning of the statute, and also (2) that the structure was "used in carrying on a trade," within the purview of the statute. Findings by the jury concerning these two elements of the statutory offense charged were quite as essential to a conviction as proof of the fact of procuring the burning of the structure. The rule is that the trial court in charging a jury may not give an instruction which assumes as true the existence or nonexistence of any material fact in issue.

See G.S. 1-180 as rewritten. *S. v. Love,* 229 N.C. 99, 47 S.E. 2d 712; *Perry v. R. R. Co.,* 171 N.C. 158, 88 S.E. 156; 53 Am. Jur., Trial, Sec. 605. Besides, the defendant's plea of not guilty put to test the credibility of the testimony bearing upon these essential elements of the crime charged. *S. v. Snead,* 228 N.C. 37, 44 S.E. 2d 359; *S. v. Stone,* 224 N.C. 848, 32 S.E. 2d 651; *S. v. Peterson,* 225 N.C. 540, 35 S.E. 2d 645; *S. v. Davis,* 223 N.C. 381, 26 S.E. 2d 869; *S. v. Singleton,* 183 N.C. 738, 110 S.E. 846.

The duty rested upon the trial court to define and explain to the jury the meaning of (1) "building," and (2) "used in carrying on any trade," as used in the statute.

1. *Building.*—The word "building" embraces any edifice, structure, or other erection set up by the hand of man, designed to stand more or less permanently, and which is capable of affording shelter for human beings, or usable for some useful purpose. See 4 Am. Jur., Arson, Sec. 16; Curtis, The Law of Arson, Sec. 28, p. 38; 6 C.J.S., Arson, Sec. 6, p. 725; Webster's New International Dictionary, 2d Ed.; Funk & Wagnall's New Standard Dictionary. Ordinarily, in the absence of a statute to the contrary, an uncompleted structure, not ready for occupation or use, is not a "building" as that term is generally used in the law of arson. 6 C.J.S., Arson, Sec. 6, p. 728; 5 C.J., pp. 551 and 552; *Davis v. State,* 153 Ala. 48, 44 So. 1018. However, by the weight of authority, the word "building" as used in criminal burning statutes, does not necessarily imply a structure so far advanced as to be in every respect finished and perfect for the purpose for which it is designed eventually to be used; and if the structure is so far advanced in construction, although not completed, as to be ready for habitation or use, the burning of it may be violative of the statute. See 2 Am. Jur., Arson, Sec. 16; 71 Am. St. Rep. 266; 6 C.J.S., Arson, Sec. 42, p. 767; Curtis, The Law of Arson, Sec. 40, p. 45. Therefore, the question whether a structure has arrived at such a stage of completion as to constitute it a building may be and frequently is a question of fact for the jury to determine. 4 Am. Jur., Arson, Sec. 16.

2. *Used in carrying on any trade.*—In this phrase, the crucial words of the statute are "used" and "trade."

The verb "used," when referring to a place or thing, has two meanings recognized by all lexicographers and usually differentiated in common speech: (1) In one sense the word means to be the subject of customary occupation, practice, or employment. In this sense the word denotes the idea of habitual use, and implies a certain degree of continuity and permanence, and is sometimes used synonymously with the word "occupied." 66 C.J., pp. 74 and 75 (see also pp. 72 and 73); *Cuthrell v. Ins. Co.,* 234 N.C. 137, 66 S.E. 2d 649. See also Funk & Wagnall's New Standard Dictionary. (2) In another sense the word means to employ for a purpose, to put to its intended purpose, application to an end, the act of

using. 43 Words and Phrases, Perm. Ed., p. 48 *et seq.* In this sense a single isolated instance may be sufficient to fulfill the meaning of the word. 66 C.J., pp. 74 and 75; *S. v. Gastonguay,* 118 Me. 31, 105 A. 402. We think it is in this latter sense that the word "used" was intended to be employed in the statute at hand. Here it must be borne in mind we are dealing with a word that is descriptive of a criminal offense, as distinguished from fixing a contractual status. (*Cuthrell v. Ins. Co., supra.*)

The word "trade" as used in this statute means more than traffic in goods, and the like. It is used in its broader sense, and as such is synonymous with "occupation" or "calling." Thus the word "trade" as here used embraces any ordinary occupation or business, whether manual or mercantile. 63 C.J., pp. 231 and 234. 42 Words and Phrases, Perm. Ed., p. 152 *et seq.*

Accordingly, on the record as presented, it was for the jury to find and declare by their verdict, among other things, (1) whether the structure alleged to have been burned had arrived at such a stage of completion as to be usable for some useful purpose so as to make it a building within the meaning of the statute, and, if so, (2) whether it had been put to use in the occupation or business of the lessee Cuthrell prior to the fire.

The action of the trial court in assuming the existence of these disputed facts was prejudicial error.

The situation here presented brings into focus the need for clarifying the instant statute. Manifestly, its application in cases like this one would be simplified by extending its provisions to cover any structure, whether completed or in process of construction, used or intended to be used in any trade or manufacture. This, however, is a matter of policy to be pondered and determined solely by the lawmaking body. Here it must be borne in mind that the common law crime of arson embraces only a dwelling house and such structures as are within the curtilage. The extension of the crime, in modified forms, to the burning of other buildings and structures rests entirely upon statutory grounds. Therefore, in dealing with these felonious burning cases the courts can only construe and interpret the statutes as written.

For the reasons given, there must be a

New trial.

STATE v. LUCILLE M. GOODSON, MRS. FLOSSIE MANN, AND MRS. LONA MEADORS.

(Filed 27 February, 1952.)

Assault § 14b—Evidence held to require submission of right of self-defense and defense of relatives.

Prosecuting witness went to the home of his mother-in-law and forcibly carried his child from the house to his automobile, stating that he had a court order permitting him to have the child visit him. This prosecution for assault is based upon his affidavit charging an assault upon him by his wife, his mother-in-law and his aunt-in-law, made upon him as he was carrying the child to his car. The wife introduced testimony to the effect that her acts were in defense of herself and her child; the mother-in-law that her acts were in defense of her daughter and granddaughter; and the aunt-in-law that her acts were in defense of her niece and grandniece. *Held:* It was error for the court to fail to submit to the jury these defenses, since even though the prosecuting witness may not have been a trespasser in going upon the premises, his language and acts thereafter, if reasonably calculated to intimidate or lead to a breach of the peace, would constitute him a trespasser. G.S. 1-180.

APPEAL by defendants from *Armstrong, J.*, at September "A" Term, 1951, of BUNCOMBE.

Criminal prosecution upon three separate warrants issued out of justice of peace court, upon affidavit of Claude F. Goodson charging Lucille M. Goodson, Mrs. Flossie Mann and Mrs. Lona Meadors, respectively, with assault upon him, consolidated for trial in Superior Court, with warrant charging Claude F. Goodson with assault upon a female person, his wife.

The testimony of witnesses put on the witness stand both by the State and the *feme* defendants tends to show that the alleged hostile activities of Claude F. Goodson and the *feme* defendants centered around Judith Ann Goodson, 8-year-old daughter of Claude F. Goodson and his wife, the defendant Lucille M. Goodson, and granddaughter of the defendant Mrs. Lona Meadors, and grandniece of the defendant Mrs. Flossie Mann; that Claude F. Goodson and his wife were not living together,—that she and her mother, Mrs. Meadors, lived together; that on 5 June, 1951, about 6:30 p.m., Claude F. Goodson went to the home of his wife (she, her mother Mrs. Meadors, her aunt Mrs. Mann, and her child Judith Ann Goodson being there at the time), for the express purpose of getting the child,—saying that he had an order of the court permitting him to have the child visit him every other week; that he was admitted into the home by his wife, Mrs. Goodson; that the child "started crying," and he caught her and undertook to and did forcibly carry her from the house to an automobile outside, in the course of which the alleged hostilities allegedly transpired. A recital of the details would serve no useful purpose.

The testimony of defendant, Mrs. Goodson, tends to show that her acts were in defense of herself, and of her child.

The testimony of Mrs. Meadors is susceptible of the inference that her acts were in defense of her daughter, Mrs. Goodson, and her granddaughter, Judith Ann Goodson.

The testimony of defendant Mrs. Mann is susceptible of the inference that her acts were in defense of her niece and grandniece,—she being present in the home.

And the testimony offered by the *feme* defendants is susceptible of the inference that while Claude F. Goodson entered the home of his wife and his mother-in-law lawfully, his conduct therein was such as to constitute him a trespasser.

The case was submitted to the jury upon the question as to whether each of these defendants made an assault on Claude F. Goodson, without any reference to the principles of law relating to self-defense, or relating to right to fight in defense of family and habitation, or relating to trespass.

The verdict as to each defendant was guilty of simple assault.

Judgment as to each of the *feme* defendants: Confinement in the common jail of Buncombe County for thirty days, and assigned to do work in and about the county institutions as the county commissioners may direct. This prison sentence suspended on conditions stated.

Defendants except and appeal to the Supreme Court, and assign error.

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

Don C. Young for defendants, appellants.

WINBORNE, J. The exceptions chiefly relied upon by appellants are directed to failure of the judge, in charging the jury upon the trial below, to "declare and explain the law arising on the evidence given in the case," in accordance with requirements of G.S. 1-180, as amended by 1949 Session Laws, Chap. 107, in respect to right of each of them to avail herself of the right to fight in defense of herself, her family and her habitation.

A careful consideration of the evidence shown in the record leads this Court to conclude that these exceptions, assigned as error, are well taken. See *S. v. Spruill*, 225 N.C. 356, 34 S.E. 2d 142, and cases there cited.

In the *Spruill case* it is said that the right of a person to defend his home from attack is a substantive right, as is the right to evict trespassers from his home. Also it is there stated that when in the trial of a criminal action charging an assault, or other kindred crime, there is evidence from which it may be inferred that the force used by a defendant was in

defending his home from attack by another, he is entitled to have evidence considered in the light of applicable principles of law; and, that in such event, and to that end, it becomes the duty of the court to declare and explain the law arising thereon, G.S. 1-180, formerly C.S. 564, and the failure of the court to so instruct the jury on such substantive feature is prejudicial error,—even though there be no special prayer for instruction to that effect—citing cases. See also *S. v. Ardrey,* 232 N.C. 721, 62 S.E. 2d 53.

What is said in the *Spruill case, supra,* is applicable to the case in hand.

Moreover, "it is the law of this jurisdiction," as stated by *Stacy, C. J.,* in *Freeman v. Acceptance Corp.,* 205 N.C. 257, 171 S.E. 63, "that although an entry on lands may be effected peaceably and even with the permission of the owner, yet if, after going upon the premises of another, the defendant uses violent and abusive language and commits such acts as are reasonably calculated to intimidate or lead to a breach of the peace, he would be liable for trespass *civiliter* as well as *criminaliter* (*S. v. Stinnett,* 203 N.C. 829, 167 S.E. 63), for 'it may be, he was not at first a trespasser, but he became such as soon as he put himself in forcible opposition to the prosecutor.' *S. v. Wilson,* 94 N.C. 839," citing cases.

The Court then defines forcible trespass. See also *Whitfield v. Bodenhammer,* 61 N.C. 362; *May v. Telegraph Co.,* 157 N.C. 416, 72 S.E. 1059, 37 L.R.A. (N.S.) 912; *Anthony v. Protective Union,* 206 N.C. 7, 173 S.E. 6.

Other assignments of error need not now be considered, as the matters to which they relate may not recur on another trial.

For error pointed out, let there be a

New trial.

DARE COUNTY v. ALBERT L. MATER, INDIVIDUALLY AND TRADING AS "AL'S BINGO."

(Filed 27 February, 1952.)

1. Injunctions § 4d—

An action to abate a public nuisance may not be maintained by the County, though the members of the Board of Commissioners may, as individuals, be relators in an action prosecuted in the name of the State. G.S. 19-2.

2. Injunctions § 4g—

Injunction will not lie to restrain a defendant from carrying on a business upon allegation that he is unlawfully operating the business without a license, since there is an adequate remedy at law by indictment, and injunction ordinarily will not lie to enjoin a commission of a crime.

3. Appeal and Error § 6c (1)—

The Supreme Court will take notice *ex mero motu* of a fatal defect of party plaintiff.

APPEAL by defendant from *Crisp, Special Judge,* August Term, 1951, DARE.

Civil action in equity to restrain a public nuisance and the playing of the game of Bingo for cash prizes.

Plaintiff undertook to license the defendant to operate the game of Bingo for the year 1 May 1951 to 30 April 1952 as a business venture, as authorized by Ch. 940, Session Laws 1949, under a written contract imposing certain limitations upon the manner and method of operation.

On 7 August 1951, the Board of Commissioners of Dare County, after notice and hearing, revoked the license issued for breach of the terms of the license which incorporates the contract.

On 14 August 1951, plaintiff instituted this action to restrain the continued operation by the defendant of the game of Bingo. The facts as detailed in the complaint make it appear that defendant is unlawfully engaged in the operation of the game of Bingo for cash prizes without license and that he is conducting his place of business in such manner as to create a public nuisance. It is specifically alleged "That the defendant, by his manner and method of operating said game, and the use of a loudspeaker in connection therewith . . . is maintaining a common nuisance . . ." Plaintiff prays permanent injunctive relief.

When the cause came on for final hearing, the court, by its judgment, made permanent the temporary restraining order theretofore issued. Defendant excepted and appealed.

Martin Kellogg, Jr., and J. Henry LeRoy for plaintiff appellee.

Worth & Horner and Forrest V. Dunstan for defendant appellant.

BARNHILL, J. We need not now consider plaintiff's motion to strike defendant's purported case on appeal for the reason a fatal defect appears on the face of the record. *Lawrence v. Lawrence,* 226 N.C. 221, 37 S.E. 2d 496; *Bell v. Nivens,* 225 N.C. 35, 33 S.E. 2d 66; *S. v. Parnell,* 214 N.C. 467, 199 S.E. 601. In fact, it may be that the service of a case on appeal was not required. *Privette v. Allen,* 227 N.C. 164, 41 S.E. 2d 364.

If the plaintiff is seeking to abate a public nuisance—and the complaint may be so construed—it is without authority to maintain this action.

An action to abate a public nuisance by injunction or otherwise must be maintained in the name of the State, and our statute designates with particularity those who may become relators and prosecute the cause in

the name of the State. G.S. 19-2. See also G.S. 160-234, G.S. 130-25, and N. C. Const., Art. VII, sec. 2. While the members of the Board of Commissioners may, as individuals, become relators, G.S. 19-2, they may not prosecute this action in the name of the County.

Ch. 940, Session Laws 1949, authorizes the playing of the game of Bingo in Dare County when the operator is duly licensed by the Board of Commissioners of Dare County. However, the statute does not specifically authorize the operator to offer prizes of any type to the winners. And any contention that the Act may be so construed as to constitute an amendment, by implication, of our general statute prohibiting gambling, G.S. Ch. 14, Art. 37, would be of dubious merit. Be that as it may, the plaintiff alleges that defendant's license to conduct the game of Bingo in Dare County has been duly revoked and that he continues his said business in the County without license and is offering cash prizes to the winners. Therefore, if upon these allegations, this cause be construed as an action to enjoin the violation of the criminal laws, it may not be maintained for the reason the plaintiff has an adequate remedy at law by indictment.

With certain limited exceptions "there is no equitable jurisdiction to enjoin the commission of a crime." *Hargett v. Bell,* 134 N.C. 394. Ordinarily, injunctive relief is available only "where some private right is a subject of controversy." *Patterson v. Hubbs,* 65 N.C. 119; *Motor Service v. R. R.,* 210 N.C. 36, 104 A.L.R. 1165; 185 S.E. 479; *City of Fayetteville v. Distributing Co.,* 216 N.C. 596, 5 S.E. 2d 838; *Clinton v. Ross,* 226 N.C. 682, 40 S.E. 2d 593; *Railway Co. v. Raleigh,* 219 F. 573, affirmed 242 U.S. 15, 61 L. Ed. 121.

Upon the trial of defendant under an indictment, he may assert his affirmative defense, to wit: He was duly licensed to operate a place of business at which the game of Bingo was played and his license has not been lawfully revoked. Thus the main issues the parties seek to present in this cause may there be fully heard and determined.

In so far as this is an action to abate a public nuisance by injunction, there is a fatal defect of party plaintiff, of which the Court must take notice *ex mero motu.* Considered as an action to restrain the violation of the criminal law, the complaint fails to state a cause of action. *Hopkins v. Barnhardt,* 223 N.C. 617, 27 S.E. 2d 644. In either event, it must be dismissed. The cause is remanded with instruction that the court below enter judgment dismissing the action.

Remanded.

MACK BRITE, ELLEN BALLANCE, AND JAMES W. BRITE v. FRANK LYNCH, RUTH M. SPENCE, ROLAND C. LYNCH, HORACE W. LYNCH, AND JOSIAH B. LYNCH.

(Filed 27 February, 1952.)

1. Descent and Distribution § 10a—

Father and son successively held the land in question. The son died intestate without issue, survived by a half-sister. *Held:* If title by adverse possession ripened in the father, then the son acquired title by descent, and upon his death the land would pass to his collateral heirs of the blood of his father; but if title by adverse possession ripened in the son, the son became a new *propositus* and upon his death without issue the land would pass to his half-sister. Canons of Descent, Rules 4 and 6.

2. Same: Adverse Possession § 7—

Where father and son hold land successively, but title by adverse possession has not ripened in the father at the time of his death, the son's possession is not tacked to that of the father so as to ripen title in the father, but would serve only to vest title in the son as a new *propositus* from whom descent would be traced.

3. Ejectment § 10—

Plaintiffs in an action to recover land must rely upon the strength of their own title, and where their title depends upon the person through whom they claim having acquired title by adverse possession at the time of his death, the court correctly places upon plaintiffs the burden of proving by the greater weight of the evidence that such person did so acquire title.

APPEAL by plaintiffs from *Sharp, Special Judge,* October Term, 1951, of PASQUOTANK. No error.

This was an action to recover land, description of which is set out in the complaint. From an adverse verdict and judgment plaintiffs appealed.

Worth & Horner for plaintiffs, appellants.

J. Henry LeRoy and John H. Hall for defendants, appellees.

DEVIN, C. J. The described land was conveyed by deed in 1861 to David Pritchard Brite. In 1865 David Pritchard Brite married Cordelia, widow of Elias Carver, and mother of Magnora, then a child two years old. About 1867 there was born to David Pritchard and Cordelia a son named Joseph R. Brite. David Pritchard Brite died in 1872. Joseph R. Brite died intestate and without issue in 1935.

It is apparent that if David Pritchard Brite's title to this land had ripened by adverse possession under color of title at the time of his death in 1872 the land descended to his heir, Joseph R. Brite; and upon the death of Joseph R. Brite, without issue, the title vested in his collateral

heirs of the blood of the ancestor David Pritchard Brite, who are represented by the plaintiffs in this action. Canons of Descent, Rule 4.

But, on the other hand, if David Pritchard Brite did not thus acquire title and was not seized of the land at the time of his death, and Joseph R. Brite thereafter acquired title to it by adverse possession or otherwise, he became a new *propositus,* and upon his death without issue the land would pass to his half-sister Magnora, now Mrs. McDonald, the mother and grantor of the defendants. Canons of Descent, Rule 6.

The burden was on the plaintiffs to recover if at all upon the strength of their own title, and in order to establish that title it was incumbent upon them to show by the greater weight of the evidence that David Pritchard Brite entered into possession of the land under the deed of 1861, and held possession thereof adversely for the statutory period.

The plaintiffs' only witness on this point was Magnora McDonald, now 88 years of age, who testified she was two years old when her mother Cordelia married David Pritchard Brite, and she was 9 when her step-father died. She said, "When I first knew it (the land) it was all in woods." She also said, "My step-father cultivated a small part of this land until the time of his death." The defendants claimed title by adverse possession under color of a deed from Magnora McDonald, dated 2 October, 1937.

The court submitted two issues: "1. Were the plaintiffs prior to October 2, 1937, the owners of and entitled to the possession of the land described in the complaint? 2. Have defendants been in adverse possession of said land under color of title for more than seven years prior to the institution of this action?" The first issue was answered "No," and the second issue was unanswered.

On the first issue the court charged the jury as follows:

"Now, gentlemen, if you find that in the year 1861 David Pritchard Brite got a deed, which described the property in question, and that at the time of his death in 1872, he had been in open, notorious, adverse, continuous possession of the property described in that deed, claiming the property by virtue of that deed under known and visible lines and boundaries for seven years prior thereto, I charge you that he would have owned the property at the time of his death, and it would have descended to his son, J. R. Brite, and then to the plaintiffs in this action. Now, if the plaintiffs have satisfied you by the greater weight of the evidence that such are the facts it would be your duty to answer the first issue YES, and otherwise you'd answer it No."

Plaintiffs excepted to this instruction, for that it limited plaintiffs' right to recover to the single proposition of the vesting of title in David Pritchard Brite. This is their only assignment of error.

On the evidence offered we think the portion of the charge excepted to properly presented the determinative question to the jury. To establish

their claim of title the plaintiffs must needs carry the burden of showing that David Pritchard Brite had acquired title to the land in order that it be in law descendable to his heir and through him to his collateral heirs. The jury's verdict was against them on this issue. True, there was evidence that Joseph R. Brite was in possession of the land after the death of his father and so continued for many years, but in the absence of a finding that David Pritchard Brite entered into possession, and that his possession was adverse and continuous up to the time of his death so as to vest title in him, the subsequent adverse possession of Joseph R. Brite could not be tacked thereto to ripen title in David Pritchard Brite, but would serve only to vest title in Joseph R. Brite as a new *propositus* from whom descent would be traced. 1 A.J. 879; *Ramsey v. Ramsey,* 229 N.C. 270, 49 S.E. 2d 476; *Boyce v. White,* 227 N.C. 640, 44 S.E. 2d 49. The verdict on the first issue rendered immaterial the question of defendants' adverse possession or other source of title.

In the trial we find

No error.

STATE v. ALTON (BUCK) RAYNOR.

(Filed 27 February, 1952.)

1. Disorderly Conduct § 2: Criminal Law § 56—

A warrant charging that defendant "unlawfully and wilfully did appear drunk on public highway" is substantially the language of G.S. 14-335 and is sufficient to repel a motion in arrest of judgment.

2. Criminal Law § 78c—

The rule that an exception to the judgment does not bring up for review the evidence upon which the findings are based applies to criminal cases, and where the verdict of the jury establishes facts sufficient to support the judgment, the verdict is the finding of fact, and exception to the judgment cannot be sustained.

3. Indictment and Warrant § 9—

An indictment or warrant for a statutory offense must charge the offense in the language of the statute or specifically set forth the acts constituting same, and nothing can be taken by intendment.

4. Arrest and Bail § 3: Criminal Law § 56—

A warrant charging that defendant "did resist arrest" neither charges the offense in the language of G.S. 14-223 nor specifically sets forth the acts constituting the offense created by the statute, and defendant's motion in the Supreme Court in arrest of judgment is allowed.

APPEAL by defendant from *Frizzelle, J.,* January Term, 1952, WASHINGTON.

Criminal prosecution upon a warrant, heard on appeal from the county court.

The warrant charges that defendant "unlawfully and wilfully did appear drunk on public highway . . . and did resist arrest . . ." As the only exceptive assignment of error appearing in the record is bottomed on the exception to the judgment, we need not summarize the evidence.

The jury returned a verdict of guilty on both counts. The court pronounced judgment on each count, and the defendant excepted and appealed. In this Court defendant moves in arrest of judgment.

Attorney-General McMullan, Assistant Attorney-General Bruton, and Robert B. Broughton, Member of Staff, for the State.

Bailey & Bailey for defendant appellant.

BARNHILL, J. In the first count in the warrant, defendant is charged with the commission of the offense condemned by G.S. 14-335, a public-local statute applying to Washington and certain other counties. The charge is laid substantially in the language of the statute and is sufficient to repel a motion in arrest of judgment. *S. v. Jackson,* 218 N.C. 373, 11 S.E. 2d 149, 131 A.L.R. 143.

Exception to the judgment presents the single question whether the facts found and admitted are sufficient to support the judgment. It is insufficient to bring up for review the evidence upon which the findings are based. *Rader v. Coach Co.,* 225 N.C. 537, 35 S.E. 2d 609; *Simmons v. Lee,* 230 N.C. 216, 53 S.E. 2d 79; *Rice v. Trust Co.,* 232 N.C. 222, 59 S.E. 2d 803; *Smith v. Furniture Co.,* 232 N.C. 412, 61 S.E. 2d 96; *Hoover v. Crotts,* 232 N.C. 617, 61 S.E. 2d 705; *Surety Corp. v. Sharpe,* 233 N.C. 642, 65 S.E. 2d 138. While this rule is usually invoked in civil cases, it applies also to appeals in criminal prosecutions.

The verdict of the jury is the finding of fact in this cause. That finding supports the judgment on the first count. Hence, as to the first count, no error is made to appear.

On the second count the motion in arrest of judgment presents a different question. It challenges the sufficiency of the charge of resisting arrest laid under G.S. 14-223.

"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 same. (citing cases) '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. Whart. Criminal Law, sec. 364; Bishop on Stat. Crime, sec. 425;' *S. v. Liles,* 78 N.C. 496." *S. v. Jackson, supra; S. v. Miller,* 231 N.C. 419, 57 S.E. 2d 392.

The charge that defendant "did resist arrest" neither charges the offense in the language of the Act, G.S. 14-223, nor specifically sets forth the facts constituting the offense created by the Act. It is wholly insufficient to support the verdict and judgment rendered. As to this count, the motion in arrest of judgment must be allowed.

On the first count: No error.

On the second count: Judgment arrested.

DELIA McCRACKEN AND HUSBAND, C. D. McCRACKEN, v. ZEB CLARK AND WIFE EVA CLARK, GROVER CLARK AND WIFE CATHERINE CLARK, AND RAYMOND McCRACKEN AND WIFE PEARL McCRACKEN.

(Filed 27 February, 1952.)

1. Trial § 29—

A verdict may not be directed in favor of the party upon whom rests the burden of proof.

2. Easements §§ 2, 3—

Where, in an action in trespass, defendants plead adverse user and an easement by implied grant to use the roadway across plaintiffs' land, the burden of proving these affirmative defenses is upon defendants and it is error for the court to direct a verdict in their favor upon these defenses.

APPEAL by plaintiffs from *Rudisill, J.,* and a jury, September Term, 1951, of HAYWOOD.

Civil action in trespass to enjoin the defendants from continuing to use a roadway leading from their lands over and across those of the plaintiffs to a public road, and for damages.

The defendants allege by way of affirmative defense that by adverse use of the roadway by themselves and their predecessors in title over a long period of years they have acquired an easement in the roadway, entitling them to use it as a matter of right.

On the issue of prescriptive easement thus raised by the pleadings, the evidence offered in the court below was conflicting. The defendants' evidence tends to show that the character of the user through the years has been hostile, adverse, and as of right, and so recognized by the plaintiffs and their predecessors in title for near unto a century.

The plaintiffs, on the other hand, offered evidence tending to show that through the years the roadway has been no more than a permissive neighborhood cartway.

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

"1. Are the plaintiffs the owners and in possession of the land described in the complaint? Answer: 'Yes.' (By the court in accordance with the admissions in the defendants' answer.)

"2. Have the defendants acquired an easement in the road over said lands entitling them to use the roadway in controversy without bars or gates or other obstructions thereon? Answer: 'Yes.'"

The court directed the verdict as to the second issue by giving the following instruction: "Under the evidence we have heard, and under the law as I understand the law to be, I direct you to answer that issue 'Yes.'" The plaintiffs' exception to this directed instruction is brought forward and urged as their chief assignment of error.

From judgment entered on the verdict, the plaintiffs appealed, assigning errors.

W. R. Francis and Jones & Ward for plaintiffs, appellants.

James H. Howell, Jr., Morgan & Ward, and Glenn W. Brown for defendants, appellees.

Johnson, J. The trial court erred in directing the verdict on the second issue. On that issue, the burden of proof was upon the defendants. This being so, they were not entitled to a directed instruction.

To establish the easement claimed by the defendants the burden of proof was upon them to satisfy the jury by the greater weight of the evidence that the user relied on was hostile in character, rather than permissive and with the owners' consent. *McPherson v. Williams,* 205 N.C. 177, 170 S.E. 662; *Chesson v. Jordan,* 224 N.C. 289, p. 292, 29 S.E. 2d 906. "Permissive use is presumed until the contrary is made to appear." *Speight v. Anderson,* 226 N.C. 492, p. 497, 39 S.E. 2d 371.

It is established by many authoritative decisions of this Court that a directed instruction in favor of the party having the burden of proof is forbidden. *Haywood v. Ins. Co.,* 218 N.C. 736, 12 S.E. 2d 221, and cases cited.

We have not overlooked the defendants' contention that they acquired an easement by implied grant. As to this phase of the case, the burden of proof was nonetheless on the defendants. 17 Am. Jur., Easements, Sec. 54 (see also sections 32, 33, and 48); *Carmon v. Dick,* 170 N.C. 305, 87 S.E. 224; *Ferrell v. Trust Co.,* 221 N.C. 432, 20 S.E. 2d 329.

New trial.

R. FRAZIER PEMBERTON AND MRS. MARGUERITE PEMBERTON HARRELSON, GUARDIANS OF W. S. PEMBERTON, v. J. L. LEWIS, TRADING AS LEWIS FUNERAL HOME, AND RICHARD GORDON.

(Filed 5 March, 1952.)

1. Carriers § 21a (3)—

A person transporting passengers for hire in an ambulance is a contract carrier and owes his passengers the duty (1) to exercise ordinary care to provide a vehicle reasonably safe for the carriage of passengers, (2) to subject his vehicle to reasonable inspection, (3) to warn his passengers of nonapparent dangers involved in the use of his vehicle, including latent defects of which he has constructive notice, and (4) to operate the vehicle in a careful and prudent manner in compliance with statutory rules of the road.

2. Carriers § 21b: Negligence § 3½—

Res ipsa loquitur does not apply to the injury of a passenger in an ambulance resulting from the sudden opening of the door while the vehicle is in motion when the passenger's evidence itself undertakes to point out reasons why the door suddenly opened.

3. Carriers § 21b—Evidence held insufficient to show that defect in or non-use of additional automatic locking device was proximate cause of accident resulting from sudden opening of ambulance door.

Plaintiff was accompanying a patient in an ambulance and was assigned a seat in the rear compartment, facing backward, and adjacent to a rear compartment door. The automatic safety locking device by which this compartment door was locked so that it could not be opened either from the inside or outside when the driver's door was closed, was defective and not in use on the occasion in question, but the door had the regular conventional door lock and latch mechanism of the kind ordinarily used on automobiles, and there was no evidence of any defect in this mechanism. When plaintiff was seated, his right hip was against or near the door handle, but the door handle was in a vertical position, and the door could be opened only by turning the lower end of the handle forward and upward, and there was no evidence that the door would open from jar or vibration or from pressure against it. The evidence tended to show that while the ambulance was being driven at a rapid rate of speed along the highway the door suddenly came open, and plaintiff fell to his injury. *Held:* Whether the door was intentionally opened by plaintiff or whether the movement of the vehicle could have caused plaintiff's body to push the bottom end of the door handle forward and upward, is left in speculation and conjecture and, therefore, the evidence is insufficient to show that the accident was the natural and probable consequence of the defective condition of the automatic door lock appliance, and nonsuit should have been entered.

ERVIN, J., dissenting.

APPEAL by defendants from *Moore, J.*, June Term, 1951, GUILFORD. Reversed.

Civil action *ex delicto* to recover damages for personal injuries.

Defendant Lewis operates a funeral home. In connection therewith he maintains a combination hearse and ambulance. On the occasion of plaintiff's injuries, defendant Gordon was the driver of the ambulance on which plaintiff was riding. For convenience of discussion hereafter Lewis will be referred to as the defendant and Gordon as the driver.

The ambulance was a 1947 Miller body Cadillac having two compartments—one at the front for the driver and his companion, if any, and one at the back for the patient or corpse, as the case might be. There are two doors on the right side—one to the driver's compartment and one to the patient compartment. Hereafter, in referring to the doors, reference is had to the right side door to the patient compartment as patient compartment door and the one to the front on the right-hand side as the driver's door. Inside the patient compartment was a cot for the patient and two small seats for his nurse or companion. These seats, when not in use, folded into and became a part of the floor. The forward seat—the one here involved—opened next to the patient compartment door, facing to the rear, so that anyone occupying it would have his body up against the door with his hip against the door handle and with his back toward the front of the ambulance. This is the seat assigned to plaintiff when the ambulance left Tabor City, and is hereafter referred to as the passenger seat.

There are two locks to the patient compartment door. One is the conventional door latch or lock found on all Cadillac passenger motor vehicles. This mechanism is provided, in part, to keep the door closed while the vehicle is in motion. The other lock is a special dowel pin safety lock wholly disconnected from the conventional lock. A dowel metal pin extends through the body frame from the rear framework of the driver's door to the front framework of the patient compartment door and is equipped with a spring so that when the driver's door is closed, the pin is pushed into a slot in the patient compartment door, locking it so that it may not be opened either from the outside or from the inside. When the driver's door is opened, the spring pushes the metal pin forward, thus releasing and unlocking the patient compartment door. Plaintiff alleges that this special dowel pin lock was defective and in a state of bad repair on the day in question, and defendant admits in his answer that it was not in use on that day.

On 27 October 1949 defendant contracted to transport plaintiff's son, an invalid, from Tabor City to the Veterans' Hospital at Roanoke, Va. Under the contract plaintiff was to, and did, accompany his son. He was assigned the front passenger seat in the patient compartment so that when he was seated his body was up against the door and his hip was against or near the door handle. This door handle is in a vertical position under the arm rest. Its arm or handle extends downward, and it is attached to

the door immediately under and in a gap in the arm rest. To open the door, this handle must be pulled forward toward the front of the vehicle and toward plaintiff as he was seated in the chair assigned to him. In order to open the door, the passenger would have to move his body, reach under the arm rest, and pull the latch toward the front of the ambulance. On the day in question, the driver closed the patient compartment door before putting the vehicle in motion.

Just when the dowel pin lock was installed is not clear. One witness, a mechanic, testified that it was "just the same as it was when I put it on there" except that a new part had been put on it. Another testified that either a hand-operated or automatic safety latch was in general use in 1947.

While the vehicle was proceeding at about 55 miles per hour on a highway in Guilford County, the door opened and plaintiff fell out. Plaintiff's only eyewitness testified: "I saw it for only a moment. It appeared to be running very fast." Plaintiff was dragged a distance of about 300 feet before losing contact with the ambulance. The ambulance continued on for another 300 feet. Just when the driver became aware plaintiff had fallen from the ambulance is not disclosed.

Shortly before the door opened, the ambulance passed over the crest of a hill. At the time of the trial, there was a patch or repaired place in the pavement about thirteen feet wide. This patched place is about 126 feet beyond and on the near side of the crest of the hill; that is, it is between the crest of the hill and the place where plaintiff fell from the ambulance. The witness testified that she did not know whether it was there on the day of the accident or not. There is no evidence that it was. When the ambulance passed over the crest of the hill, the door was closed. Shortly thereafter, a witness heard a rather loud noise, looked out, and saw plaintiff being dragged along the highway. Whether the noise was produced by the opening of the door or by some other cause is not made to appear.

There is no evidence as to the absence of any object inside the passenger compartment to which a passenger could hold to balance himself. Nor is there any evidence the door had ever opened while the ambulance was in motion.

Plaintiff suffered serious and permanent physical injuries.

The defendants' motion for judgment of nonsuit at the close of plaintiff's evidence was overruled and defendants excepted. Appropriate issues were submitted to the jury and were answered in favor of plaintiff. From judgment on the verdict defendants appealed.

Walter D. Thompson and Frazier & Frazier for plaintiff appellees.

R. B. Mallard and Smith, Sapp, Moore & Smith for defendant appellants.

BARNHILL, J. On this record defendant was a private or contract carrier of passengers for hire.

As such he owed the plaintiff the duty to exercise ordinary care to transport his passengers safely. This general duty required him to (1) exercise ordinary care to supply a motor vehicle reasonably safe for the carriage of passengers, (2) subject his vehicle to reasonable inspection, (3) warn his passengers of nonapparent dangers involved in the use of his vehicle, including latent defects in the vehicle, of which he had actual or constructive notice, and (4) operate his motor vehicle in a careful and prudent manner and in compliance with the statutory rules of the road. 13 C.J.S. 1262, sec. 678 (d); 9 A.J. 435, sec. 10 (see cases cited in notes); 2 Torts A.L.I., sec. 392; 21 A.L.R. 2d 916.

Did defendants breach these duties which they owed the plaintiff on the day in question as a result of which plaintiff suffered the personal injuries disclosed by the record? This is the decisive question posed by this appeal. A majority of the court is constrained to answer in the negative.

The oft-repeated rules controlling the consideration of an assignment of error directed to the denial of a motion to dismiss an action as in case of nonsuit have become axiomatic. It would serve no useful purpose to repeat them here. It suffices to say we have them in mind.

We may observe, however, that defendants offered no testimony, and therefore the rule defining the extent to which the testimony of the defendant may be considered on a motion for an involuntary nonsuit has no application here.

The evidence in this case does not invoke the application of the *res ipsa loquitur* doctrine. We need not discuss that contention of plaintiff further than to say that plaintiff himself undertakes to point out at least two reasons why the door to the ambulance suddenly opened. Hence *Etheridge v. Etheridge*, 222 N.C. 616, 24 S.E. 2d 477, and the other like cases cited by him are clearly distinguishable. *Rushing v. Mulhearn Funeral Home*, 200 So. 52.

The plaintiff offered testimony tending to show that the extra or special dowel pin lock was in a state of bad repair, and defendants admit it was not in use on the day plaintiff was injured. Was its defective condition or nonuse the proximate cause of the mishap as alleged by plaintiff?

Plaintiff relies upon the assertion, which he contends is a reasonable conclusion, that the defect in, or nonuse of the dowel pin lock would cause the patient compartment door to open suddenly in the event of heavy pressure on the door. This is a *non sequitur*. The conventional door-locking mechanism held the door closed. The automatic appliance locked it from the driver's seat so that it could not be opened by anyone in the patient compartment.

Every automobile has a regular door lock and latch mechanism on its doors. This mechanism is provided, in part, to keep the door closed while the automobile is in motion. In addition there is provided in connection with each door lock a "push button" device which may be used to lock the door from the inside.

Such was the case on the ambulance being used by defendant at the time plaintiff received his injuries. It had on the patient compartment door a regular conventional door lock and latch mechanism such as is provided for and may be found on all Cadillac automobiles.

There is not a particle of evidence in the record tending to show that this conventional mechanism found on all Cadillac and other automobiles was defective or in a state of bad repair. Instead, all the testimony relating thereto tends to show it was not defective but adequately served the purpose for which it was intended. And it is a matter of common knowledge that it is this mechanism that keeps the door closed while a motor vehicle is in motion. Locking devices serve another purpose.

"The catches on that door are exactly the same as you'd have on a Cadillac or most any General Motors automobile. They have two catches on them. There is a groove catch and also the latch catch and the latch catch has a safety catch on it too. . . . There is no safety device other than the regular conventional Cadillac door latch. That's all any automobile has. . . . Jar or vibration will not cause the door to come unlatched any more so than it would on a regular automobile. I'll say there is as much chance of that door flying open from the jar as there would be on your car or my car or anybody else's automobile . . ."

Since there was no defect in the conventional lock and latch mechanism, there was no danger created by any defect in the mechanism which held the door closed while it was in motion, notice of which had been brought home to defendant and of which he should have warned plaintiff. Anno. 21 A.L.R. 2d 916. Nor is there any evidence tending to show that the door would open when someone leaned his weight against it. *Rushing v. Mulhearn Funeral Home, supra; Everett v. Evans,* 207 S.W. 2d 350.

So then, it is just as reasonable to surmise that plaintiff voluntarily opened the door and threw out a cigar or cigarette butt or other waste material as it is to "infer" that plaintiff was suddenly thrown against the door, causing it to fly open. Either conclusion rests on pure speculation. *Everett v. Evans, supra.*

The plaintiff further insists there was a patched place in the highway; that when the ambulance passed over this place at a high rate of speed it caused a jolt or jar which either caused the door to open or threw plaintiff against it with such force as to cause it to open. This position is untenable, in the first place, for the reason there is no evidence the patched place existed on the day of the accident. In the second place, if

we concede that it did then exist, there is no evidence tending to show that it was either elevated above or depressed below the surface of the road so as to disturb the even tenor of a motor vehicle passing over it.

Lastly, the plaintiff urges the view that the seat furnished him was small and so arranged that a man of his size seated in it had his hip pressed against the door and the door handle in such manner that the jarring and swaying of the ambulance when operated at a high rate of speed would cause his hip to slip or slide against the handle and thus open the door. This position would be quite plausible and might support an inference of negligence if the door could be opened by pressing the handle toward the rear of the ambulance. But such is not the case. Plaintiff was seated with his back to the driver's seat, facing the rear. If a sudden jar caused him to slip down in his seat, his hip would press against the regular door lock handle. But on this record that would only tend to brace the handle and keep it from turning—this for the simple reason the handle had to be pulled forward toward plaintiff in order to open the door.

"It (the seat) is right beside the arm rest on the door. The latch (door handle) inside the door is perpendicular and when you sit in that seat the latch strikes you approximately at your hip. . . . In order to move that latch you have to move your body, reach under and pull the latch toward the front of the ambulance. . . . In order to reach this handle you would have to reach up under the arm rest." And another witness testified to the same effect. "The latch is perpendicular as shown in the picture. In order to open the door the latch must be pulled forward. . . . The bottom part of the latch moves toward the front of the ambulance."

The very multiplicity of possible reasons why the door opened, advanced by plaintiff, merely serves to emphasize the speculative nature of the testimony. There is no evidence in the record to support the inference that the accident was a natural and probable consequence of the defective condition of the automatic door-locking appliance. Just why it did open, in the light of the fact there was no defect in the regular door lock and latch mechanism, is a matter of speculation.

In effect the case comes to this: The plaintiff alleges and proves a defect in a special locking device—not in use at the time of the accident—and was permitted to recover in the court below on the theory that the defect in, or nonuse of, this device created a special hazard, notwithstanding the testimony that the door was equipped with the conventional door lock and latch upon which all motorists rely to keep the doors closed while their vehicles are in motion, and that this mechanism was in good working order so that "you had to use the handle to open it."

The record presents one of the tragedies of life. Plaintiff suffered grave injuries which affect his mind and from which he will not recover.

Yet this does not warrant a judgment against the defendant unless these injuries are the proximate result of his negligence. As we read the record, there is no evidence that would warrant this conclusion.

For the reasons stated the judgment below must be

Reversed.

ERVIN, J., dissenting: According to my interpretation of the case on appeal, the evidence of the plaintiffs is sufficient to support the conclusion that the pitiful plight of their ward, W. S. Pemberton, is the natural and probable consequence of the virtual refusal of the defendants to keep in proper repair a simple safety appliance of a type in general and approved use on ambulances. In consequence, I cannot join in the decision holding that in no view of the testimony can the defendants be deemed guilty of actionable negligence. The reasons which prompt my dissent are set forth below.

The decisions explaining how the court determines whether the evidence is sufficient to withstand a motion for compulsory nonsuit in a case where the defendant offers no evidence are well-nigh as numerous as the "autumnal leaves that strow the brooks in Vallombrosa." According to these decisions, the court must do these things in performing this judicial task:

1. The court must take it for granted that the plaintiff's evidence is true, and give the plaintiff the benefit of every favorable inference which his evidence fairly supports. *Graham v. Gas Co.*, 231 N.C. 680, 58 S.E. 2d 757; *Higdon v. Jaffa*, 231 N.C. 242, 56 S.E. 2d 661; *Hughes v. Thayer*, 229 N.C. 773, 51 S.E. 2d 488.

2. The court must resolve all conflicts and discrepancies in the evidence in the plaintiff's favor. *Sanders v. Hamilton*, 233 N.C. 175, 63 S.E. 2d 187; *Jackson v. Hodges*, 232 N.C. 694, 62 S.E. 2d 326; *Barlow v. Bus Lines*, 229 N.C. 382, 49 S.E. 2d 793; *Bank v. Ins. Co.*, 223 N.C. 390, 26 S.E. 2d 862; *Edwards v. Junior Order*, 220 N.C. 41, 16 S.E. 2d 466; *Dozier v. Wood*, 208 N.C. 414, 181 S.E. 336; *Lincoln v. R. R.*, 207 N.C. 787, 178 S.E. 601.

3. The court must deny the motion to nonsuit if it appears that a recovery can be had by the plaintiff upon any view of the facts which the evidence as thus interpreted reasonably tends to establish. *Graham v. Gas Co., supra; Cox v. Hinshaw*, 226 N.C. 700, 40 S.E. 2d 358; *Gorham v. Insurance Co.*, 214 N.C. 526, 200 S.E. 5; *Diamond v. Service Stores*, 211 N.C. 632, 191 S.E. 358.

When the plaintiffs brought this action against the defendants, they assumed the burden of producing evidence sufficient to establish the three essential elements of actionable negligence, namely: (1) That the defendants were under a legal duty to protect the plaintiffs' ward against injury;

(2) that the defendants failed to perform that duty; and (3) that such failure was the proximate cause of injury to the plaintiff's ward. *Holderfield v. Trucking Co.*, 232 N.C. 623, 61 S.E. 2d 904; *Hammett v. Miller*, 227 N.C. 10, 40 S.E. 2d 480; *Truelove v. Railroad*, 222 N.C. 704, 24 S.E. 2d 537; *Gold v. Kiker*, 216 N.C. 511, 5 S.E. 2d 548; *Ellis v. Refining Co.*, 214 N.C. 388, 199 S.E. 403.

A consideration of the question whether the plaintiffs have satisfied the requirement of the law in this respect necessitates some statement of their evidence. It conduces to convenience of narration to call the plaintiffs' ward, W. S. Pemberton, and the defendants, J. L. Lewis and Richard Gordon, by their respective surnames.

The first inquiry which arises is whether the evidence suffices to show the existence of the first essential element of actionable negligence, namely: That the defendants were under a legal duty to protect Pemberton against injury. The testimony relevant to this inquiry is summarized in the next paragraph.

Lewis, a mortician at Tabor City, North Carolina, owned a combination motor ambulance and hearse, which he used on special occasions to transport patients and persons ministering to them from one place to another for hire. Lewis employed Gordon to drive this vehicle, which is hereinafter designated as an ambulance. On 27 October, 1949, Lewis and Pemberton entered into an express contract whereby Lewis obligated himself to have Gordon transport Pemberton and Pemberton's sick son in the ambulance from Tabor City to Roanoke, Virginia, where Pemberton's son was to be placed in a hospital, and whereby Pemberton bound himself to pay Lewis a stipulated compensation for such transportation. The tragic event giving rise to the present litigation occurred while Gordon was carrying out this contract.

This evidence compels an affirmative answer to the first inquiry. It discloses that Lewis was a private carrier of passengers for hire, *i.e.*, one, who, without being engaged in such business as a public employment, undertakes by way of special contract to transport persons in a particular case for hire. Blashfield's Cyclopedia of Automobile Law and Practice, sections 2141, 2141.5; 13 C.J.S., Carriers, section 531. It also shows that at the time named in the pleadings the relation of private carrier and passenger existed between Lewis and Pemberton, and Gordon was employed by Lewis to perform the obligations which Lewis owed Pemberton by virtue of that relationship.

A private carrier of passengers for hire is under the legal duty to exercise ordinary care to transport his passengers safely, and is liable to them for personal injuries proximately resulting from his negligence in failing to exercise such care. *Forbes v. Reinman*, 112 Ark. 417, 166 S.W. 563, 51 L.R.A. (N.S.) 1164; *Duffy v. J. W. Bishop Co.*, 99 Conn.

573, 122 A. 121; *Lazor v. Banas,* 114 Pa. Super. 425, 174 A. 817; *Campbell v. Campbell,* 104 Vt. 468, 162 A. 379, 25 A.L.R. 626; *Garrett v. Hammack,* 162 Va. 42, 173 S.E. 535; Blashfield's Cyclopedia of Automobile Law and Practice, section 2271; 9 Am. Jur., Carriers, section 10; 13 C.J.S., Carriers, section 678d. When a private carrier undertakes to transport passengers by motor vehicle for hire, his legal duty to exercise ordinary care for their safety imposes upon him these specific obligations: (1) To exercise reasonable care to supply a motor vehicle reasonably safe for the carriage of his passengers; (2) to subject his motor vehicle to reasonable inspection to discover defects in it; (3) to warn his passengers of nonapparent dangers which he actually or constructively knows are involved in the use of his motor vehicle; and (4) to drive his motor vehicle on the highway at a speed which is reasonable and prudent under the existing conditions. The American Law Institute's Restatement of the Law of Torts, Volume 2, Negligence, section 392; G.S. 20-141 (a).

This brings us to the question whether the evidence suffices to show the existence of the second essential element of actionable negligence, to wit: That the defendants failed to perform their legal duty to protect Pemberton against injury. The answer to this query is to be found in the testimony bearing on the character of the vehicle as well as in that relating to the conduct of the defendants.

The conveyance was a "1947 Miller body Cadillac" ambulance. Transparent slide bars or windows divided the ambulance into two compartments: a front one, where the driver sat; and a rear one, where the patient and his attendant rode. The left-hand half of the rear compartment was fitted with a cot for the patient and the right-hand half was equipped with two seats for the attendant, one of them being a front seat, which faced backwards, and the other being a rear seat, which faced forwards. The ambulance had five doors, two on each side and one at the back. The two foremost side doors afforded access to the front or driver's compartment, and the other three doors furnished entrance to the rear or patient's compartment. The right side door to the front compartment, which is hereafter called the driver's door, was hinged at its front, and the right side door to the rear compartment, which is hereafter designated as the patient's compartment door, was hinged at its rear.

When the ambulance was put on the market by its manufacturer and purchased by Lewis, it was equipped with two mechanisms to secure the patient's compartment door when such door was closed. One of them was a conventional door-catch or latch similar to that in common use on ordinary passenger-carrying automobiles, and the other was an automatic door-locking appliance, which was of a type in general and approved use upon ambulances, and which was designed to enable the driver to prevent

the patient's compartment door from opening while the vehicle was in motion. When this automatic door-locking appliance was in operating condition, it automatically locked the patient's compartment door whenever the driver's door was closed so that the patient's compartment door could not be either accidentally or intentionally opened from either the inside or the outside while the driver's door remained closed.

Although the majority opinion does not expressly so state, it does intimate that the patient's compartment door was also equipped with a third door-closing mechanism, namely, a "push button device" similar to that in use on ordinary passenger-carrying motor vehicles. According to my reading of the case on appeal, this intimation cannot be reconciled with the testimony of Harry Mashburn, the only witness queried on the matter. He stated that the ambulance did "not have that catch on it." The majority opinion calls the automatic door-locking appliance "the dowel pin lock" and makes this observation: "Just when the dowel pin lock was installed is not clear." According to my interpretation of the case on appeal, this statement is based on a misconstruction of the testimony of A. J. Inman, a mechanic residing near Tabor City, who is briefly quoted in the majority opinion. When Inman's evidence is read aright in its entirety, it shows that he made repairs on the ambulance subsequent to Pemberton's injury, and that he was talking about a new automatic door-locking appliance which he put on the vehicle at that time. Besides, the statement is wholly inconsistent with the testimony of V. C. Ward and Harry Mashburn. Ward stated that he was employed by Lewis prior to January, 1949; that he drove the ambulance in question; that the ambulance was equipped with the automatic door-locking appliance when "they first got it"; that the appliance soon fell into disrepair; and that it was not in operating condition when he left the employ of Lewis approximately ten months before the accident. Mashburn testified that he was a salesman for the A. J. Miller Company, which sold Miller body Cadillac ambulances; that the automatic door-locking appliances were put on such ambulances by the manufacturer; and that similar door-locking appliances, "either automatic or hand operated," had been in general and approved use on ambulances ever since the vehicle in question was made.

The front seat in the rear compartment, which is hereafter called the passenger seat in deference to the nomenclature of the majority opinion, was adjacent to the patient's compartment door. The conventional door-catch or latch securing this door when closed was controlled or operated on the inside by a perpendicular inside door-handle made of metal. This door-handle was hinged at its top to the inside of the door just below an arm-rest, which was attached to the inside of the door at a point "approximately ten inches above the level of the (passenger) seat." The potential movement of the inside door-handle was limited. It would turn one

way only, *i.e.*, upwards toward the front of the ambulance for a space not exceeding a quarter of a circle. Whenever the inside door-handle was turned by any force, whether accidentally or intentionally applied, to any appreciable extent in the only direction in which it could move, *i.e.*, upwards, and forward in an arc, it disengaged the conventional door-catch or latch securing the patient's compartment door. For this reason, such movement of the inside door-handle would cause the door in question to open if the driver's door was not closed *or* if the automatic door-locking appliance was not in operating condition. Inasmuch as the patient's compartment door was hinged at its rear, its certain and speedy opening was insured by the inevitable friction generated by the forward movement of the ambulance in case the conventional door-catch or latch became disengaged while the vehicle was in motion and the automatic door-locking appliance was not in operating condition.

The passenger seat was small in area and hard in composition. When the attendant ministering to a patient rode in this seat, he necessarily traveled backwards with his left thigh and knee virtually under and against the lower and moveable end of the inside door-handle which controlled the conventional door-catch or latch securing the patient's compartment door. His left elbow, forearm and hand were in constant danger of forcible contact with the door-handle, regardless of whether he placed them on the arm rest or elsewhere. There was no substantial object within his reach which he could grasp to keep from sliding about on the seat, or to steady his body against any external force occasioned by the movement of the ambulance.

The automatic door-locking appliance fell into disrepair and ceased to operate at least as early as January, 1949. Neither Lewis nor Gordon made any effort to restore it to operating condition.

When Pemberton presented himself and his son to Gordon at Tabor City on 27 October, 1949, for transportation to Roanoke, Virginia, pursuant to his contract with Lewis, Gordon put Pemberton's son, who was in a comatose state, upon the cot in the rear compartment of the ambulance, and permitted Pemberton to occupy the passenger seat in such compartment for the purpose of ministering to his unconscious son while the vehicle was en route to Roanoke. Gordon closed the door of the ambulance before he put the vehicle in motion. Neither Lewis nor Gordon warned Pemberton that the automatic door-locking appliance was in disrepair, and that in consequence there was danger that the door beside his seat would be opened while the ambulance was in motion in case the pressure of any part of his body on the lower and movable end of the door-handle caused the door-handle to turn in the only direction in which it could move, *i.e.*, upward and forward in an arc, to any appreciable extent. Inasmuch as the defective state of the automatic door-

locking appliance was not visible to a passenger, the defect and the resultant danger were not open to ordinary observation.

While the ambulance was "running very fast" along a highway in Guilford County, North Carolina, the door beside the seat occupied by Pemberton suddenly opened, and Pemberton fell from the ambulance, which dragged him along the highway for 300 feet and thereafter continued on its way for an additional 300 feet before Gordon brought it to a standstill. As a consequence of the opening of the door and his resultant fall, Pemberton suffered injuries, which disabled him mentally as well as physically and necessitated the appointment of the plaintiffs as his guardians.

The only witness to see the ambulance at the precise moment of the accident was Mrs. Rebecca Ward, who said "it appeared to be running very fast." The statement in the majority opinion that the vehicle was proceeding at about fifty-five miles per hour at that time is based on the evidence of State Highway Patrolman Lane, who testified that he questioned Gordon on the day of the accident and that Gordon "said he was doing about fifty-five miles an hour." There is nothing in the record to indicate that Gordon was seeking to merit the praise bestowed by the Psalmist upon the person "that sweareth to his own hurt and changeth not" at the time he undertook to explain to the patrolman the circumstances surrounding the critical injury to his passenger. Inasmuch as the rear view mirror afforded Gordon a reflected view of the entire rear compartment at all times, the fact that the ambulance overshot the point where the door opened by 600 feet before it was brought to a standstill is sufficient to warrant the conclusion that the speed of the vehicle far exceeded the estimate of its driver. Blashfield's Cyclopedia of Automobile Law and Practice, section 6560.

A. J. Inman testified that he made certain experiments in the ambulance in question while the action was being tried in the court below; that he sat in the passenger seat beside the patient's compartment door in the rear compartment when the automatic door-locking appliance "was off" and the conventional door-catch or latch "was on"; that he turned on the seat so as to bring his elbow and knee into contact with the door-handle; and that "the door opened up" whenever his elbow or knee came into contact with the door-handle.

The majority of the court and I reach diametrically opposite conclusions on this phase of the case. They hold that the evidence is wholly insufficient in any view to justify a finding that the defendants breached any one of the four specific obligations inherent in their legal duty to exercise ordinary care to transport Pemberton safely.

If I read the majority opinion aright, it is based on the portion of the testimony of Harry Mashburn quoted in the twelfth paragraph of the

opinion and these additional considerations: (1) That the ambulance was equipped with the conventional door-catch or latch found on all ordinary passenger-carrying automobiles; (2) that such conventional door-catch or latch was free from defect; and (3) that "it is a matter of common knowledge that it is this mechanism (*i.e.,* the conventional door-catch or latch) that keeps the door closed while a motor vehicle is in motion."

When the additional considerations motivating the decision of the majority are analyzed, they come to this: The evidence compels the single conclusion that the defendants fully performed their legal duty to exercise ordinary care to transport Pemberton safely by furnishing an ambulance which had no door-securing device whatever except the conventional door-catch or latch found on all ordinary passenger-carrying automobiles. I am unable to perceive how all the testimony in this cause drives the reasoning faculty to this solitary conclusion. A passenger in an ordinary passenger-carrying motor vehicle sits on a soft and comparatively commodious seat, faces to the front, is held in place by the forward motion of the conveyance, and is not in virtual contact with the lower and moveable end of the inside door-handle. It is a far cry from the circumstances surrounding the passenger in the ordinary passenger-carrying automobile to those which encircled Pemberton in the defendants' ambulance. This being true, the evidence admits of the finding that the conventional door-catch or latch was wholly insufficient to keep the ambulance door closed while that vehicle was in motion, even though it may have been sufficient to secure the door of an ordinary passenger-carrying automobile while it was in motion.

The majority opinion candidly concedes that the plaintiffs' testimony tends to show that the automatic door-locking appliance "was in a state of bad repair" and that "the defendants admit it was not in use" on the day Pemberton was injured. The opinion dismisses this testimony and this admission with the declaration that they have no bearing whatever on the question whether the defendants breached their legal obligation to exercise reasonable care to supply a motor vehicle reasonably safe for the carriage of Pemberton. The declaration of the majority rests on the theory that the automatic door-locking appliance was not designed to keep the patient's compartment door closed while the ambulance was moving, but that, on the contrary, it served "another purpose." The majority does not undertake to tell us what this other purpose was, or to explain why the manufacturer failed to put similar door-locking appliances on the other two doors of the rear compartment, which happened not to be adjacent to either of the seats provided for attendants. While Harry Mashburn did testify that "jar or vibration will not cause the door to come unlocked any more so than it would on a regular automobile," he

did not deny the validity of the plaintiff's theory of the case. He said: "I never did get in . . . and see if I could open it with my elbow or my knee."

In my judgment, the testimony reasonably warrants this conclusion: The manufacturer of the ambulance appreciated the somewhat obvious fact that the conventional door-catch or latch was insufficient to secure the patient's compartment door while the passenger seat was occupied by an attendant, and installed the automatic door-locking appliance for the precise purpose of safeguarding an attendant riding on that seat from the very mishap which befell Pemberton.

Moreover, the evidence fairly supports these inferences on the present phase of the case:

1. The automatic door-locking appliance was defective, creating the danger that the door adjacent to the seat occupied by Pemberton would suddenly open in case the movement of the ambulance caused his body to come into forcible contact with the lower and moveable end of the inside door handle.

2. The danger was known to Lewis and Gordon, or had existed for such a time that they would have known of it had they subjected the ambulance to reasonable inspection.

3. The danger was not apparent to Pemberton, who was justifiably ignorant of it. Neither Lewis nor Gordon gave Pemberton any warning of his peril.

4. Gordon undertook to carry Pemberton and his son along the highway at an imprudent and unreasonable speed notwithstanding the tendency of such speed to cause Pemberton's body to come into forcible contact with the lower and moveable end of the inside door-handle.

This being true, the testimony suffices to establish that the defendants failed to exercise ordinary care to transport Pemberton safely.

This brings me to the final question whether the evidence is sufficient to show the existence of the third essential element of actionable negligence, namely: That the failure of the defendants to exercise ordinary care to transport Pemberton safely was the proximate cause of his injuries.

The majority of my brethren adjudge with complete finality of conviction that this inquiry must be answered in the negative. Their opinion lays hold on the evidence that the inside door handle "had to be pulled" toward the front of the ambulance to open the patient's compartment door, and declares that it was logically impossible for any external force occasioned by the movement of the ambulance to cause Pemberton's body to push the door-handle in that direction. I entertain grave misgivings as to the validity of the thesis that a judicial tribunal can expect observance of the precepts of logic by such an illogical thing as an accidental

external force. It can certainly be argued with much show of reason that such a force partakes of the nature of the mule, which "don't kick according to no rule." Be this as it may, the evidence reveals facts which ought to satisfy the logician as well as the jury that the accident in question could have happened in exactly the way in which the plaintiffs allege it did happen.

The evidence that the inside door handle "had to be pulled" toward the front of the ambulance to open the patient's compartment door does not imply that such door handle had to be pulled or pushed directly toward the front of the vehicle. Indeed, it could not move in that precise direction. Its lower and moveable end traveled in one way only, *i.e.*, upward and forward in an arc. As a consequence, the patient's compartment door could be opened by any pressure which turned the lower and moveable end of the door handle upward and forward. Manifestly, such a pressure could be caused by a force moving either upward or forward. The notion of the majority that any movement of Pemberton's body was necessarily in the direction of the rear of the ambulance ignores various important factors. One of them is that Pemberton instinctively pressed his body backward towards the front of the ambulance to counteract the tendency of the forward-motion of the vehicle to propel him towards the rear, and another is that the external force occasioned by the motion of the ambulance would bounce Pemberton upwards or impel him backwards or forwards or sideways, depending upon the origin and direction of the force and its interaction with Pemberton's instinctive reaction. These things being so, the external force occasioned by the motion of the ambulance could bring Pemberton's elbow or knee or thigh into forcible contact with the lower and moveable end of the inside door handle in such a manner as to turn such end of the door handle upwards and forwards, causing the door to open.

My brethren assert finally that the evidence leaves all questions arising in the case shrouded in mystery. They say that it is just as reasonable to "surmise" that Pemberton voluntarily opened the door as it is to "infer" that his body was brought into forcible contact with the lower and moveable end of the door handle by the movement of the ambulance, causing the door to open.

The testimony discloses that Pemberton was a mature man in the full possession of all his mental faculties before he fell from the moving ambulance. It is certainly not reasonable either to infer or to surmise that a reasonable man will do such an unreasonable thing as voluntarily to open the rearward-hinged door of a motor vehicle while it is being driven along the highway at a high speed.

The evidence does not entomb this case among the law's unsolved riddles. Indeed, it justifies the incontrovertible assertion that the plain-

tiff's ward could not possibly have suffered his disabling injuries had the defendants maintained the automatic door-locking appliance in proper condition. Moreover, it warrants these final inferences on the third phase of the case:

1. The movement of the ambulance brought Pemberton's body into forcible contact with the lower and moveable end of the inside door handle, causing the door to open and Pemberton to fall from the moving ambulance to his injury.

2. The mishap was the natural and probable consequence of the defective condition of the automatic door-locking appliance, the neglect of Lewis and Gordon to warn Pemberton of the resultant danger, and the speed of the ambulance.

For the reasons given, the evidence of the plaintiffs is sufficient to establish that Lewis was a private carrier of passengers for hire; that he and his driver Gordon were negligent in that they failed to exercise ordinary care to carry their passenger Pemberton safely; and that their negligence was the sole proximate cause of the injuries sustained by Pemberton.

In consequence, I vote to uphold the judgment of the trial court.

WATSON INDUSTRIES, INC., v. EUGENE G. SHAW, COMMISSIONER OF REVENUE OF NORTH CAROLINA.

(Filed 5 March, 1952.)

1. Statutes § 5a—

Ordinary words of a statute must be given their natural, approved, and recognized meaning.

2. Taxation § 30—

Fabricated parts manufactured for, and used by the purchaser in the erection or construction of radio towers in this State are building materials subject to the excise tax of 3%, and taxpayer's contention that each radio tower was but a single purchase upon which the tax was limited to fifteen dollars is untenable, G.S. 105-187. "Building" and "structure" are synonymous, and a radio tower is a structure within the meaning of the statute.

3. Same—

That parts for a structure are practically worthless singly or in combinations less than required for the unit is immaterial in the levy of sales tax, the purchase price being the yardstick by which the tax is to be measured.

4. Same: Constitutional Law § 31—

The imposition of a sales tax on parts or materials used in the erection of radio towers, even though such parts are shipped from out of State, is

not a burden upon interstate commerce, since at the time the tax is assessed the property has reached the end of its interstate transportation and has become a part of the common mass of property within the State.

5. Taxation § 30—

An excise tax is a tax levied upon the sale or consumption of personal property.

6. Same—

A use tax is a tax on the enjoyment of that which has been purchased.

7. Same—

No tax is imposed under G.S. 105-220 unless there has been (1) a purchase of tangible personal property, (2) from a retailer (3) for storage, use or consumption within this State; and (4) title to or possession of such property passes from the retailer to the purchaser.

8. Same—

The rental price of transcriptions used by a radio station for rebroadcasting recorded programs, which transcriptions are then returned to the lessor, is not subject to the tax under G.S. 105-220, since such recordings are not in the "possession" of the radio station within the meaning of the law. "Custody" and "possession" are not synonymous, but possession implies custody with the added present right to control and dispose of the property at the possessor's pleasure to the exclusion of others.

9. Statutes § 5a—

A word or phrase of a statute may not be interpreted out of context so as to render it inharmonious to the intent and tenor of the act, but must be construed as a part of the composite whole and accorded only that meaning which other modifying provisions and the clear intent and purpose of the act will permit.

10. Taxation § 30—

The words "loan, lease, rental, or license" as used in G.S. 105-219 (c) must be read in context in conformity with the intent of the statute to impose upon the storage, use, or consumption within this State of tangible personal property which has been purchased by a local resident, a use tax corresponding to and equalizing the sales tax imposed by G.S. 105, Art. V, and the words cannot be enlarged to embrace a transaction under which a resident merely leases property for nondestructive or unconsuming use and then returns the goods to lessor, so that he has "custody" without "possession" within the legal significance of that term.

11. Statutes § 5a—

The legislative intent is the guiding star in the interpretation of a statute.

12. Statutes § 5b: Taxation § 23½—

Administrative interpretation of a statute can be considered in its construction only when ambiguity exists, and never can be considered when in direct conflict with the clear intent and purpose of the act.

13. Taxation § 23½—

Tax statutes are to be strictly construed against the State and in favor of the taxpayer.

APPEAL by both plaintiff and defendant from *Stevens, J.*, October Term, 1951, WILSON.

Civil action to recover excise taxes paid under protest.

Plaintiff purchased from the Wincharger Corporation of Iowa the necessary fabricated parts for the construction of four radio towers. Defendant assessed a use or excise tax against the total purchase price of such parts at the rate of three per cent. Plaintiff paid the tax so assessed in excess of $60, under protest.

Likewise plaintiff regularly receives, under rental contracts, tape recordings and records of speeches on political, religious, and other subjects and of dramatic, musical, and other programs for rebroadcasting by transcription. The defendant levied and assessed against the total rentals paid by plaintiff a use or excise tax at the rate of three per cent in the sum of $347.70. Plaintiff paid the assessment under protest.

Thereafter it instituted this action to recover back taxes so paid with interest.

When the cause came on for trial, the parties waived trial by jury, stipulated the facts and submitted the cause to the court for consideration and decision of the legal questions thereby raised. The stipulated facts may be summarized as follows:

1. The plaintiff is engaged in the radio broadcasting business, broadcasting both paid advertising and entertainment programs throughout eastern North Carolina and parts of Virginia and South Carolina.

2. In order to operate its said business, plaintiff, on 4 August 1947, purchased from the Wincharger Corporation of Iowa articles and items of tangible personal property costing $26,855.40, which when joined together, connected, assembled, and erected at plaintiff's location in Wilson, resulted in four radio towers, complete with earth anchors and mounting plates. Said articles and items, although constituting four allotments or four groups of articles or items—one group for each tower—were designed to form and did form four radio towers, and the purchase was made as four radio towers.

3. The articles so purchased were shipped in interstate commerce from Iowa to Wilson, N. C. They were many in number, and any one article or combination of parts, less than all for one tower, is practically worthless for the reason they were fabricated especially to form, when joined together, four radio towers, and none of said articles are adaptable to use for any other purpose.

4. The total cost to plaintiff of all said articles was $26,855.40, upon which amount defendant calculated, charged, and collected a tax of three per cent. Plaintiff paid said tax but protested the payment so made, except as to $60, on the contention that for tax purposes it had purchased only four articles, to wit: four radio towers.

5. That it is approved procedure for a broadcasting station to bring to its listeners various programs by transcription. These transcriptions are obtained through rental agreements. The plaintiff had adopted and was following this approved procedure. Under the contracts for transcriptions made by it, the tape recordings and records were shipped to plaintiff, used by it for rebroadcasting the recorded programs, and then returned to the owners. Under its rental contracts plaintiff was never vested with any property interest or right in the records or transcriptions used. It acquired only the right to play and use them in such manner as to broadcast the recorded program, speech, or discussion to its listening audience.

6. The total amount of rentals paid by plaintiff at the time defendant audited its books was $11,589.84. The defendant calculated, charged, and collected a tax of three per cent upon said sum in the amount of $347.70. Plaintiff paid said tax so assessed under protest.

It is admitted that plaintiff has complied with all prerequisite statutory requirements and has exhausted its administrative remedies and is entitled to maintain and prosecute this action.

The court below concluded, upon the facts agreed, that the articles purchased for the purpose of erecting four radio towers constituted, for sales or use tax purposes, only four articles, to wit: four radio towers; that plaintiff was and is liable to defendant for the use tax in the sum of $15 on each tower purchased, that is, in the total sum of $60 only; that the rentals of transcriptions for rebroadcasting "and their subsequent use, storage, or consumption in this State constituted taxable transactions" and plaintiff is liable for a use tax in the sum of three per cent of the total amount "paid for the license, use or rental thereof."

It thereupon entered judgment that: (1) plaintiff recover of defendant $953.84 with interest, excess taxes paid on the purchase of the four radio towers, and (2) plaintiff have and recover nothing on its claim for a refund of taxes paid upon the rental of the transcriptions for rebroadcasting.

Defendant excepted to the judgment on the first cause of action that plaintiff recover taxes collected on the parts purchased for the erection of radio towers and appealed. Plaintiff excepted to the judgment on his second cause of action that it recover nothing on account of taxes paid on the total rental price of transcriptions and appealed.

Bunn & Bunn, Gardner, Connor & Lee, and John G. Dawson for plaintiff.

Attorney-General McMullan, Assistant Attorneys-General McGalliard and Lake for defendant.

BARNHILL, J. The plaintiff properly sets forth in its complaint two separate and distinct causes of action: (1) for the recovery of the alleged excess amount paid on the parts purchased for the construction of the four radio towers, and (2) for the recovery of the taxes paid on the rentals for transcriptions. This serves to clarify and facilitate discussion of the questions of law raised by the appeals herein.

FIRST CAUSE OF ACTION.

Are the fabricated articles or parts purchased by plaintiff for use in the erection of four radio towers building material within the meaning of G.S. 105-187? If so, plaintiff was liable for the excise tax assessed and collected by defendant.

The subtitle of that section of our sales and use tax Act, General Statutes 105, Art. 5, is: "Tax on building materials." The pertinent part thereof reads as follows:

"There is hereby levied and there shall be collected from every . . . corporation, an excise tax of three per cent of the purchase price of all tangible personal property purchased or used . . . which shall enter into or become a part of any building or any other kind of structure in this State, including all materials, supplies, fixtures, and equipment of every kind and description which shall be annexed thereto or in any manner become a part thereof . . ." The tax collectible on any one article is limited to $15.

None of the parts purchased and upon which a tax was levied come within the exceptive provision contained in G.S. 105-187 and, so far as the record discloses, no single part cost in excess of $500. Likewise, there is no suggestion that the plaintiff purchased four radio towers erected and standing in Iowa which were disassembled merely for the purpose of shipment. While the parts were fabricated for use in the erection of radio towers, they were first actually assembled and joined together in the form of towers after they reached Wilson and were delivered to plaintiff by the carrier. So then, if the fabricated parts constituted building material for use in building or erecting a "structure" as that term is used in G.S. 105-187, plaintiff was liable for the tax assessed and collected and was not entitled to recover any part thereof.

A "structure" is "something constructed or built." Webster's New Int. Dic., 2nd Ed.; *Jefferson Davis County v. Riley,* 130 So. 283; *Brown v. City of Decatur,* 188 Ill. App. 151; that which is built or constructed; an edifice or a building of any kind; in the widest sense any product or piece of work artificially built up or composed of parts and joined together in some definite manner. *Favro v. State,* 46 S.W. 932, 73 Am. St. Rep. 950; *Paye v. City of Grosse Pointe,* 271 N.W. 826.

"Building" and "structure" are synonymous. They agree in meaning but differ slightly in application. "Structure" retains more frequently than the other the sense of something constructed, often in a particular way. Webster's Dic. of Synonyms.

That a radio tower comes within the accepted definition of the term "structure" would seem to be beyond question. In applying G.S. 105-187, we must accord the ordinary words used therein their natural, approved, and recognized meaning. *Cab Co. v. City of Charlotte,* 234 N.C. 572. This being true, we are constrained to conclude that the fabricated parts purchased by plaintiff for the erection of radio towers constituted building material within the meaning of that statute. That the parts, singly or in combinations less than are required for the erection of a tower, were practically worthless is not material. The purchase price is the yardstick by which the tax due is to be measured.

The contention that the tax imposed constitutes a burden on interstate commerce is without merit. At the time the tax was assessable, the property had reached the end of its interstate transportation and had come to rest in this State. It then formed a part of the common mass of property within this State. It was purchased for use as building material and its purchase for such use within this State was taxable under the provisions of the statute. G.S. 105-187; *Johnston v. Gill, Comr. of Revenue,* 224 N.C. 638, 32 S.E. 2d 30; *Powell v. Maxwell, Comr. of Revenue,* 210 N.C. 211, 186 S.E. 326; *Henneford v. Silas Mason Co.,* 300 U.S. 577, 81 L. Ed. 814; *Monamotor Oil Co. v. Johnson,* 292 U.S. 86, 78 L. Ed. 1141; *McLeod v. Dilworth Co.,* 322 U.S. 327, 88 L. Ed. 1304. See also *Helson & Randolph v. Kentucky,* 279 U.S. 245, 73 L. Ed. 683.

It follows, therefore, that the court below erred in rendering judgment in favor of plaintiff on its first cause of action and the judgment in that respect must be reversed.

SECOND CAUSE OF ACTION.

G.S. 105-220 reads in part as follows:

"An excise tax is hereby levied and imposed on the storage, use, or consumption in this State of tangible personal property purchased from a retailer within or without this State . . . for storage, use, or consumption in this State at the rate of three per cent of the sales price of such property regardless of whether said retailer is or is not engaged in business in this State.

". . .

"Every person storing, using, or otherwise consuming in this State tangible personal property purchased or received from a retailer . . . shall be liable for the tax imposed by this article . . ."

The statute, in G.S. 105-219, defines the material terms used in the foregoing section.

"(a) 'Storage' means and includes any keeping or retention of possession . . . for any purpose except sale in the regular course of business of tangible personal property purchased from a retailer."

"(b) 'Use' means and includes the exercise of any right or power of dominion whatsoever over tangible personal property by a purchaser thereof and includes . . . any . . . exhaustion or consumption of tangible personal property by the owner or purchaser thereof . . ."

"(c) The word 'sale' or 'selling' shall mean any transfer of title or possession, or both, exchange or barter of tangible personal property, conditional or otherwise . . . for a consideration paid or to be paid . . . and shall include any of said transactions whereby title or ownership is . . . to pass . . . and shall further mean and include any bailment, loan, lease, rental or license to use or consume tangible personal property for a consideration paid . . . in which possession of said property passes to the bailee, borrower, lessee, or licensee . . ."

"(d) 'Purchase' means the buying of, giving an order for . . . tangible personal property as a result of which there occurs a sale or delivery of tangible personal property by a retailer to a person for the purpose of storage, use, or consumption in this State . . ."

"(g) 'Retailer' means and includes every person engaged in the business of making sales of tangible personal property . . . for storage, use or consumption in this State, and every manufacturer, producer, or contractor engaged in business in this State selling . . . tangible personal property for use in this State . . ."

"(i) 'Tangible personal property' means personal property which may be seen, weighed, measured, felt, touched, or is in any other manner perceptible to the senses . . ."

To these definitions contained in the statute we may add that an "excise tax" is a tax levied upon the sale or consumption of personal property. Callaghan, Cyc. Law Dic., 2d Ed.; Webster's New Int. Dic., 2d Ed. A use tax is a tax on the enjoyment of that which was purchased. *McLeod v. Dilworth Co., supra.*

Thus it appears no excise tax is assessable under the terms of G.S. 105-220 unless there has been (1) a purchase of tangible personal property, (2) from a retailer (3) for storage, use or consumption within this State; and (4) title to or possession of such property passes from the "retailer" to the "purchaser." *Johnston v. Gill, Comr. of Revenue, supra.*

The mere statement of the essentials of a taxable transaction under this section would seem to make it apparent that the contracts between plaintiff and lessors of transcriptions for rebroadcasting do not come within the terms of the statute.

The lessors are not retailers. They are merely distributors of transcriptions for rebroadcasting. Nor is the plaintiff the purchaser of tangible personal property. It merely purchases the right to rebroadcast the program, speech, or discussion recorded on a transcription tape or record. In order that it may make use of its purchase, it is accorded temporary custody of the recordings necessary to that end. Neither title to nor possession of tangible personal property passes to it.

"Custody" and "possession" are not convertible terms. *Boatright v. State,* 51 S.W. 2d 311.

By possession is meant that by which one can exercise his power over property at his pleasure to the exclusion of all others. *Commission Co. v. London,* 13 S.W. 513, 7 L.R.A. 403. "Possession" means simply the owning or having a thing in one's possession and implies the present right to deal with property at pleasure and exclude others from meddling with it. *S. v. Danser,* 144 S.E. 295. Personal property is in the "possession" of a person when it is in his custody and control and subject to his disposition. *S. v. Jones,* 213 N.C. 640, 197 S.E. 152.

But defendant leans heavily upon that part of the definition of "sale" contained in G.S. 105-219 (c) which reads as follows: "and shall further mean and include any bailment, loan, lease, rental or license to use or consume tangible personal property for a consideration paid . . . in which possession of said property passes to the bailee, borrower, lessee, or licensee." This provision, however, may not be lifted out of its context so as to universalize its meaning. A word or phrase or clause or sentence may vary greatly in color and meaning according to the circumstances of its use. *Towne v. Eisner,* 245 U.S. 418, 62 L. Ed. 372. It is axiomatic, therefore, that a provision in a statute must be construed as a part of the composite whole and must be accorded only that meaning which other modifying provisions and the clear intent and purpose of the act will permit. Its meaning must sound a harmonious—not a discordant—note in the general tenor of the law.

The purpose of this extension of the ordinary meaning of the word "sale" is apparent. It is intended to plug a possible loophole in the statute by preventing a retailer from evading the provisions of the act by camouflaging a sale under the label of bailment, loan, lease, or like term when it is intended that in fact both the use and the possession shall pass to the bailee, borrower, lessee, or licensee. It is not sufficient to embrace the transactions here in question.

Our sales tax statute, G.S. Ch. 105, Art. 5, levies a tax upon the sale of tangible personal property in this State by a "retail" merchant as a privilege tax for engaging or continuing in the business of a retail merchant. The compensating use tax, G.S. Ch. 105, Art. 8, here under consideration, levies a tax upon the storage, use, or consumption within this

State of tangible personal property which has been purchased by a local resident from a retailer. Its purpose is to remove, in so far as possible, the discrimination against local merchants resulting from the imposition of a sales tax, and to equalize the burden of the tax on property sold locally and that purchased without the State. *Johnston v. Gill, Comr. of Revenue, supra.*

The intent runs throughout both statutes, which are merely separate divisions of the same revenue law, that the tax shall be assessed upon the basis of the consideration paid in transactions between retailers and consumers in which dominion over, possession of, or title to tangible personal property is acquired by the "purchaser." The only difference is that in the first the tax is upon the sale, and in the second it is upon the enjoyment of the thing purchased.

The legislative intent is the essence of the law and the guiding star in the interpretation thereof. 50 A.J. 200; *Mullen v. Louisburg,* 225 N.C. 53, 33 S.E. 2d 484; *Midkiff v. Granite Corp., ante,* p. 149, and cases cited.

"Few words are so plain that the context or the occasion is without capacity to enlarge or narrow their extension." Crawford, Stat. Constr. 276, sec. 174; *Mullen v. Louisburg, supra.* Such is the case here. The words "bailment," "loan," "lease," "rental," and "license," as used in the definition of "sale," must be so construed as to harmonize with the other provisions of the statute and conform to the clear intent of the Legislature.

While it is true one of the most significant aids to construction in determining the meaning of a revenue law is the interpretation given such act by the administrative agency charged with its enforcement, the rule has no application here. This for the reason the rule is invoked only when ambiguity exists. Under no circumstances will the courts follow an administrative interpretation in direct conflict with the clear intent and purpose of the act under consideration. Crawford, Stat. Constr. 397 (see cases cited in note); Sutherland, Stat. Constr., 3rd Ed. 310; *Gill v. Commissioners,* 160 N.C. 176, 76 S.E. 203; *Bottling Co. v. Shaw, Comr. of Revenue,* 232 N.C. 307, 59 S.E. 2d 819.

"It is only in cases of doubt or ambiguity that the courts may allow themselves to be guided or influenced by an executive construction of a statute. If the words of the law are clear and precise, and the true meaning evident on the face of the enactment, there is no room for construction." Black, Interpretation of Laws, 2nd Ed. 305, 50 A.J. 204. And this is true no matter how long the administrative construction has been followed. *Louisville & N. R. Co. v. U. S.,* 282 U.S. 740, 75 L. Ed. 672.

Tax statutes are to be strictly construed against the State and in favor of the taxpayer. *S. v. Campbell,* 223 N.C. 828, 28 S.E. 2d 499; *Sabine v. Gill, Comr. of Revenue,* 229 N.C. 599, 51 S.E. 2d 1; *Henderson v. Gill,*

Comr. of Revenue, 229 N.C. 313, 49 S.E. 2d 754; 3 Sutherland, Stat. Constr., 3d Ed., 293.

"In the interpretation of statutes levying taxes, it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operation so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government, and in favor of the citizen." *Gould v. Gould,* 245 U.S. 151, 62 L. Ed. 211.

The language used in G.S. 105-220 and related sections of our sales and use tax Act, when so construed, compels the conclusion that the court below erred in sustaining the tax levied against the total cost to plaintiff of the right to broadcast transcriptions furnished it under contract as set forth in its second cause of action.

We have examined the decisions cited by defendant to which we have made no specific reference. None of them are sufficiently pertinent to the question here presented to require discussion.

The judgment entered in the court below on each cause of action must be

Reversed.

GATES SCHOOL DISTRICT COMMITTEE, COMPOSED OF M. R. TAYLOR, JOHN H. WIGGINS AND R. G. OWENS, AND THE FOLLOWING INDIVIDUALLY, J. R. FREEMAN, J. N. EURE, L. J. HAYES, HARRY EURE, D. G. FREEMAN, L. T. HARRELL AND HOWARD EURE, CITIZENS, RESIDENTS AND TAXPAYERS AND PATRONS OF THE ABOVE NAMED SCHOOL DISTRICT HAVING CHILDREN ASSIGNED TO AND ATTENDING THE SCHOOL OF SAID DISTRICT, AS PUPILS, v. THE BOARD OF EDUCATION OF GATES COUNTY, COMPOSED OF S. P. CROSS, CHAIRMAN, AND MRS. MARIAN NIXON AND LAMAR BENTON, AND W. C. HARRELL, GATES COUNTY SUPERINTENDENT OF PUBLIC INSTRUCTION.

(Filed 5 March, 1952.)

1. Schools § 3a—

The county board of education has the power, with the approval of the State Board of Education, to consolidate for administrative or attendance purposes a special tax district having no supplemental levy with a non-special tax district without the approval of the voters of the non-special tax district, G.S. 115-99. Such consolidation does not involve a tax, since the boundaries of the special tax district remain.

2. Same—

Where a district having a supplemental tax to provide a higher standard of schools than provided by State support is consolidated with a non-special tax district, the supplemental levy may not be collected unless approved by a majority of the qualified voters of the non-special tax district.

3. Same—

Since a supplemental tax to provide a higher standard of schools than provided by State support may be levied only in districts having a school population of five hundred or more, G.S. 115-361, the question of a supplemental levy does not arise upon the consolidation of a special tax district having no supplemental levy with a non-special tax district when the consolidated district has a school population of less than five hundred pupils, the consolidation being made under the general law, G.S. 115-99, and not under G.S. 115-192 or G.S. 115-361.

APPEAL by defendants from *Frizzelle, J.*, at Chambers in Washington, North Carolina, 8 October, 1951; from GATES.

The pertinent evidence adduced in the trial below and bearing on the question of consolidating school districts, may be summarily stated as follows:

1. Prior to 28 April, 1948, Gates County was divided into four school attendance districts. None of these districts had theretofore authorized the levying of a local tax for any purpose. On the above date, Sunbury School District of Gates County was created under the provisions of Chapter 279, Public-Local Laws of 1937 as amended by Chapter 149, Session Laws of 1947, and subsequent thereto the voters therein approved a bond issue for school purposes, and the levying of a tax for the payment of the interest thereon and for the retirement of the bonds as they may fall due.

2. On 28 August, 1949, the State Board of Education directed that certain elementary and high school children living in the Gates School District should attend the Sunbury school and that the remainder of the high school students in the Gates district be transferred to Gatesville High School. The remainder of the elementary students (approximately 75 in number) were directed to attend the school theretofore operated as a union school at Gates.

3. On 3 July, 1950, the Gatesville School District was created under the provisions of Chapter 279, Public-Local Laws of 1937, as amended by Chapter 149 of the Session Laws of 1947, and the voters in said district subsequent thereto approved a bond issue of $125,000 for the construction of a high school building and gymnasium at Gatesville which buildings are now under construction and expected to be completed and ready for occupancy before the end of the 1951-1952 school term.

4. The school building at Gates was constructed in 1925 and is a one-story building consisting of ten classrooms and an auditorium, and is a class "C" building. This building, subsequent to an inspection made on or about 23 April, 1951, by an engineer from the Insurance Department of the State of North Carolina and by an engineer and architect from the Division of School House Planning of the Department of Public Instruction of the State of North Carolina, was condemned by the Insur-

ance Department as being unsafe for use as a school building. The plaintiffs offered evidence tending to show that the building could be put in satisfactory condition by the expenditure of not more than $11,000. The defendants offered evidence tending to show it would cost from $35,000 to $50,000 to make the repairs recommended by the engineer of the Engineering Division of the Insurance Department.

5. On 28 August, 1951, the County Board of Education of Gates County passed a resolution consolidating certain districts as hereinafter pointed out, for the following reasons: "Since the Insurance Commission has condemned the Gates School building and since the Division of School House Planning and Surveys has recommended that the school building be abandoned and the pupils transported to the Gatesville School, the Gates County Board of Education is unable to work out any alternative except to transport the children to Gatesville School." Whereupon, the Board passed a resolution consolidating all that portion of Gates School District, consisting of approximately two-thirds thereof in area, by metes and bounds, with the Gatesville School District, and the remainder thereof, in which area both high school and elementary pupils have been attending Sunbury school since 1949, with the Sunbury School District. These consolidations were approved by the State Board of Education on 6 September, 1951.

6. It is disclosed by the record that the average daily attendance for the Gates elementary school, consisting of the first eight grades, was 69.6 pupils during the 1950-1951 school term; that for the term the aggregate cost of janitorial service, electric current, and fuel, amounted to $17.93 per child in average daily attendance at the Gates school, and that these items cost a total of only $6.85 per child in average daily attendance in the other schools in Gates County; and that since the consolidation and transfer of the children from the Gates school to the Gatesville school, the cost of janitorial service, electric current, and fuel at the Gatesville school for the 1951-1952 term, will not be greater than for the 1950-1951 term; that prior to the aforesaid consolidation and transfer of school children from Gates school and for the 1950-1951 term, the State Department of Public Instruction allotted only two teachers to Gates school which was composed of the first eight grades, and that two other teachers were provided at said school by the Gates community, and that each of the four teachers teaching in the Gates school for the 1950-1951 term, were forced and required, of a necessity, to teach two full grades or classes, and that it is not a desired practice that a North Carolina school teacher have the responsibility for more than one grade or class.

7. It appears from the affidavit of the principal of Gatesville school that including the children transferred from the Gates school, the Gatesville school now has 288 children enrolled in the elementary department

of the school and 104 in the high school department; that the State of North Carolina has allotted to the Gatesville school all the teachers to which it is entitled, based upon the average daily attendance of the school, which allotment includes the two teachers heretofore allotted by the State to the school at Gates; that there are no combination classes in the elementary grades; and that the new high school building and gymnasium which are under construction on the Gatesville school site, will provide classrooms and facilities which will make for greater convenience and comfort; that the present Gatesville school building is not overcrowded, unsafe, or unfit for the housing and teaching of the student body presently enrolled in said school.

8. It appears from affidavits filed by the plaintiffs that the consolidation has required children to leave their homes earlier in the day and to return home later in the afternoon than was the case when they attended the Gates school. It appears, however, from the affidavit of the County Superintendent of Public Instruction, that the consolidation has resulted in no change in the routing of school buses in Gates County; that prior to the said consolidation and transfer of children, the school buses transporting children to Gates school were required to arrive at the Gates school in ample time to unload the school children so that the high school children from the Gates community could be reloaded on a school bus and transported to the Gatesville school in time for the opening of the Gatesville school each day, at the same hour that the Gates school opened, and that children attending the Gates school were required to wait in the afternoon until the high school children living in the Gates area could be transported from Gatesville to Gates after the close of school each day before the children attending the Gates school could be transported to their homes, with the result that considerably more time was required to transport the children living in the Gates community to and from their homes than has been required since the consolidation and transfer of the children to Gatesville.

The court found as a fact that the Gatesville and the Sunbury districts were special tax districts and that the Gates district was a non-special tax district, at the time of the attempted consolidation, and that the voters in the non-special tax district had not approved the consolidation. Upon this finding, the court held that the defendant Board was without power and authority in law to order the consolidation of a special tax district and a non-special tax district. The court, thereupon, entered an order restraining the defendant from continuing the attempted consolidation and abandoning the operation of the Gates school. The order, however, to go into effect only after a reasonable time for making the necessary repairs to the Gates school building. The cause was retained for further orders of the court.

The defendants excepted to this order and appealed to the Supreme Court, assigning error.

Godwin & Godwin for defendant, appellant.

John A. Wilkinson and H. S. Ward for plaintiff, appellee.

Attorney-General McMullan and Assistant Attorney-General Love for the State Board of Education, Amicus Curiae.

DENNY, J. A non-special school tax district may be consolidated with a special tax district, without the approval of the voters of the non-special tax district when the consolidation is for administrative or attendance purposes only and does not involve a supplemental tax.

In the case of *Board of Education v. Bray,* 184 N.C. 484, 115 S.E. 47, which involved the consolidation of a special tax district with three non-special tax districts for the purpose of creating a new special tax district, *Stacy, J.* (later *Chief Justice*), in speaking for the Court, said: "Indeed, for the bare purpose of consolidation, no election is necessary under the general law. C.S. 5473. The county board of education in any county may, however, in its discretion, ask for an election on the question of consolidation or the new formation of a district, and submit the question of a special tax or the issuance of bonds at the same time, but it is not required to do so. C.S. 5526."

It will be observed that the general law, C.S. 5473, with respect to the consolidation of school districts, at the time the above case was decided, read as follows: "The county board of education is hereby authorized and empowered to redistrict the entire county or any part thereof and to consolidate school districts wherever and whenever in its judgment the redistricting or the consolidation of districts will better serve the educational interests of the township, or the county, or any part of the county."

The essential parts of the above statute, now codified as G.S. 115-99, are still in full force and effect. It has been amended, however, so as to require the approval of the State Board of Education whenever school districts are consolidated; and to provide that "existing schools having suitable buildings shall not be abolished until the county board of education has made ample provisions for transferring all children of said school to some other school in the consolidated district." *Kreeger v. Drummond, ante,* 8, 68 S.E. 2d 800.

The appellees argue and contend that the attempted consolidation complained of herein is violative of the provisions contained in G.S. 115-192 and G.S. 115-361.

The consolidation, pursuant to the resolution passed by the Board of Education of Gates County on 28 August, 1951, and approved by the State Board of Education on 6 September, 1951, could have the effect

only of consolidating a portion of the Gates non-special tax district with the area contained in the Gatesville special tax district for administrative or attendance purposes.

It should be kept in mind that the provisions contained in G.S. 115-192 were enacted at a time when there were practically no restrictions on the power of a school district to vote special taxes for bonds or supplemental purposes. Now, a supplement may not be voted in a school district unless it is an administrative unit that contains a school population of five hundred (500) or more. And since the present school enrollment of the Gatesville school, including the children transferred from the Gates school, is less than four hundred, the provisions, with respect to a special tax for supplemental purposes, contained in G.S. 115-192 or in G.S. 115-361, have no bearing on the present consolidation.

School districts created by the county boards of education of the various counties of the State, subject to the approval of the State Board of Education, exist for administrative or attendance purposes only. G.S. 115-99 and G.S. 115-352. Special tax districts, for the purpose of issuing bonds or voting a supplemental tax, must comply with certain statutory requirements not essential for the creation of an administrative unit. G.S. 115-192 and G.S. 115-361; Chapter 279, Public-Local Laws of 1937, and the amendments thereto.

It is true that where an administrative unit has voted a supplemental tax in order to operate schools of a higher standard than that provided by State support in an administrative unit having a school population of 500 or more, pursuant to the provisions of G.S. 115-361, neither a nontax district nor any part thereof may be consolidated with such administrative or tax districts, without losing the right to levy its then existing supplemental tax (*Bivens v. Board of Education,* 187 N.C. 769, 122 S.E. 846), unless an election is held in the territory to be added and the majority of those who voted in such election voted in favor of the proposed tax. And the tax authorized must be equal to the supplemental tax previously authorized in the administrative unit, including any tax levied therein to meet the interest and sinking fund of any bonds theretofore issued by the district proposed to be enlarged. *Perry v. Comrs.,* 183 N.C. 387, 112 S.E. 6; *Hicks v. Comrs.,* 183 N.C. 394, 112 S.E. 1; *Barnes v. Comrs.,* 184 N.C. 325, 114 S.E. 398; *Vann v. Comrs.,* 185 N.C. 168, 116 S.E. 421; *Blue v. Trustees,* 187 N.C. 431, 122 S.E. 19.

A tax of this character cannot be levied in this State unless it has been approved by a majority of the voters who voted in favor of such tax in an election duly held as provided by law in the area in which the tax is to be levied. Consequently, when an area is consolidated with an administrative unit that has voted a supplemental tax and no election has been held in the area added to or consolidated with such administrative unit,

then no supplemental tax can be legally levied in any part of the consolidated area. *Perry v. Comrs., supra; Bivens v. Board of Education, supra.*

The consolidation complained of herein, however, does not involve a tax. The consolidation was not effected pursuant to the terms of the act under which the special tax district was created for the purpose of issuing bonds, but under the general law, G.S. 115-99. The boundaries of the special tax district remain the same and the local tax duly authorized therein for the payment of the principal and interest on its bonds, is in no way jeopardized or affected by the consolidation. Furthermore, the taxpayers in this special tax district are not protesting the consolidation.

If it should be held as a matter of law that a consolidation for administrative or attendance purposes, such as that involved herein, could not be made, then in many instances, no doubt, county boards of education and the State Board of Education would be compelled to maintain numerous small elementary schools contrary to the established policy of the State with respect to consolidation. The wisdom of that policy is not involved in this appeal, but only the interpretation of the law with respect to the power of the Board of Education of Gates County, with the approval of the State Board of Education, to make the consolidation involved in this action.

In view of the conclusion we have reached, the restraining order entered in the court below will be dissolved, and the cause is remanded for such other and further proceedings as may be necessary for a proper disposition of the case not inconsistent with this opinion.

Error and remanded.

MARY GAFFORD v. WILLIAM HERBERT PHELPS.

(Filed 5 March, 1952.)

1. Divorce and Alimony § 21: Constitutional Law § 28—

Where a resident of this State appears in his wife's action for divorce instituted in the state of her domicile, the decree of divorce is binding on our courts under the full faith and credit clause, but provision of the decree awarding custody of their child who was domiciled here and not present in that state at the time the decree was entered, is not binding on our courts, since the foreign court had no jurisdiction of the child. Art. IV, sec. 1, Constitution of the United States.

2. Divorce and Alimony § 19—

Agreement of the parties to a divorce action in regard to the maintenance and custody of a child of the marriage is not binding upon the courts.

3. Same—

The welfare of the child is the paramount consideration which must guide the court in making an award of custody.

4. Same—

Where the trial court finds that both the mother and the father are suitable persons to have the custody of their child, but further finds that the child had not been happy when in the custody of her nonresident mother and looked with dread upon returning to her mother's home, that the child was sensitive and that it was to the child's best interest to live in the home of her father, the court properly awards the custody of the child to the father in furtherance of the welfare of the child.

5. Appeal and Error § 40d—

Where the court's findings of fact are supported by evidence, exceptions to the findings cannot be sustained.

6. Divorce and Alimony § 19—

Where the court upon proper findings awards the custody of a child to its resident father as being in the best interests of the child, a provision in the order permitting the child's nonresident mother to have custody of the child in her home for a part of each year must be stricken, since the court should not permit the child to be removed from the State by a person to whom unqualified custody has not been awarded. The court may, in its discretion, make provision that the nonresident mother might visit the child in this State under such conditions and circumstances as the court may deem proper.

APPEAL by petitioner and respondent from *Bone, J.*, at Chambers in Nashville, North Carolina, 10 November, 1951. From WASHINGTON.

This is a proceeding instituted under the provisions of G.S. 50-13, to obtain custody of a child pursuant to the provisions contained in a divorce decree previously entered in the State of Alabama. In the hearing below, the court found the following facts:

"Petitioner and respondent were married to each other in Washington County, North Carolina, on September 20, 1941. Their child, Linda Dianne Phelps, was born in said county and state on April 14, 1943 and the three of them continued to reside there until the fall of 1944 when they went to Alabama, petitioner's native state, and there lived until respondent entered the military service in April 1945 after which petitioner and the child went to live with respondent's mother in Plymouth, N. C. Respondent was discharged from military service in November 1946 and thereafter lived with petitioner and the child in Plymouth, N. C. until September 1947, at which time petitioner and respondent separated and petitioner, after remaining in Plymouth for a short time, went to her native State of Alabama, leaving the child with respondent in Plymouth, N. C., where said child continued to live until May 1950.

"On June 18, 1948 petitioner and respondent entered into a written agreement in Mobile County, Alabama, under the terms of which respondent was to have custody of the child during the school time of each year and petitioner was to have custody of her during non-school time, subject to the provision that if petitioner subsequently remarried she should have the right each year thereafter to elect whether she would take custody during the school time or non-school time. On June 19, 1948 petitioner filed a complaint in the Circuit Court of Mobile County, Alabama, attaching thereto the aforesaid custody agreement, and therein prayed for an absolute divorce from respondent and for custody of the child in accordance with the said agreement. On the same date, respondent, being present in the State of Alabama, filed in the said court a written answer and waiver and thereby voluntarily submitted himself to the jurisdiction of the said court.

"On June 25, 1948 said court rendered a decree of absolute divorce and awarded custody of the child in accordance with the aforesaid agreement of the parties. The child, Linda Dianne Phelps, was not present in the State of Alabama at the time of the rendition of the aforesaid decree nor at any other time for about 3 years prior thereto . . .

"On or about October 31, 1948 petitioner married Ralphton Gafford and now lives with him in Chickasaw, Alabama. There are no children of this marriage. Subsequent to the aforesaid decree of divorce respondent married Gwendolyn Ward and now lives with her in Plymouth, N. C. One child has been born to this marriage and now lives with respondent and his present wife.

"In May 1950 petitioner for the first time since her separation from respondent took the child, Linda Dianne Phelps, to live with her and her present husband in Alabama where said child continued to live until about June 19, 1951 when respondent took her back with him to Plymouth, N. C. where she has since remained. On or about September 3, 1951 petitioner, having elected to take custody of the child for the school year, came to Plymouth and sought to take said child back home with her but was prevented by respondent from doing so.

"Respondent is a man of good character, is gainfully employed and is held in high esteem by the people of his community. His present wife is a woman of education and refinement and bears an excellent reputation. They maintain a good home in which there is a religious atmosphere and are caring for Linda Dianne Phelps in a proper manner. There is mutual love and affection between them and said child is happily situated. She is attending a good school and is being reared in a wholesome environment.

"Petitioner is a woman of good character and has a good husband. While the affidavits do not particularize on this point it does appear with-

out contradiction that they maintain a good home in the State of Alabama and are in a position to give the child proper educational and material advantages but she has not been happy with them and looks with dread upon the prospect of returning to their home. The court is of the opinion that this attitude of the child has not been produced by any prejudicial teaching on the part of the respondent and his wife. It appears that she is a child of a sensitive nature and is not compatible with petitioner and her present husband while there is great compatibility between the said child and respondent and his present wife who, it appears, is especially qualified by nature and training to understand and administer to her peculiar spiritual and emotional needs. The child has spent the greater part of her life in Plymouth and is no doubt more familiar with the people and surroundings there than she is with those obtaining at the place of petitioner's residence.

"While the court does not find that petitioner is unfit to have custody of the said child, it finds that respondent is a fit and suitable person to have her custody and after careful consideration has reached the conclusion and finds that the welfare of said child would be promoted by awarding custody of her to respondent with reasonable provision for her visitation with petitioner."

Upon the foregoing findings of fact, the court awarded the custody of the child, Linda Dianne Phelps, to the respondent, William Herbert Phelps, but directed that the petitioner, Mary Gafford, was to be allowed to take said child to her home in Alabama and keep her from June 15th to August 15th of each year commencing with June 15, 1952. The judgment further provided that since the provision for visitation involved taking the child out of the jurisdiction of the courts of this State, the petitioner, before she is to be allowed to exercise the aforesaid privilege of visitation shall execute and file with the Clerk of the Superior Court of Washington County a bond in the sum of $500 with sufficient surety to be approved by said Clerk, conditioned upon the return of said child in accordance with the terms of the judgment.

The petitioner and respondent appealed to the Supreme Court, assigning error.

W. L. Whitley for petitioner.
Bailey & Bailey for respondent.

DENNY, J. We shall first consider and dispose of the petitioner's appeal.

The petitioner insists that she is entitled to the custody of her child pursuant to the provisions of the decree heretofore entered in her action for divorce in the State of Alabama. Therefore, the question for determi-

nation is simply this: Is a decree entered in a court of competent jurisdiction, in a sister state, awarding the custody of a child, domiciled in this State, valid and enforceable under the full faith and credit clause of the Constitution of the United States, Art. IV, sec. 1, where custody was awarded in accordance with a written agreement duly executed by the parents of the child and filed with the court?

Linda Dianne Phelps was not domiciled in the State of Alabama at the time the bonds of matrimony were dissolved between her parents in the Circuit Court of Mobile County, Alabama, on 25 June, 1948. Therefore, the decree awarding her custody is not enforceable under the full faith and credit clause of our Federal Constitution. 27 C.J.S., Divorce, section 333 (c), page 1299; *State ex rel. Rasco v. Rasco* (Fla.), 190 So. 510; *Elliott v. Elliott,* 181 Ga. 545, 182 S.E. 845; *Callahan v. Callahan,* 296 Ky., 444, 177 S.W. 2d 565; *Wilson v. Wilson,* 136 Va. 643, 118 S.E. 270.

When a child is not within the jurisdiction of the court, such court is without power to make an order awarding the child's custody. *Burrowes v. Burrowes,* 210 N.C. 788, 188 S.E. 648; *Coble v. Coble,* 229 N.C. 81, 47 S.E. 2d 798; *Sadler v. Sadler,* 234 N.C. 49, 65 S.E. 2d 345. See Anno. 4 A.L.R. 2d 25. Moreover, a contract between divorced parents as to the custody and maintenance of their children, is not binding on the courts. 17 Am. Jur., Divorce and Separation, sec. 682, page 516; 27 C.J.S., Divorce, section 311, page 1177; *In re Albertson,* 205 N.C. 742, 172 S.E. 411; *Story v. Story,* 221 N.C. 114, 19 S.E. 2d 136; *S. v. Duncan,* 222 N.C. 11, 21 S.E. 2d 822; *Fortson v. Fortson,* 195 Ga. 750, 25 S.E. 2d 518.

The welfare of the child should be the paramount consideration which guides the court in making an award of custody. *In re Alderman,* 157 N.C. 507, 73 S.E. 126; *Clegg v. Clegg,* 186 N.C. 28, 118 S.E. 824; *Tyner v. Tyner,* 206 N.C. 776, 175 S.E. 144; *Pappas v. Pappas,* 208 N.C. 220, 179 S.E. 661; *Story v. Story, supra; Ridenhour v. Ridenhour,* 225 N.C. 508, 35 S.E. 2d 617; *Brake v. Brake,* 228 N.C. 609, 46 S.E. 2d 643; *Hardee v. Mitchell,* 230 N.C. 40, 51 S.E. 2d 884.

Furthermore, if the child in controversy had been domiciled with her father in Alabama at the time the decree, referred to herein, was entered in that State, and she and her father had become domiciled in Washington County, North Carolina, the Superior Court of that county would have jurisdiction to hear and determine questions as to her custody and welfare when properly presented. G.S. 50-13; *In re Alderman, supra; In re Biggers,* 228 N.C. 743, 47 S.E. 2d 32; *Phipps v. Vannoy,* 229 N.C. 629, 50 S.E. 2d 906; *Boone v. Boone,* 132 F. 2d 14, *Cert.* denied, 319 U.S. 762, 63 S. Ct. 1319, 87 L. Ed. 1713; *Boone v. Boone,* 150 F. 2d 153, 80 U.S. App. (D.C.) 152.

The petitioner contends that the Alabama judgment cannot be valid in so far as it dissolves the bonds of matrimony, and at the same time invalid

and unenforceable in so far as it purports to award custody of the minor child of the marriage. This contention is without merit.

In the case of *In re Biggers, supra,* decided on appeal from the Superior Court of Cabarrus County, this Court held that where the husband instituted a divorce action in the State of Florida, and the wife entered an appearance and filed an answer, the parties were bound by the decree in so far as it dissolved the marriage; and that such decree was valid in this State under the full faith and credit clause of the Constitution of the United States. However, *Devin, J.* (now *Chief Justice*), in speaking for the Court, said: "But it does not necessarily follow as a corollary therefrom that the decree of the Florida court awarding the custody of the children . . . is binding upon the courts of North Carolina. That decree, in so far as it operates upon the children, has no extra-territorial effect. *In re Alderman,* 157 N.C. 507, 75 S.E. 126, 39 L.R.A. N.S. 988. So that, if these children were at the time of the decree, or have since become and were at the time of the hearing below, residents of North Carolina and within the jurisdiction of the court in which relief on their behalf was sought, the Superior Court of Cabarrus County was not without authority or power to hear and determine questions as to their custody and welfare when properly raised."

The petitioner excepts to certain findings of fact by the court below. However, an examination of the record discloses that such findings are supported by competent evidence. Hence, these exceptions are overruled.

The judgment of the court below, in so far as it awards the custody of the child, Linda Dianne Phelps, to the respondent, William Herbert Phelps, will be upheld.

RESPONDENT'S APPEAL.

The court below, after awarding custody to the respondent, imposed a condition which permits the petitioner to take the child to her home in Alabama and keep her from 15 June to 15 August of each year commencing with June, 1952, and imposed upon the respondent liability for all reasonable expenses involved in returning the child to North Carolina, including the petitioner's expenses both ways. In lieu of paying such expenses, the respondent may, at his option and upon notice to the petitioner, go to petitioner's home and bring the child back with him. The respondent excepts to the above provisions of the order. The exception is well taken and will be sustained. *In re DeFord,* 226 N.C. 189, 37 S.E. 2d 516.

In the case of *Harris v. Harris,* 115 N.C. 587, 20 S.E. 187, this Court said: "It does not appear that the mother . . . is in anywise more suitable than the father. The father is domiciled in this State; the mother is a nonresident. Under these circumstances, unless more shall appear,

the custody should remain with the father. The Court certainly would not, upon these facts, award the custody to a person out of the State. To award the custody alternatively to the father and the nonresident mother would be to place the child out of the jurisdiction of the Court, so that it would be impossible to enforce so much of the decree as directs the return of the child to the father after the specified time. The bond might possibly secure the payment of damages, but not the return of the child. The Court, under special circumstances, may allow an infant ward to go out of its jurisdiction, but it will not abdicate its functions, and upon the state of facts here appearing take the child from a father of good character, who is taking every proper care of it, and place it out of the reach of its process and beyond its control."

The respondent was found by the court below to be a fit and suitable person to have the custody of the child. On the other hand, while the court found that the petitioner is a good woman, and has a good husband; that they maintain a good home in Alabama and are in a position to give the child proper educational and material advantages, it also found that the child "has not been happy with them and looks with dread upon the prospect of returning to their home . . . It appears that she is a child of sensitive nature and is not compatible with petitioner and her present husband while there is great compatibility between the said child and respondent and his present wife who, it appears, is especially qualified by nature and training to understand and administer to her peculiar spiritual and emotional needs."

It is clear that the unusual conditions and circumstances which prompted the court to find that it was for the best interest of the child or children to be awarded to a nonresident, in the case of *In re Means,* 176 N.C. 307, 97 S.E. 39, and *Clegg v. Clegg,* 187 N.C. 730, 122 S.E. 756, are not present in this proceeding. "In a proceeding of this nature, in the absence of unusual circumstances, the court should not enter an order which permits an infant to be removed from the State by one to whom unqualified custody has not been awarded. *Harris v. Harris,* 115 N.C. 587; *In re Turner,* 151 N.C. 474, 66 S.E. 431; *Page v. Page,* 166 N.C. 90, 81 S.E. 1060; *Page v. Page,* 167 N.C. 350, 83 S.E. 627; *Walker v. Walker,* 224 N.C. 751." *In re DeFord, supra.*

So much of the judgment below as permits the petitioner to take the child out of the State, must be stricken. In lieu thereof, the court, in its discretion, may make provision for the petitioner to visit her child in this State under such conditions and circumstances as the court may deem proper. *In re DeFord, supra.*

Modified and affirmed.

BRYCE E. NEAL, EXECUTOR OF THE ESTATE OF WILLIE BENNETT NEAL, DECEASED, v. ATLANTIC GREYHOUND CORPORATION.

(Filed 5 March, 1952.)

Appeal and Error § 40f—

The Supreme Court will not attempt to chart the course of the trial upon appeal from an order denying motion to strike, and will not disturb the order when it does not appear that the allegations attacked are not germane, certainly when appellant can fully protect its rights by objections to the evidence and to the issues.

APPEAL by defendant from *Pless, J.*, at September Term, 1951, of FORSYTH.

Civil action heard upon a motion to strike various parts of the complaint.

The plaintiff's testate allegedly suffered fatal injuries on 20 October, 1950, in a collision occurring at Madison, N. C., between a private automobile in which the testate was riding and a passenger-carrying motor bus owned and operated by the defendant. The complaint undertakes to state two causes of action against the defendant, one for damages for the wrongful death of the testate, and the other for damages for the pain and suffering of the testate during the period between the injury and the death. *Hoke v. Greyhound Corp.*, 226 N.C. 332, 38 S.E. 2d 105. The defendant moved to strike eleven separate portions of the complaint for irrelevancy and redundancy under G.S. 1-153. Judge Pless entered an order denying the motion in its entirety, and the defendant appealed, assigning error.

Ratcliff, Vaughn, Hudson, Ferrell & Carter for plaintiff, appellee.
Deal, Hutchins & Minor for defendant, appellant.

ERVIN, J. No good purpose will be served by our analyzing in detail the various allegations of the complaint challenged by the motion to strike, or by our attempting to chart in advance the course of the trial in the court below. It is altogether likely that most of the questions which counsel debate before us with marked earnestness and manifest research will fall by the wayside when the cause is heard on its merits in the Superior Court. We cannot see clearly at this stage of the action that the allegations under attack have no possible bearing on the subject matter of the litigation. 71 C.J.S., Pleading, section 474. Besides, it is apparent, we think, that the defendant can fully protect its legal rights in the premises by objections to testimony and objections to the submission of issues. *Hinson v. Britt*, 232 N.C. 379, 61 S.E. 2d 185. For these reasons, the order denying the motion to strike will not be disturbed.

Affirmed.

STATE v. FRED T. MILLS.

(Filed 5 March, 1952.)

1. Criminal Law § 40a—

The witness, in reply to a question as to the defendant's general character, stated that it was good "with the exception of dealing in whiskey." *Held:* The answer is not a proper subject of exception, since a witness may voluntarily qualify and explain his character testimony.

2. Intoxicating Liquor § 9d—

Evidence in this case *held* sufficient to support a verdict of guilty of unlawful possession of intoxicating liquor for the purpose of sale.

APPEAL by defendant from *Bobbitt, J.*, and a jury, Regular September 1951 Criminal Term, McDOWELL.

The defendant was found guilty by a jury of the unlawful possession of intoxicating liquor for the purpose of sale. All other counts in the bill of indictment were disposed of by judgment as of nonsuit.

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

I. C. Crawford, Robert R. Reynolds, and Lawrence C. Stoker for defendant, appellant.

VALENTINE, J. A witness for the State was asked if he knew the general character and reputation of the defendant. He replied: "It is good with the exception of dealing in whiskey."

It is well settled in this jurisdiction that a witness, who is questioned only as to defendant's general character, may qualify and explain his answer. *S. v. McLawhorn,* 195 N.C. 327, 141 S.E. 883; *S. v. Saleeby,* 183 N.C. 740, 110 S.E. 844; *S. v. Mills,* 184 N.C. 694, 114 S.E. 314; *S. v. Reagan,* 185 N.C. 710, 117 S.E. 1; *S. v. Fleming,* 194 N.C. 42, 138 S.E. 342; *S. v. Pridgen,* 194 N.C. 795, 139 S.E. 601; *S. v. Butler,* 177 N.C. 585, 98 S.E. 821; Stansbury, N. C. Evidence, Sec. 114.

There was sufficient evidence to support the verdict of guilty upon the charge of unlawful possession of intoxicating liquor for the purpose of sale. *S. v. Carlson,* 171 N.C. 818, 89 S.E. 30; *S. v. Mann,* 219 N.C. 212, 13 S.E. 2d 247; *S. v. Johnson,* 220 N.C. 773, 18 S.E. 2d 358; G.S. 15-173.

Hence, the judgment of the court below must stand.

No error.

EVELYN T. RICE, ADMINISTRATRIX OF WILTON A. RICE, DECEASED, v. CITY OF LUMBERTON.

(Filed 19 March, 1952.)

1. Trial § 22b—

On motion to nonsuit, defendant's evidence is not to be considered except when not in conflict with plaintiff's evidence, in which event it may be considered to explain or make clear that which has been offered by plaintiff.

2. Trial § 22a—

On motion to nonsuit, plaintiff's evidence and so much of defendant's evidence as is favorable to plaintiff or tends to explain and make clear plaintiff's evidence, will be considered in the light most favorable to plaintiff.

3. Municipal Corporations § 12—

A municipal corporation in distributing electricity for profit is regarded as a private corporation, and in such capacity is liable to persons injured by the actionable negligence of its servants, agents and officers.

4. Electricity § 6—

An electric company is under duty to exercise that degree of care which an ordinarily prudent man would exercise in dealing with such a dangerous instrumentality, which care, in regard to high voltage wires carrying a lethal current, is the utmost care and prudence consistent with the practical operation of its business.

5. Electricity § 7—

When an electric company has notice of a broken wire it is under duty to repair it within a reasonable time under the circumstances; but when the wire carries a high voltage and the circumstances are such that a reasonably prudent man would immediately cut off the current, it is under duty to do so and to keep the current off until proper precautions are taken to prevent danger to persons or property.

6. Same—Evidence of negligence of electric company in failing to turn off current after notice of broken wire held sufficient for jury.

Plaintiff's intestate was electrocuted by current from a primary high voltage wire which had fallen in his yard during a thunderstorm. The evidence tended to show that some twenty-five or thirty minutes prior to the fatal accident, intestate's next door neighbor had telephoned defendant's power station and reported to its superintendent that there "was a wire down" on the street and that the lights were out, that a second call was made after the accident, and that linesmen arrived some forty-five minutes after the first telephone call. The evidence further disclosed that current along the line serving this section could have been turned off immediately by a switch in the power station. *Held:* The evidence was sufficient to be submitted to the jury on the issue of negligence of the power company, and nonsuit was improvidently entered.

7. Negligence § 11—

A person *sui juris* is under duty to exercise that degree of care for his own safety which is commensurate with the obvious danger.

8. Electricity § 10—

The evidence tended to show that intestate came out of his house to help his father, who had been knocked down by current just after driving up in an automobile, that it was dark, that a high voltage wire had become entangled under the automobile, that intestate was not warned by a passenger in the car until he was "right against the automobile," and that intestate was electrocuted when he came in contact with the car or wire. *Held:* The evidence does not show contributory negligence as a matter of law on the part of intestate.

APPEAL by plaintiff from *Williams, J.*, at May Term, 1951, of ROBESON.

Civil action to recover damages for alleged wrongful death.

The record on this appeal discloses these facts to be uncontroverted: (1) Wilton A. Rice, intestate of plaintiff, domiciled in Robeson County, North Carolina, came to his death on night of 18 May, 1950, when he came in contact with an electric wire in the front yard of his home outside, and east of the corporate limits of the town of Lumberton, North Carolina. (2) Plaintiff Evelyn T. Rice has been duly qualified as administratrix of the estate of Wilton A. Rice, deceased, and summons in this action was issued 8 September, 1950. (3) The city of Lumberton, located in said Robeson County, is a municipal corporation engaged not only in the usual duties and activities pertaining to such corporations, but, in addition thereto, in furnishing electric energy for hire to patrons within and outside its corporate limits,—the current being purchased by it from Carolina Power and Light Company. (4) Prior to 18 May, 1950, said town had purchased the wires, instruments and attachments, which had been used by private ownership, to distribute to retail customers electric energy outside of its corporate limits for gain. And (5) prior to and on said date Wilton A. Rice lived in a residence which was supplied with electricity by defendant for gain.

Plaintiff alleges in her complaint that on the evening of 18 May, 1950, while her intestate was at his home, his attention was called to his front yard, where an automobile had driven up, and he went immediately and found his father, and others, at, or in the automobile and that his father was unable to get away from the automobile; that the intestate immediately started to his father to help him out of said automobile and came in contact with one of the wires of defendant's lighting system that was down in the dark on the premises; that the wire was highly charged with electricity, and the intestate was instantly electrocuted thereby and died before reaching his said father; and that the intestate had no knowledge that any wire was down in the yard, or was entangled with said automobile, and on account of the darkness was unable to see the wire.

Plaintiff also alleges in her complaint that the death of her intestate was proximately caused by the negligence of defendant in that, among other things, defendant, in operating the system of electric wires and

appliances in the vicinity where intestate of plaintiff lived, failed (1) to properly insulate the wires; (2) to properly equip same with switches, jacks and other safety devices; (3) to respond to the notice that the wire which caused death of plaintiff's intestate was down, although it knew of the lack of safety equipment; and (4) to exercise due care to keep its said electric lighting system in reasonably safe condition, and free of danger from exposed live wires.

Plaintiff further alleges in her complaint that she has duly filed claim with defendant and it has failed to pay any part of it; and that this action was instituted within one year next after death of her intestate.

Defendant, answering the complaint, admits the allegations in respect to (1) filing claim with defendant, and its failure to pay same, and (2) the institution of this action, but denies, in material aspect, other allegations as above detailed.

And defendant, further answering, set up a further specific defense, which is summarized as follows:

"Defendant denies that it was negligent in any manner whatever; that the exposure of the live wire which caused the death of plaintiff's intestate was due to an act of God, and beyond the control of defendant; that the sole and proximate cause of the injury and death of plaintiff's intestate was his own negligence, and contributory negligence, as alleged . . . which defendant pleads as a bar to any recovery herein."

Upon the trial in Superior Court, the evidence in chief offered by plaintiff tends to show these relevant facts as variously expressed by the witnesses as of the time and at the scene of the death of Wilton Rice on 18 May, 1950:

The home of Wilton Rice was located on Linwood Avenue, also referred to as Linden Avenue, at a point about three hundred yards, or three city blocks, from the intersection of the avenue with Highway 74, and about a mile and a half from the power station in town. The house itself is probably 15 or 20 feet from the street, and has just a small yard between it and the street, "just a few feet." The Wilton Rice lot adjoined the residence lot of Mr. and Mrs. Ernest Todd,—the two houses being about 100 to 150 feet apart. There were "nothing but small trees in the Wilton Rice yard," but there were limbs and pecan trees on the Todd lot,—50 to 100 feet from the Rice house.

There was an electric line along Linwood Avenue for the distribution of electric current to residences, one pole being between the Rice and the Todd houses. The line was built by George W. West, who sold it to the city of Lumberton in the year 1937. It had other lines off from this line into houses. The primary wire was a "2200 or 2300 volt line."

Late that afternoon "there was a severe electrical windstorm" (testimony of George W. West). At five o'clock "it was quite windy . . . bad

weather all afternoon,—just a continuation of it" (testimony of Ernest Todd).

Later "just after about coming dark time . . . a good bit of rain fell and wind blowing" (testimony of George W. West). And the Todds testified to the effect that there was some lightning and thunder, and that a live limb, two inches in diameter, with "a lot of foliage on it," split off a pecan tree in their yard and was hanging from the tree, and an electric wire was hanging below the limb. Ernest Todd testified: "The wire was down right of my house about 10 feet,—laying across my front door steps; it was also hanging from the pole across through the trees, across to his house . . . The first time I saw it, it was in the tree, limbs beating against it. The lights had been out for 30 minutes. It was undoubtedly down." Lights were out in that section, including the Rice and Todd houses.

And W. O. Rice, uncle of Wilton Rice, gave this narrative: (Direct examination) "Woodie Rice was in the car with me when I went up to the Wilton Rice residence on the evening of May 18th. Woodie Rice is Wilton's father. It was dark when I drove up there,—it was just first dark. I suppose it was around 8:30. The lights were burning on my car. I reached the residence by going up the road that turns off Highway 74 and turned in to the Wilton Rice lot. As we turned it caused my lights to shine to the back of the Wilton Rice residence; that is back through his back yard. I did not see any lights in his residence when I turned up there. As I turned up in his yard I heard something scrub under my automobile and Woodie Rice got out of my car and he fell, and he fell for the third time, and the fourth time he fell, he got up. He got clear and Wilton Rice came out of the house and as he came around and touched my automobile, he fell. Wilton got up and fell again; that was the last time. I could not see any wire out there. I found there was a wire tangled up with my car after Wilton Rice had fallen. After Wilton Rice fell, I got out of the automobile . . . and saw Wilton laying beyond at the back of my automobile and then I recognized there was a wire and sparks of fire were burning and I could see the wire . . ."

Then W.O. Rice, on cross-examination, continued: "When my brother and I drew up in the yard I felt something scrub under my car. I didn't know what it was, and when my brother got out and was knocked down, he said there was a hot wire or something . . . I was sitting in the car. I did not feel the current of electricity. My brother did not call Wilton Rice. I don't think Wilton could have seen his father when he came out. As he came out the car lights were burning, and it was dark except where the lights were shining . . . I did not tell Wilton not to come about the car. I told him his father said there was a hot wire down in there and I told him to stop. He was right against the automobile when I told him. I have an idea he touched my automobile after I told him that . . ."

Mrs. Evelyn Rice, widow of Wilton Rice, testified: That she was at home that night; that they were eating supper; that the lights were off at the time, had been off about 30 or 45 minutes; that she did not know anything about a wire being down on the outside; that Wilton saw the lights of the automobile as they shone by the kitchen window, and went out the front door; that she was in the house when he went out, but went out after that; that the car was just a few feet from the front door,—"just a little way . . . 8 or 10 feet"; that it was 8:30; that when she got out there, she did not see any wire except from the light where it was burning Wilton's leg; and that there was no light out there except at the front of the car.

Mrs. Todd testified that she called the power station 25 or 30 minutes before Wilton Rice was killed and "told them there was a wire down on Linwood Avenue and . . . the lights were out," and that she called a second time and "at that time Rice had been killed."

And plaintiff's evidence tends to show that the linemen of the city electric department did not arrive until after Wilton Rice was killed; and that it was about 45 minutes after Mrs. Todd notified them that any lineman came to fix the wires,—quoting Ernest Todd, "45 minutes before they got to the end of the street where we lived,—they could have been on the other end of the line."

Plaintiff also offered the testimony of a line foreman of the Carolina Power and Light Company in respect to use of jacks, cut-outs and switches, and among other things he stated that "they have switches down at the town power plant to cut out the current in the section in which plaintiff's intestate was killed," continuing, "I am not familiar with the distribution of the town of Lumberton. I know they have switches at the sub-station. I am talking about switches at the power house. I know they have switches there. They could have killed the whole thing here at the power house."

Defendant then offered the testimony of Johnny McNeill, superintendent of the water and light department of the city of Lumberton, and of Willie McNeill, connected with the power and light system of the city as assistant to the superintendent.

Johnny McNeill testified in pertinent part: "I remember the occasion 18th May, 1950 . . . getting a telephone call from Mrs. Todd . . . said the wire going to her house was down and she didn't have any lights. I told her all right, that as soon as one of the boys came in I would send him out. We had two storms that afternoon. . . . My boys started after the first storm,—around 3:30. There was wind, rain and lightning and we had never quit when Mrs. Todd called me. The second storm was at first dark,—along about dark,—windstorm. We had six men working on the wires, two different crews. We had more than 25 calls in regard to

disrupted electrical service . . . As a call comes in, we have a tablet and put down each call so that the boys will get the call and see about all of them before we quit. When the boys come in, they take the list and go out and when they come back, we give them the other list, keep on that way until we catch up. Due to the storm that day we had several places where the wires were out, transformer fuses knocked, wire broken down by trees; . . . wires were broken by trees over the river, out at the Ada McLean Mill, Old National Mill, North Lumberton and East Lumberton, in fact we had the same thing all over town.

"When I got the second call from that section where the Wilton Rices lived, Mrs. Todd telephoned the second time informing me that someone was hurt, Willie Mac came in as the phone was ringing and he answered, and he went directly to the scene. Craven Pridgen was with him."

The witness continued: "The jacks we use in our system are not timed, they are single jacks. They use some in REA with three timing switches. We don't use that kind. If we have a long circuit and we do much work on it, we put jacks so we can kill the current and be able to work on the line. There wasn't any jacks in that particular area. It was off the main line and did not have jacks. A jack would not have cut off the current automatically if the line had fallen down. A cutoff would not have cut off the current unless one wire contacted the other wire. Automatic switches knock out if you have a short circuit; if they fall on the ground they do not knock out, don't have sufficient current. . . . The switches we have will not knock out when a wire falls on the ground . . . there isn't enough conductor there—unless they come in contact with another wire . . . The system we use in Lumberton is the latest improved system of electric wiring, of general and approved use. We have a modern switchboard, as modern as can be at present; was installed about two years ago, that is switching equipment. We could have cut off the current at the power house. If we had . . . we would have cut off more than 2000 homes. We do not cut off the current unless we have a primary wire on the ground. . . . When it was reported to me that a wire was down . . . unless I know it is a primary wire, I do not cut off the whole current of that area . . . When I first got the message from out there, all the information I had was the lady said the wire was down and she didn't have any lights. I told her I would get to her as soon as I could contact one of the men. And then I stayed until someone came in and when they came in they went out there. The lady called again about first dark . . . I did not have information where to find them when the first message came in. I tried to get information from the lady. I asked where she lived; in fact I didn't understand who she was. I did know her, but at that time I didn't remember who she was. I asked whether she lived back of George West or go to Taylor's and turn in, so I would

know the exact location. She said she lived back of the George West store, and that is the information I gave out. It was ten or ten thirty that night when the crewmen got through working on the wires. They had been working from three that afternoon. They hadn't had anything to eat. I had to stay in the powerhouse and direct the work.

Then on cross-examination, this witness continued in pertinent part: ". . . We supply East, North and West Lumberton, only residences, don't supply the mills. I would say there are . . . one hundred and fifty at East Lumberton, including the territory we took over from George West. The primary line that fell down on the 18th of May, 1950, running north from 74 before the end of it is reached, goes out as far as Mr. Vander's on the Seventh Street road, probably a mile. The highway is an extension of Fifth Street, and the Seventh Street road is the one Pittman lives on. There is considerable settlement around what used to be the old county home . . . We furnish all of them. There are not more than six or eight customers on that primary line from Highway 74 until it gets to Pittman's out on Seventh. We put 2300 volts on a line for six or eight, and that line furnishes the Rice residence. Insulation on that line wouldn't do any good if you come in contact with it. It would kill anybody who came in contact with it; anybody on the ground would make a ground . . . The line Mrs. Rice told us about was the line running up Linwood Avenue and that was the line that fed the customers of Linwood Avenue up to Sandy Pittman's . . . I said that if we had cut off the current at the plant, we would have taken current from 2000 customers. We don't often do that . . . We have the latest equipment . . . gadgets to turn off the electricity . . . We have a way to cut off different sections . . . We can cut off East Lumberton. We have switch controls, one for East Lumberton . . . I know Mrs. Todd, George West's daughter. I knew where she lived at that time."

Then on re-direct examination this witness concluded by saying, "I had on my pad 25 calls. The 25 calls were ahead of the call from East Lumberton—this was one of the last calls that came in. We were working as the calls came in. As the truck would come in, would give them another list."

And Willie McNeill, witness for defendant, testified: "This occasion on the 18th of May, 1950 . . . It was between three and four o'clock . . . had such a hard wind—saw lights go out . . . and came back in. We worked from then on . . . We have two crews, three men on each truck. We worked on through. There were lines down over the city; some . . . over the river on Carthage Road, two . . . the other side of East Lumberton Baptist Church and one beyond Mr. Taylor's. There was a pole knocked down at the corner of Second, at the intersection . . . Second and Fifth Streets, a man ran into it with a truck; had a crew

working there and others jumping from one place to another. Transformer fuses over town were knocked out . . . it was wind and lightning and both will knock them out . . . It was one of the strongest winds I have ever seen . . . There was another blow about 7:30 . . . Limbs off trees were knocked down, twisted off, not split, but at that particular point, the limb was split. As I drove up to the power station the phone was ringing. Mr. McPhail called me to the telephone. There was a message that there was a wire down up at Mr. Todd's house and they had no lights. I believe she told me that that boy was hurt . . . and I went right on out there. I picked up Craven Pridgen to go out there with me . . . when Craven and I got out there we found a wire on the ground. It was drizzling rain; we cut the wires down first thing we did; the other crew came out later on to help. We found a limb the wind had twisted and the limb fell across the wire. One line was down and the wire was on the limb at that time. We cut the limb off the tree. The limb was four inches through,—I measured it. That tree was 12 to 15 feet east of the power line . . . it was a pecan tree. The limb ran above the wire,—had twisted off above there about 5 or 6 feet above the wire,—made the limb fall on top of the wire—that was the cause of the wire being down on the ground . . . A green limb could burn a wire in two, act as a conductor . . . The limb was across one wire, and other on the ground—one wire down and one was up."

Then on cross-examination, the witness Willie McNeill continued, in pertinent part: "We had two primary wires out there. It takes two to make a circuit, and the two out there were charged with 2300 volts . . . Switch at the power house did not kick out. I knew that the wire on the ground was burning when I went out there on Linden Avenue . . . If the switch at the power house had kicked out, it would have been out, and it could have been turned off at the power house . . . I didn't get but one message to go out there . . . I hadn't heard anything about the first call 30 minutes before the second one . . . Mr. McNeill told about their calling him and I told him I was going right down there . . ."

Motion of defendant, renewed at close of all the evidence, for judgment as of nonsuit, was allowed, and to judgment, pursuant thereto, dismissing the action, plaintiff excepted and appeals therefrom to Supreme Court, and assigns error.

L. J. Britt and Varser, McIntyre & Henry for plaintiff, appellant.
McLean & Stacy for defendant, appellee.

WINBORNE, J. The assignment of error, determinative of this appeal, is directed against the ruling of the trial court in allowing motion of defendant, renewed at the close of all the evidence, for judgment as of nonsuit under provisions of G.S. 1-183.

In considering such motion, "the defendant's evidence, unless favorable to the plaintiff, is not to be taken into consideration, except when not in conflict with plaintiff's evidence, it may be used to explain or make clear that which has been offered by plaintiff," *Stacy, C. J.*, in *Harrison v. R. R.*, 194 N.C. 656, 140 S.E. 598, citing *S. v. Fulcher*, 184 N.C. 663, 113 S.E. 769. This rule is applied also in these cases: *Hare v. Weil*, 213 N.C. 484, 196 S.E. 869; *Crawford v. Crawford*, 214 N.C. 614, 200 S.E. 421; *Tarrant v. Bottling Co.*, 221 N.C. 390, 20 S.E. 2d 565; *Jeffries v. Powell*, 221 N.C. 415, 20 S.E. 2d 561; *Gregory v. Ins. Co.*, 223 N.C. 124, 25 S.E. 2d 398; *Pappas v. Crist*, 223 N.C. 265, 25 S.E. 2d 850; *S. v. Oldham*, 224 N.C. 415, 30 S.E. 2d 318; *Atkins v. Transportation Co.*, 224 N.C. 688, 32 S.E. 2d 209; *Buckner v. Wheeldon*, 225 N.C. 62, 33 S.E. 2d 480; *Humphries v. Coach Co.*, 228 N.C. 399, 45 S.E. 2d 546; *Perry v. Hurdle*, 229 N.C. 216, 49 S.E. 2d 400; *Bundy v. Powell*, 229 N.C. 707, 51 S.E. 2d 307; *Chesser v. McCall*, 230 N.C. 119, 52 S.E. 2d 231; *Winfield v. Smith*, 230 N.C. 392, 53 S.E. 2d 251; *Carson v. Doggett*, 231 N.C. 629, 58 S.E. 2d 609; *Ervin v. Mills Co.*, 233 N.C. 415, 64 S.E. 2d 431; *Register v. Gibbs*, 233 N.C. 456, 64 S.E. 2d 280.

Therefore, taking the evidence offered by the plaintiff, and so much of defendant's evidence as is favorable to the plaintiff, or tends to explain and make clear that which has been offered by the plaintiff, in the light most favorable to plaintiff, this Court is of opinion, and holds that there is sufficient evidence to take the case to the jury on the issue of negligence of defendant.

A municipal corporation, engaged in the business of supplying electricity for private advantage and emolument is, as to this, regarded as a private corporation,—and in such capacity, is liable to persons injured by the actionable negligence of its servants, agents and officers. *Fisher v. New Bern*, 140 N.C. 506, 53 S.E. 342; *Harrington v. Wadesboro*, 153 N.C. 437, 69 S.E. 399.

The principle is recognized and applied in numerous other cases before this Court. See *Grimesland v. Washington*, 234 N.C. 117, 66 S.E. 2d 794.

And this Court declared in *Helms v. Power Co.*, 192 N.C. 784, 136 S.E. 9, that: "Electric companies are required to use reasonable care in the construction and maintenance of their lines and apparatus. The degree of care which will satisfy this requirement varies, of course, with the circumstances, but it must always be commensurate with the dangers involved, and where the wires maintained by a company are designed to carry a strong and powerful current of electricity, the law imposes upon the company the duty of exercising the utmost care and prudence consistent with the practical operation of its business, to avoid injury to those likely to come in contact with its wires."

And in *Small v. Utilities Co.,* 200 N.C. 719, 158 S.E. 385, it is said that "Due to the deadly and latently dangerous character of electricity, the degree of care required of persons, corporate or individual, furnishing electric light and power to others for private gain, has been variously stated." Then after reciting such expressions, the Court said: "In approving these formulae as to the degree of care required in such cases, it is not to be supposed that there is a varying standard of duty by which responsibility for negligence is to be determined. . . . The standard is always the rule of the prudent man, or the care which a prudent man ought to use under like circumstances. What reasonable care is, of course, varies in different cases and in the presence of different conditions."

And these principles apply in cases of broken high tension wires. Diligence must be exercised to repair any breaks in such wires. To permit a broken wire charged with electricity of high voltage unnecessarily to remain in or near a highway is evidence of negligence. *Fisher v. New Bern, supra.* And this is true where the company has notice of the condition, regardless of the cause which produced it. However, under some circumstances, in order to show negligence in this respect, a reasonable time to repair it must have elapsed. And what is reasonable time depends on the circumstances of each case. On the other hand, where there is a broken wire charged with electricity of high voltage, extending into a street or highway creating imminent danger to others, whether sufficient time has elapsed to make repairs is not the test of negligence. But where an electric company receives notice that its wire, charged with electricity of high voltage, is down in a street or highway it should take speedy and efficient action. And, if the situation be such that a reasonably prudent person would cut off the current, this should be done, and the current kept off until proper precautions are taken to prevent danger to persons or property from the fallen wire, and until it is ascertained that it is safe to turn it on. Where, however, the wire is down at a place where the company has no reason to anticipate that anyone will be injured thereby, it is not negligent in failing to cut off the electricity at the first opportunity. See 29 C.J.S. 591, Electricity 45; 18 Am. Jur. 480, Electricity 87-95; *Fisher v. New Bern, supra; Osborne v. Tennessee Electric Power Co.,* 158 Tenn. 278, 12 S.E. 2d 947; *Lutolf v. United Electric Light Co.,* 184 Mass. 53, 67 N.E. 1025; *Mayor v. City of Madison,* 130 Ga. 153, 60 S.E. 461; *Lexington Utilities Co. v. Parker,* 166 Ky. 81, 178 S.W. 1173; *Kentucky and West Virginia Power Co. v. Riley,* 233 Ky. 224, 25 S.E. 2d 366; *Hayden v. Carey,* 182 Wis. 530, 196 N.W. 218.

Now, as to the issue of contributory negligence pleaded in answer of defendant: The law imposes upon a person *sui juris* the obligation to use ordinary care for his own protection, and the degree of such care should be commensurate with the danger to be avoided.

In the light of this principle, and under the circumstances which the evidence being considered tends to show, contributory negligence on the part of intestate of plaintiff is not established as a matter of law. Rather, the evidence presents a case for the jury under proper instruction by the trial judge.

For reasons stated, the judgment of nonsuit is

Reversed.

COMMERCIAL SOLVENTS, INC., v. D. A. JOHNSON AND T. L. BAILEY, A PARTNERSHIP TRADING AS WILSON MOTOR PARTS COMPANY.

(Filed 19 March, 1952.)

1. Principal and Agent § 13c—

Extra-judicial declarations of an alleged agent are not competent to prove the fact of agency or its extent.

2. Same—

Even when the fact of agency is proved by evidence *aliunde*, extra-judicial declarations of the agent are not competent against the principal unless it also is made to appear by evidence *aliunde* that the declarations were within the actual or apparent scope of the agent's authority.

3. Principal and Agent § 7a—

A manufacturer's agent whose duties relate solely to promotion of the principal's products among prospective customers of the dealer, has no actual authority to modify the contractual relations between the principal and the dealer.

4. Principal and Agent § 7b—

The doctrine of apparent authority has no application when the person dealing with the agent has actual or constructive knowledge of the nature and extent of the agency.

5. Principal and Agent § 13c—Extra-judicial declarations of agent held incompetent in absence of evidence aliunde of authority.

Defendants' evidence was to the effect that they had knowledge, actual or constructive, that the duties of plaintiff's agent related solely to promotional work of plaintiff's goods among defendants' customers, and that his work was actually limited to this phase without any dealings affecting the contractual relations between plaintiff and defendants. *Held:* Extra-judicial declarations of the agent, offered to prove estoppel or waiver of the contractual provisions as to plaintiff's right to terminate the agreement, were properly excluded, since there was no evidence tending to show that the declarations were within the actual or apparent authority of the agent.

6. Trial § 28—

An instruction that if the jury believe all the evidence in the case it should answer the issue as directed is not a directed verdict, since under

the instruction it is left to the jury to determine whether it believes the evidence.

7. Trial § 29—

While a verdict may not be directed in favor of the party upon whom rests the burden of proof, when all the evidence in the case points one way as the sole inference, the court may instruct the jury that if it believes all the evidence so to answer the issue.

APPEAL by defendants from *Stevens, J.*, and a jury, at October-November Term, 1951, of WILSON.

Civil action to recover an alleged balance due for merchandise delivered to the defendants under consignment contracts.

The plaintiff is a manufacturer of chemical products, including anti-freeze compounds and other chemicals used in automobile radiators. The defendants are engaged in the business of selling at wholesale and retail automotive parts, accessories, and supplies. Their place of business is in the Town of Wilson. They have customers and outlets in numerous towns in Eastern North Carolina. For a number of years prior to 24 May, 1948, the defendants had been handling products manufactured by the plaintiff. Two methods were followed by the plaintiff in supplying these products: (1) The anti-freeze compounds—Peak (the permanent type), and Nor'way (the evaporating type)—were furnished to the defendants under separate, though substantially identical written contracts, by which these brands of anti-freeze were delivered to the defendants on consignment, remittances to be made monthly covering sales and disposals for the preceding month. (2) The general line of chemicals—which included radiator stop leak, anti-rust, cleaners, and so forth—was sold outright to the defendants upon their orders as and when needed.

During 1948 and for several years prior thereto there was and had been a general market shortage of the radiator anti-freeze compounds, whereas there was and had been an abundant supply of the plaintiff's general line of chemicals.

The contracts concerning anti-freeze were made in May, 1945, without fixed time for termination. However, each contract contained a stipulation providing that it "may be terminated by either party at any time upon written notice to the other," and that "termination . . . shall not relieve the jobber (defendants) of any of its obligations hereunder."

On 24 May, 1948, the plaintiff elected to terminate these contracts and wrote the defendants that day giving them notice as required by the contracts. The defendants admitted receiving the letter on or about 25 May, 1948.

This action was instituted to recover the sum of $2,006.93 which the plaintiff alleges the defendants owe for consignments of anti-freeze sold prior to termination of the contracts.

The defendants by answer denied the debt and set up a counterclaim against the plaintiff. The gist of the allegations of the counterclaim is that the plaintiff, by reason of representations made and assurances given by one of its agents, waived or became estopped to exercise the privilege of terminating the contracts and became bound to furnish the defendants supplies of anti-freeze for the approaching winter season of 1948-1949, and that the plaintiff's alleged wrongful refusal to so furnish these compounds resulted in substantial damage to the defendants, who were unable, after due diligence, to obtain these goods elsewhere.

The evidence discloses that during the spring of 1948, Herbert R. Snyder (hereinafter referred to as Snyder), was employed by the plaintiff as special representative in Eastern North Carolina to promote the sale of its regular line of chemicals. Snyder reported to the defendants in February or March, 1948, and thereafter worked among the defendants' customers for several days promoting the qualities of these chemicals.

The defendants sought to show by the testimony of numerous witnesses, principally managers of customer-stores, that the plaintiff's agent Snyder, in promoting the sale of the chemicals other than anti-freeze compounds, gave assurances that both lines were being handled by the defendants and that allocations of the scarce anti-freeze compounds would be made available to the trade in proportion to the volume of purchases of the regular chemical line. The proffered testimony was excluded. It would serve no useful purpose to bring forward all that was excluded. The following excerpts will suffice to illustrate the defendants' exceptions:

(1) One customer of the defendants, a store manager, if permitted would have testified: "He (Snyder) said that anti-freeze would continue to be short but that by showing Commercial Solvents Corporation that we could move their related products we stood a much better chance of getting a larger supply of Peak (anti-freeze)." (2) A garage operator, customer of defendants, if permitted would have testified: "He (Snyder) just told us that we would get more anti-freeze the following season. He made us a promise of it." (3) Another customer of the defendants would have testified: "He (Snyder) just told me if we took on the chemical line we would get more anti-freeze." (4) The manager of another customer store, if permitted would have testified: "He (Snyder) showed them (customers of witness) the folder and in each case the customer asked if we would have and did have Peak and Nor'way anti-freeze. He told them that we were the jobbers and would have the complete line." This witness also would have said, if permitted, that as a result of the statements made about anti-freeze some of his customers gave Mr. Snyder orders for chemicals. (5) A salesman from the defendants' store who accompanied Snyder would have said if permitted: "He told me . . . that his job was to promote chemicals but that the amount of chemicals that each jobber

bought would have a direct bearing on the amount of anti-freeze available to that particular jobber."

One of the defendants' salesmen who accompanied Snyder testified that he, the salesman, in the presence of Snyder, took about twenty orders for anti-freeze for delivery the next winter. However, at the time the salesman took these orders for anti-freeze he said the defendants had none in stock. The written contracts then in force between the plaintiff and the defendants governing the sale of anti-freeze compounds contained this provision: "The jobber shall not accept orders for, or commit the Manufacturer to the sale or delivery of, any Nor'way (same provision in Peak contract) in excess of the unsold quantity then in Jobber's custody, or make any representation or warranty in respect of Nor'way (same as to Peak) on behalf of the Manufacturer without the written consent of the manufacturer."

At the close of all the evidence the plaintiff moved for judgment as of nonsuit on the counterclaim. The motion was allowed. Thereupon, in the plaintiff's action the single issue of debt was submitted to the jury. A verdict was returned in favor of the plaintiff in the amount of $2,006.93.

From judgment entered on the verdict, the defendants appealed, assigning errors.

Chas. B. McLean and Lucas & Rand for plaintiff, appellee.

Gardner, Connor & Lee for defendants, appellants.

JOHNSON, J. The defendants' chief assignments of error challenge the action of the trial court in (1) excluding evidence proffered by the defendants in support of their counterclaim, (2) allowing the motion for judgment of nonsuit on the counterclaim, and (3) the charge of the court on the issue of debt in the plaintiff's action.

1. *The excluded evidence and judgment of nonsuit in respect to the counterclaim.*—The excluded testimony consists of a mass of extra-judicial declarations and statements allegedly made by the plaintiff's agent Snyder, by which the defendants sought to prove that the plaintiff waived the right, or estopped itself, to terminate the consignment contracts under which the defendants had been receiving consignment shipments of anti-freeze compounds.

Conceding, but not deciding, that the excluded testimony may have probative force as tending to establish the facts alleged in the counterclaim, nevertheless it would seem that no sufficient foundation was laid to make this evidence admissible.

While proof of agency, as well as its nature and extent, may be made by the direct testimony of the alleged agent (*Jones v. Light Co.*, 206 N.C. 862, 175 S.E. 167), nevertheless it is well established that, as against the

principal, evidence of declarations or statements of an alleged agent made out of court is not admissible either to prove the fact of agency or its nature and extent. *West v. Grocery Co.,* 138 N.C. 166, 50 S.E. 565; *Parrish v. Mfg. Co.,* 211 N.C. 7, 188 S.E. 817; 1 Meacham on Agency, 2d Ed., Sec. 285.

And in applying this rule, ordinarily the extra-judicial statement or declaration of the alleged agent may not be given in evidence, unless (1) the fact of agency appears from other evidence, and also unless it be made to appear by other evidence that the making of such statement or declaration was (2) within the authority of the agent, or (3) as to persons dealing with the agent, within the apparent authority of the agent. *Salmon v. Pearce,* 223 N.C. 587, 27 S.E. 2d 647; *D'Armour v. Hardware Co.,* 217 N.C. 568, 9 S.E. 2d 12; Am. L. Inst. Restatement, Agency, Vol. 2, Sec. 285; Anno: 3 A.L.R. 2d p. 598. See p. 599, note 6.

When these preliminary factors have been proved by evidence *aliunde,* then evidence of extra-judicial statements of the agent, when otherwise relevant and competent, may be introduced as corroborative of other evidence (*Hester v. Motor Lines,* 219 N.C. 743, 14 S.E. 2d 794; 3 C.J.S., Agency, Sec. 322, p. 280), or as substantive evidence bearing on the main issue in suit as a part of the *res gestæ. Queen v. Insurance Co.,* 177 N.C. 34, 97 S.E. 741; *Lumber Co. v. Johnson,* 177 N.C. 44, 97 S.E. 732; *Miller v. Cornell,* 187 N.C. 550, 122 S.E. 383; *Bank v. Sklut,* 198 N.C. 589, 152 S.E. 697.

It follows, then, that the proffered evidence was properly excluded, unless it appears from the admitted evidence (1) that Snyder was the plaintiff's agent, and (2) that either (a) the excluded statements of Snyder were made within the actual scope of his authority, or (b) that, as to the defendants, the statements were made within the scope of Snyder's apparent authority.

The fact of Snyder's agency and the extent of his authority are shown by his deposition, offered in evidence by the defendants. From this it appears that the scope of his authority was limited to doing sales-promotion work in respect to the plaintiff's line of chemicals. As he put it, he was ". . . to promote the qualities of . . . radiator chemicals," and to do "missionary work with the wholesale jobbers' salesmen there,—Wilson Motor Parts salesmen and their affiliated branches, merely explaining the merits of the Stop Leak, the Anti-Rust, the Quick Flush, the Dry-Ex and the Radiator Cleaner that Commercial Solvents Corporation manufactured . . ." And such is the thread of all the admitted evidence in the case. It all tends to show that Snyder's authority was limited to promotional work, with no evidence being susceptible of the inference that Snyder possessed actual authority to modify the contractual relations between the plaintiff and the defendants.

This brings us to an examination of the defendants' contention that the excluded statements and declarations of agent Snyder were admissible under the doctrine of apparent authority. Here, again, it must be kept in mind that before this doctrine may be invoked, the apparent authority relied on must be shown by evidence *aliunde*. The controverted extrajudicial statements and declarations may not be used for the purpose of enlarging the agent's authority. *Railroad v. Smitherman,* 178 N.C. 595, mid. p. 599, 101 S.E. 208.

Moreover, since the doctrine of apparent authority rests upon the principle that where one of two innocent parties must suffer, the one must bear the burden who places another in a position to cause loss, it necessarily follows that the doctrine may not be invoked by one who knows, or has good reason for knowing, the limits and extent of the agent's authority. In such case the rule is: "Any apparent authority that might otherwise exist vanishes in the presence of the third person's knowledge, actual or constructive, of what the agent is, or what he is not, empowered to do for his principal." 2 C.J.S., Agency, Sec. 92, p. 1189.

An examination of the record in the light of these controlling principles discloses that the admitted evidence, standing alone, is insufficient to support the inference that, as to the defendants, Snyder had apparent authority to make the statements and declarations shown in the excluded testimony. On the contrary, all the admitted evidence tends to show the defendants knew, or had good reason to know, that Snyder's actual scope of authority was limited to promoting the plaintiff's regular line of chemicals. Neither of the defendants dealt with Snyder at any time on a contractual level. There is no evidence that Snyder ever made personal contact with the defendant Bailey. This defendant did not go upon the witness stand. The other partner, the defendant Johnson, testified to no dealings with Snyder affecting the contractual relations between his firm and the plaintiff corporation. Johnson said that Snyder on arriving introduced himself as being with the plaintiff. "He showed me some samples of chemicals of Commercial Solvents that he was demonstrating . . ." Snyder made no demonstration for Johnson, who said, "I just saw the literature." After this, as the evidence developed in the trial below, Snyder was out in the trade areas promoting the qualities of the plaintiff's line of chemicals, part of the time with one of the defendants' salesmen, but never any more, according to the record, did he make contact with either of the defendants.

Also, the evidence tends to show that all previous contractual dealings were conducted between the defendants themselves and executives of the plaintiff corporation. The record reflects no evidence tending to show that either of the defendants was misled in respect to the scope of Snyder's authority.

Since the admitted evidence in no aspect supports the inference that Snyder possessed either the actual or apparent authority to waive or modify the existing contractual relations between the parties, error may not be predicated upon the excluded evidence.

The evidence bearing upon the counterclaim, when considered in its light most favorable to the defendants, is insufficient to make out a *prima facie* case. The court below properly allowed the motion for nonsuit.

2. *The charge of the court on the issue of debt.*—It seems to be conceded, and rightly so, that there was sufficient evidence to carry to the jury the plaintiff's case involving the issue of debt. On this phase of the case, the defendants challenge the correctness of this instruction: "The Court instructs you peremptorily if you believe all the evidence in this case that you will answer this issue '$2,006.93 with interest from the 30th of April, 1948.' There it is, gentlemen. Go out and say how you answer it."

Here, the defendants contend that the court in effect directed a verdict for the plaintiff; and that this may not be done in favor of the party who has the burden of proof.

However, the instruction as given left it to the jury to determine whether they believed the evidence. Hence it was not a directed instruction. See *McCracken v. Clark, ante,* 186, and cases there cited.

In the instant case all the evidence tends to show that the plaintiff was entitled to recover the full amount sued for. No evidence was offered *contra,* and defendant D. A. Johnson on cross-examination admitted the correctness of the account.

Ordinarily, where all the evidence points in the same direction, with but one inference to be drawn from it, an instruction to find in support of such inference, if the evidence is found to be true, will be upheld. *Mercantile Co. v. Ins. Co.,* 176 N.C. 545, 97 S.E. 476; *Holt v. Maddox,* 207 N.C. 147, 176 S.E. 261; *Davis v. Warren,* 208 N.C. 174, top p. 177, 179 S.E. 329.

The form of the instruction as given has the sanction of numerous decisions of this Court. *Holt v. Maddox, supra; Davis v. Warren, supra; Nelson v. Ins. Co.,* 120 N.C. 302, bot. p. 304, 27 S.E. 38; *Bank v. Griffin,* 153 N.C. 72, bot. p. 75 and top p. 76, 68 S.E. 919. See, however, *Morris v. Tate,* 230 N.C. 29, top p. 33, 51 S.E. 2d 892, where a more exact formula is given. See also comment of *Stacy, C. J.,* in *Brooks v. Mill Co.,* 182 N.C. 258, mid. p. 260, 108 S.E. 725.

Other exceptive assignments of error (including those relating to the dismissal of the defendants' second counterclaim by judgment of nonsuit), not set out in the defendants' brief, or in support of which no reason or argument is stated or authority cited, are deemed abandoned. Rule 28,

Rules of Practice of the Supreme Court, 221 N.C. 544, at p. 562 *et seq.*; *Dillingham v. Kligerman, post,* 298.

No error.

GEORGE M. SCOTT v. MABEL M. JORDAN.

(Filed 19 March, 1952.)

1. Pleadings § 14—

A complaint and reply are inconsistent within the meaning of G.S. 1-141 when they are contrary so that one is necessarily false if the other is true, and the rule against inconsistency does not preclude plaintiff from replying to a defense by alleging new matter involving a new position which is not necessarily inconsistent with that taken in the complaint, since plaintiff should not anticipate a defense in his complaint.

2. Vendor and Purchaser § 11: Frauds, Statute of, § 10—

A mutual oral agreement to abandon or cancel an executory contract to convey realty is a defense to any rights asserted by the other party under the contract, since the statute of frauds, while applying to the contract, does not apply to its abondonment or cancellation. G.S. 22-2.

3. Pleadings § 14—

Plaintiff sought to recover the land in question as the sole heir at law of his ancestor. Defendant set up in her answer an executory contract to sell executed by the ancestor. Plaintiff's reply set up abandonment and cancellation of the contract by mutual agreement of plaintiff and defendant. *Held:* The reply is not inconsistent with the complaint and states a defense to the new matter set up in the answer, and motion to strike the reply was properly denied.

4. Executors and Administrators § 8; Descent and Distribution § 1: Conversion § 3—

Where the owner of land executes an executory contract to convey, his heirs take the land subject to the equities of the purchaser and the rights of the administrator and distributees under the doctrine of equitable conversion, and the administrator is entitled to the balance of the purchase price; but where the money is not necessary to pay debts of the estate, a sole heir at law who is also sole distributee has the absolute right as against the administrator to elect to reconvert and take the property in its original state.

5. Executors and Administrators § 11—

In an action by the purchaser for specific performance of an executory contract to convey realty, instituted against the administrator of the vendor, G.S. 28-98, an heir claiming abandonment and cancellation of the executory contract should be allowed to intervene and set up his claim, since judgment against the administrator would not be binding on the heir if he were not a party to the action. Constitution of North Carolina, Art. I, sec. 17.

6. Parties § 7: Constitutional Law § 21—

A person claiming an interest in the subject matter of an action and whose rights would be purportedly adjudicated by a judgment therein should be allowed to intervene, since the judgment cannot affect his rights unless he comes in or is brought before the court in some way sanctioned by law. Constitution of North Carolina, Art. I, sec. 17.

7. Appeal and Error § 14: Ejectment § 14—

An appeal from order of the court refusing defendant's motion to strike plaintiff's reply in an action to recover possession of realty does not preclude a Superior Court judge from thereafter granting plaintiff's motion for an increase in the defense bond. G.S. 1-111, G.S. 1-294.

FIRST APPEAL by defendant from *Nettles, Resident Judge,* at Chambers in Asheville, North Carolina, on 1 December, 1951; and second appeal by defendant from *Bennett, Special Judge,* at the December Term, 1951, of the Superior Court of BUNCOMBE County.

Civil action to recover a parcel of realty in Buncombe County known as No. 6 Buckingham Court.

These are the essential facts in chronological order:

1. The plaintiff, George M. Scott, brought this action against the defendant, Mabel M. Jordan, for the recovery of No. 6 Buckingham Court. His complaint makes out this case:

The plaintiff, who is the "sole child and heir at law" of W. L. Scott, has title in fee to the land with a present right to its possession. He acquired his title by inheritance from his ancestor, W. L. Scott, who let the defendant into possession as his tenant at will on 11 June, 1949, and who died intestate shortly thereafter, to wit, on 15 August, 1949. The plaintiff terminated any right of the defendant to remain in the occupation of the premises by a reasonable demand for possession before the commencement of the action, but the defendant ignored such reasonable notice to quit and now wrongfully withholds the possession of the premises from the plaintiff.

2. The defendant furnished a defense bond in the amount of $200.00 conditioned as provided in G.S. 1-111 to secure the plaintiff against costs and loss of rents and profits pending the action, and filed an answer denying the material allegations of the complaint other than those averring the former ownership of the land by W. L. Scott and the death of W. L. Scott. The answer also pleaded the following new matter:

On 11 June, 1949, W. L. Scott, acting through his duly authorized agent, Edward E. Dunn, and the defendant entered into a contract in writing whereby W. L. Scott bound himself to convey No. 6 Buckingham Court to the defendant for $7,800.00, and whereby the defendant obligated herself to pay that sum to W. L. Scott in three several installments of $250.00, $750.00, and $6,800.00. The contract has been duly proved

and registered in Buncombe County, where the land is situated. The defendant entered on the premises during the life of W. L. Scott in conformity with a stipulation of the contract, and has rightfully occupied the same ever since in her capacity as vendee. The defendant duly paid the first two installments of the consideration for the land to W. L. Scott, who died before the third installment of $6,800.00 matured. After W. L. Scott's death, the defendant tendered the unpaid part of the consideration to Edward E. Dunn, the administrator of W. L. Scott, and made demand upon him for a deed executed by him in his capacity as administrator of the vendor under G.S. 28-98 conveying No. 6 Buckingham Court to her. The administrator, acting at the instance of the plaintiff, refused to accept the tender or to make the deed. The defendant has kept her tender good, and is still able, ready, and willing to make payment of the unpaid portion of the consideration in exchange for the deed. Prior to the commencement of this action, the defendant Mabel M. Jordan, as plaintiff, sued "Edward E. Dunn, agent for W. L. Scott, and Edward E. Dunn, Administrator of W. L. Scott," for specific performance by the administrator of the contract of 11 June, 1949. Before commencing this action, the plaintiff, George M. Scott, applied to Buncombe Superior Court for leave to intervene in the suit between Mabel M. Jordan and the administrator, but his application was denied. That suit is still pending.

3. The plaintiff filed a reply, which does not allege ultimate facts with the directness and positiveness desirable in pleading. Nevertheless when the reply is construed with liberality in the plaintiff's favor, it does allege by implication rather than by express averment that subsequent to the death of W. L. Scott the alleged contract of 11 June, 1949, was abandoned and canceled by an oral agreement made by plaintiff and defendant acting through Edward E. Dunn as mediator.

5. The defendant forthwith filed a motion to strike the above allegations from the reply. When the motion to strike was heard by him at Chambers on 1 December, 1951, Judge Nettles entered an order denying it, and the defendant took her first appeal to the Supreme Court, assigning the refusal to strike as error.

6. Subsequently, to wit, on 13 December, 1951, the plaintiff moved before Judge Bennett, the presiding judge at the December Term, 1951, of the Superior Court of Buncombe County, for an order requiring an increase in the defense bond. Judge Bennett entered an order requiring the defendant to give defense bonds totaling $800.00 conditioned as provided in G.S. 1-111 to secure the plaintiff against costs and loss of rents and profits pending the action, and the defendant took her second appeal to the Supreme Court, assigning the order requiring the increased bond as error.

Williams & Williams for plaintiff, appellee.
J. W. Haynes and George A. Shuford for defendant, appellant.

ERVIN, J. The code of civil procedure prescribes that where the answer contains new matter constituting a counterclaim, the plaintiff may plead in his reply "any new matter not inconsistent with the complaint, constituting a defense to the new matter in the answer." G.S. 1-141.

The defendant contends on her first appeal that Judge Nettles ought to have stricken the reply for want of conformity to this provision of the code. She asserts initially that the reply departs from the plaintiff's case as made in his complaint and introduces new matter inconsistent with it; and she insists secondarily that the new matter set up in the reply does not constitute a defense to the counterclaim stated in the answer.

It thus appears that the first appeal necessitates an examination of the pleadings.

The complaint states a good cause of action for the recovery of the parcel of realty known as No. 6 Buckingham Court. It alleges, in substance, that the plaintiff has title in fee to this land with the present right to its possession; that the plaintiff acquired his title by inheritance from the former owner, W. L. Scott; and that the defendant wrongfully withholds the possession of the land from the plaintiff.

The answer denies the material averments of the complaint, and avers as new matter and counterclaim that the defendant has equitable title to the land in question with a present right to its possession as the vendee in an executory contract in writing duly executed by the former owner, W. L. Scott, during his lifetime, to wit, on 11 June, 1949.

The reply pleads that subsequent to the death of W. L. Scott the alleged executory contract of 11 June, 1949, was abandoned and canceled by an oral agreement made by plaintiff and defendant acting through Edward E. Dunn as mediator.

A complaint and a reply are inconsistent within the meaning of the code when they are contrary the one to the other, so that the one is necessarily false if the other is true. *Colahan v. Herl,* 168 Kan. 130, 210 P. 2d 1003; *O'Malley v. Luzerne County,* 3 Kulp (Pa.) 41. When the complaint and the reply under scrutiny are laid alongside this test, they are seen to be free of the vice of inconsistency. The reply in which the plaintiff alleges that the executory contract supporting the defendant's claim to No. 6 Buckingham Court has been abrogated by the mutual agreement of the parties is in complete harmony with the complaint in which the plaintiff asserts that he is the absolute owner of that property. Indeed, the plaintiff's pleadings conform to the general procedural principle that a plaintiff's initial pleading need not, and should not, by its averments, anticipate a counterclaim or a defense, and undertake to negative or avoid it. 71 C.J.S., Pleading, section 84.

This brings us to the inquiry whether the new matter set up in the reply constitutes a defense to the new matter stated in the answer.

The new matter in the answer bases the defendant's claim to the realty in controversy upon the executory contract allegedly made by the plaintiff's ancestor and the defendant. Manifestly the reply states a defense to this claim if it alleges that this executory contract has been abandoned and canceled in a lawful mode by parties having legal power to take such action. *May v. Getty,* 140 N.C. 310, 53 S.E. 75; 58 C.J., Specific Performance, section 14. See, also, in this connection: 66 C.J., Vendor and Purchaser, section 1561.

According to the answer, the executory contract was executed by W. L. Scott, acting through his agent, Edward E. Dunn, in strict conformity with the provision of the statute of frauds that a contract "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 person by him thereto lawfully authorized." G.S. 22-2.

The statute of frauds applies to the making of enforceable contracts to sell or convey land, not to their abrogation. As a consequence, an executory written contract to sell or convey real property may be abandoned or canceled by mutual agreement orally expressed. *Bell v. Brown,* 227 N.C. 319, 42 S.E. 2d 92; *May v. Getty, supra; Holden v. Purefoy,* 108 N.C. 163, 12 S.E. 848; *Houston v. Sledge,* 101 N.C. 640, 8 S.E. 145, 2 L.R.A. 487.

It necessarily follows that the reply states a defense to the new matter in the answer if the plaintiff and the defendant had legal power to do what they are alleged to have done.

When an owner of land contracts to sell and convey it and dies intestate without doing so, his heirs take the property subject to (1) the equities of the purchaser under the contract, and (2) the rights of the administrator and the distributees of the owner under the doctrine of equitable conversion. *Mizell v. Lumber Co.,* 174 N.C. 68, 93 S.E. 436; *Mills v. Harris,* 104 N.C. 626, 10 S.E. 704; *Grubb v. Lookabill,* 100 N.C. 271, 6 S.E. 390; *Osborne v. McMillan,* 50 N.C. 109; *Hodges v. Hodges,* 22 N.C. 72; *Earle v. McDowell,* 12 N.C. 16; 18 C.J.S., Conversion, section 40; 26 C.J.S., Descent and Distribution, section 125; 33 C.J.S., Executors and Administrators, section 104; 58 C.J.S., Specific Performance, section 452.

For this reason, we digress here to observe that the plaintiff ought to have been made a party to the action based on the Act of 1797, now G.S. 28-98, in which the defendant sues the administrator of the plaintiff's ancestor for specific performance of the executory contract of 11 June, 1949. The basic issues in the two suits are identical. Manifestly the

defendant cannot prevail in either case if the executory contract has been abandoned or canceled by parties having legal power to take such action. 58 C.J., Specific Performance, section 165; 66 C.J., Vendor and Purchaser, section 1561. As the result of the order of some judge not identified by the present record denying the motion of the plaintiff for leave to intervene in the defendant's action against the administrator, we now have two lawsuits where one would suffice. Moreover, each of the two suits bears a remarkable resemblance to "the play-bill which is said to have announced the tragedy of Hamlet, the character of the Prince of Denmark being left out."

When all is said, the order barring the plaintiff from intervention in the defendant's action against the administrator merely doubles litigation for litigation's sake. Under Article I, Section 17, of the North Carolina Constitution, a judgment cannot bind a person unless he comes or is brought before the court in some way sanctioned by law and afforded an opportunity to be heard in defense of his rights. *Eason v. Spence,* 232 N.C. 579, 61 S.E. 2d 717; *Thomas v. Reavis,* 196 N.C. 254, 145 S.E. 226. As an inexorable consequence of this constitutional provision, any judgment which may be rendered in the defendant's action against the administrator will be wholly ineffectual as against the plaintiff, who is not a party to such action, even though such action is predicated upon the Act of 1797, now G.S. 28-98. This basic principle of the organic law was impliedly recognized and applied in *McCraw v. Gwin,* 42 N.C. 55, where the heirs were permitted to assail a deed made by the administrator of their ancestor under the power vested in him by the statute. As that great jurist *Chief Justice Ruffin* said more than a century ago: "It is not the meaning of the statute that the executor should be obliged, or have power, to convey, where the deceased or his heir or devisee would not be bound to do so." *Hodges v. Hodges, supra.*

If the court should deny the plaintiff the right to plead the abandonment or cancellation of the executory contract in the instant action after having barred him from participation in the defendant's suit against the administrator, he could justly complain not only of the law's delay, but also of the slings and arrows of a fortune which would be unconstitutional as well as outrageous.

Our digression has not been altogether amiss if it has any tendency to induce judges or lawyers to ponder the implications of Article I, Section 17, of the State Constitution when they consider who should be made parties to litigation. We now return to the inquiry whether the plaintiff and the defendant had legal power to abandon or cancel the executory contract.

According to the complaint, the plaintiff is the sole distributee and heir of the deceased owner. Since they were both *sui juris* at the time named

in the reply, the plaintiff, as the only heir and distributee of the deceased owner, and the defendant, as the sole purchaser, had undoubted legal authority to abandon or cancel the executory contract, unless they were precluded from doing so by rights devolving upon the administrator of the deceased owner under the doctrine of equitable conversion.

We might reasonably come to a decision upon the present record favorable to plaintiff on this aspect of the litigation either on the theory that it inferentially appears that the administrator has released or waived any rights accruing to him under the doctrine of equitable conversion, or on the theory that the defendant is not privileged to invoke any rights devolving upon the administrator under that doctrine to invalidate an agreement abandoning or canceling the executory contract made between him and the plaintiff. We are not compelled, however, to rest our decision on either of these grounds.

Conversion is the fictional change of realty into personalty or of personalty into realty for equitable purposes. 18 C.J.S., Conversion, Section 1; *Seagle v. Harris,* 214 N.C. 339, 199 S.E. 271; *Woodward v. Ball,* 188 N.C. 505, 125 S.E. 10; *McIver v. McKinney,* 184 N.C. 393, 114 S.E. 399. When the doctrine of conversion is applied to the present record, it is plain that the administrator has no rights entitling him or anyone else to question the capacity of the plaintiff and the defendant to abandon or cancel the executory contract. An administrator does not take charge of the assets of his intestate merely for the sake of handling them. He takes charge of such assets for this twofold purpose: (1) To pay the debts of the intestate; and (2) to make distribution of the intestate's property to the rightful beneficiaries of the estate. The executory contract between the deceased owner and the defendant worked an equitable conversion, entitling the administrator of the deceased owner to claim the unpaid portion of the sale price as personalty for the purposes of administration. *Mills v. Harris, supra;* 18 C.J.S., Conversion, sections 9, 40. It does not appear that the intestate left any debts, and it does appear that the plaintiff is the sole distributee of his estate. These things being true, the plaintiff, as the sole beneficiary of the estate of the deceased owner, had an absolute right as against the administrator to elect to reconvert the property and to take it in its original state. *Trust Co. v. Allen,* 232 N.C. 274, 60 S.E. 2d 117; *Seagle v. Harris, supra; Clifton v. Owens,* 170 N.C. 607, 87 S.E. 502; *Phifer v. Giles,* 159 N.C. 142, 74 S.E. 919; *Duckworth v. Jordan,* 138 N.C. 520, 51 S.E. 109. Under the allegations of the reply, the plaintiff made a positive election to reconvert the property and to take it in its original state when he made his agreement with the defendant to abandon or cancel the executory contract. Such election put an end to any rights devolving upon the administrator under the doctrine of equitable conversion.

For the reasons given, Judge Nettles rightly refused to strike the reply.

The defendant asserts that her appeal from the order of Judge Nettles denying her motion to strike "carried the entire case to the Supreme Court," and that by reason thereof Judge Bennett had no jurisdiction to make the order requiring the defendant to give an increased defense bond conditioned as provided in G.S. 1-111 to secure the plaintiff against costs and loss of rents and profits pending the final determination of the action.

This contention is untenable. It is in direct conflict with the controlling statute, which prescribes in express terms that "when an appeal is perfected . . . it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein; but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from." G.S. 1-294. See, also, in this connection: McIntosh on North Carolina Practice and Procedure in Civil Cases, section 693. Inasmuch as the complaint stated a cause of action for the recovery of real property, the question of the sufficiency of the defense bond required by G.S. 1-111 "was a matter included in the action," which was not affected in a legal sense by the motion of the defendant to strike the reply.

The order of Judge Nettles denying the motion to strike and the order of Judge Bennett requiring the increased defense bond must be affirmed.

This action ought to be consolidated with the defendant's suit against the administrator for the purpose of trial and judgment. The presiding judge in the Superior Court will undoubtedly take such step either on motion of the parties or *ex mero motu*.

Affirmed.

STATE v. ESTEL McLAMB.

(Filed 19 March, 1952.)

1. Searches and Seizures § 2—

A warrant reciting that an officer of the law had sworn under oath that named persons illegally possessed intoxicating liquor at a specified locality, and commanding a search of the premises without affidavit, *is held* governed by G.S. 18-13 and not G.S. 15-27, and the warrant is a sufficient compliance with the apposite statute to render competent evidence discovered by an officer at the premises designated.

2. Criminal Law § 28—

Defendant's plea of not guilty puts in issue every element of the offense charged.

3. Intoxicating Liquor § 5b—

Possession of property designed and intended for the illegal manufacture of intoxicating liquor may be actual or constructive. "Designed" means fashioned according to a plan for that purpose. G.S. 18-4.

4. Intoxicating Liquor § 9d—

Evidence that officers, searching in defendant's house and barn, found jars, some with small amounts of whiskey in them, kegs and barrels, and a worm or condenser barrel, with testimony that it was of a type used in the manufacture of whiskey, *is held*, considered in the light most favorable to the State, sufficient to be submitted to the jury in a prosecution for possession of property designed and intended for the illegal manufacture of whiskey.

5. Criminal Law § 50f—

Defendant did not testify, but his wife, three other women, and several men testified in his behalf. *Held:* Argument of the solicitor to the effect that defendant was "hiding behind his wife's coattail" is tantamount to comment on defendant's failure to testify in his own behalf, and upon the court's overruling of objections thereto, must be held for prejudicial error. G.S. 8-54.

6. Same—

When defendant does not go upon the stand and does not put his character in evidence, the solicitor is not entitled to attack or make adverse comment on defendant's character in the argument to the jury.

7. Intoxicating Liquor § 9a: Criminal Law § 56—

A warrant charging defendant with the unlawful possession of property for the purpose of manufacturing illegal whiskey, instead of with possession of property designed and intended for that purpose, *held* not fatally defective, and motion in arrest of judgment is denied. G.S. 18-4.

APPEAL by defendant from *Grady, Emergency Judge,* at October Term, 1951, of JOHNSTON.

Criminal prosecution upon a warrant dated 4 May, 1951, based upon affidavit of same date charging that defendant "did unlawfully, wilfully and feloniously have in his possession for the purpose of manufacturing illegal whiskey one complete distillery outfit, about 500 gallons capacity, and 800 gallons of beer, and two complete distillery outfits of about 750 gallons each, and 750 gallons of beer, and 16 cases of fruit jars, 7 jugs (barrels and other materials for manufacture and sale of intoxicating liquor)"—the portion in parentheses being added by way of amendment allowed by the court—in the progress of the trial in Superior Court—as hereinafter shown.

The record shows that on 2 May, 1951, before E. C. Jones, a justice of the peace of Johnston County, one "E. O. Beasley, an officer charged with the execution of the law," said "under oath, that he is informed and believes that Estel McLamb and wife have in their possession intoxicating

liquors for the purpose of sale located in his dwelling, garage, filling station, automobiles, barns and out-houses, and premises . . . which is located in Bonner Township, Johnston County, N. C."

Thereupon E. C. Jones, J.P., signed a warrant which reads as follows:

"NORTH CAROLINA
JOHNSTON COUNTY

"To the Sheriff or any Lawful Officer—GREETING:

"Whereas information has been furnished me by E. O. Beasley an officer charged with the execution of the law says under oath that Estel McLamb and wife has in their possession intoxicating liquors for the purpose of sale, located as above stated, you are authorized and commanded to enter upon said premises and make search of same. Seizing all intoxicating liquors, containers and other articles used in carrying on the illegal handling of intoxicating liquors. Herein fail not, and make due return of this warrant.

"This 2nd day of May 1951.

E. C. JONES, J.P."

At the bottom of which appear these entries:

"OFFICER'S RETURN:

Received the 2nd day of May 1951.
Executed the 3rd day of May, 1951.

B. A. HENRY, Sheriff,
By: G. IRA FORD, D. S."

Defendant Estel McLamb, being put upon trial upon the charges in the warrant, entered a plea of not guilty.

And upon the trial in Superior Court the State offered evidence tending to show that on 2 May, 1951, officers found two stills,—oil-burners,—in the woods, back of defendant's house,—the nearest one 450 steps from his house, and the other 150 steps beyond that, and surrounded as detailed by them; that on morning of 3 May officers destroyed the stills,—the circumstances and surroundings being detailed; and that on same morning, and under the search warrant, obtained as hereinabove stated, two of the officers searched the house, barn, and premises around the house of defendant where they found the following:

(1) An oil tank of four hundred or five hundred gallon capacity, with a faucet on it, upon a scaffold at the wash house, 15 or 20 feet from the building;

(2) Imprints of cans on the ground where oil had been drained from the tank;

(3) In the house (a) five half-gallon jars with about half teaspoonful of whiskey in each, (b) seven or eight "brand new jars," and (c) upstairs,

a number of new oak kegs or buckets,—looked to be five or ten gallon capacity;

(4) Out at barn, (a) two half-gallon jars with strong odor of liquor in them, (b) one fifty-five gallon barrel with odor of beer in it, and shipstuff on the sides,—this was in feed barn downstairs, and (c) another barrel that was a worm or condenser barrel with holes in it—that is, an empty barrel that water runs in,—"they condense whiskey in it";

(5) Upstairs in the pack barn, 389 cases of new half-gallon fruit jars similar to the ones that were in the house,—the cases containing 12 jars each;

(6) Outside in the barn yard, (a) one-horse wagon that had strong odor of kerosene in the bottom of it, on burlap bags, and a cover "like they use in the Army for camouflage to put over something," and (b) fresh horse's tracks from the wagon to the oil tank and across the field and back around the path to barn; and

(7) Just across the road, at a pig pen, in front of the house, eleven empty fruit jar cartons and a barrel (the officer saying he did not know whose barn it was).

After giving above details, officer Ira Ford testified that the kegs and jars were new; that "Mrs. McLamb told us that the kegs and jars belonged to a wholesale merchant in Benson who used the place for storage," and again, "I did not indict Mr. or Mrs. McLamb for the liquor we found at the house or for anything else we found in the house. They are indicted only for the stills, beer, jugs and jars that we found in the woods." Thereupon, the solicitor moved to amend this warrant to include "barrels and other materials for the manufacture of whiskey." Objection overruled. Defendant excepted.

Officer Hinton, referring to the new kegs, testified that kegs of this kind are used for doubling kegs at stills; that in order to use these kegs for doubling barrels there has to be holes in the head; that he did not see any barrels there with holes drilled in them; that he saw the barrel that has been referred to as the one with mash on it; and that this was a 55-gallon barrel and there were holes in it. Then the witness was asked the question, "What use is made of a barrel of that type in the manufacture of whiskey?" Objection—overruled. Exception. The witness answered, "It is known as a worm barrel or condenser barrel."

And, under cross-examination, this witness continued, "found kegs with bails on them. They were oak stave bucket kegs and they were similar to buckets used in drawing water from wells and I also found some small oak kegs that did not have a bail. They were like the buckets except they did not have bails. They were all new and unused . . . The kegs I saw there could be used to put syrup, vinegar, grape juice, or any other liquid substance in . . . found 389 cases of new fruit jars . . . they are com-

monly used for fruit, and are in general use and sold by merchants throughout the country . . ."

Thereupon, defendant, reserving exception to denial of his motion for judgment as of nonsuit made when the State first rested its case, offered sixteen witnesses, among whom were his wife, his mother-in-law, and two other women. The evidence offered tends, in the main, to exculpate defendant of any connection with any of the articles found by the officers. Some of the witnesses testified to the general good character of defendant's wife. Defendant did not testify.

Defendant renewed his motion for judgment as of nonsuit at the close of all the evidence. Motion denied. Defendant excepted.

The record also shows the following: "The solicitor in arguing the case to the jury stated: 'Who did the defendant have up here as witnesses? His wife and a bunch of women, hiding behind his wife's coat-tail; Gentlemen of the Jury, you are not dealing with an honest man, you are dealing with a big-time bootlegger.' Defendant objects. Objection overruled. By the Court: 'That is a question for the jury.'" Defendant excepts. Exception 16.

Verdict: Defendant is not guilty as to the ownership and operation of the three stills described in the warrant: Guilty as to the possession of the materials and things found at the house for use in manufacturing liquor.

Judgment: Sentenced to the common jail of Johnston County, and assigned to work the roads of the State under the direction of the State Highway and Public Works Commission for a term of 18 months.

Defendant appeals therefrom to Supreme Court, and assigns error.

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

Canaday & Canaday and J. Roscoe Barefoot for defendant, appellant.

WINBORNE, J. Defendant assigns as error several rulings of the trial court upon which he formulates questions of law involved. We treat them *seriatim.*

1. Exceptions were taken to the admission of evidence secured by the officers under the search warrant. It is contended that the search warrant is defective for that the justice of the peace, who issued it, failed to comply with the requisites of G.S. 15-27, and amendments thereto, in that the procuring officer was not required to furnish sufficient facts to show probable cause for the issuance of such warrant. Be that as it may, it appears here that the provisions of G.S. 18-13 are applicable rather than G.S. 15-27. G.S. 18-13 provides that "upon . . . information furnished under oath by an officer charged with the execution of the law, before a justice of the peace, . . . that he has reason to believe that any person

has in his possession, at a place or places specified, liquor for the purpose of sale, a warrant shall be issued commanding the officer to whom it is directed to search the place or places described in such . . . information; and if such liquor be found in any such place or places, to seize and take into his custody all such liquor, and to seize and take into his custody all glasses, bottles, jugs, pumps, bars, or other equipment used in the business of selling intoxicating liquor which may be found at such place or places, and to keep the same subject to the order of the court . . ."

Testing the affidavit of the officer here in question by the provisions of this statute, G.S. 18-13, it appears that the matters contained in the affidavit are sufficient to justify the justice of the peace to issue the search warrant. Hence, in the admission of the evidence to which such exceptions relate, error is not made to appear.

2. Defendant next stresses for error the denial of his motions, aptly made, for judgment as in case of nonsuit. G.S. 15-173.

In passing upon this question, it is appropriate to note that in Article 1 of Chapter 18 of the General Statutes of North Carolina, pertaining to the regulation of intoxicating liquors, G.S. 18-4, it is provided that ". . . It shall be unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in violating this article . . ." See *S. v. Jaynes,* 198 N.C. 728, 153 S.E. 410; *S. v. Webb,* 233 N.C. 382, 64 S.E. 2d 268.

Defendant is charged with violating this statute as it pertains to property designed for the manufacture of liquor, etc. His plea of not guilty puts in issue every element of the offense charged. *S. v. Meyers,* 190 N.C. 239, 129 S.E. 600; *S. v. Harvey,* 228 N.C. 62, 44 S.E. 2d 472; *S. v. Hendrick,* 232 N.C. 447, 61 S.E. 2d 349; *S. v. Webb, supra.*

Possession, within the meaning of the above statute, may be either actual or constructive. *S. v. Lee,* 164 N.C. 533, 80 S.E. 405; *S. v. Meyers, supra; S. v. Penry,* 220 N.C. 248, 17 S.E. 2d 4; *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." And in the *Webb case, supra,* it is said that this principle applies alike to the possession of property designed for the manufacture of intoxicating liquor within the meaning of the statute. G.S. 18-4.

Moreover, in the *Jaynes case, supra,* this statute, then 3 C.S. 3411 (d), and under consideration, used the word "designated," and this Court held that this word was evidently intended for "designed," and might be so regarded, and, hence, the charge against the defendant was "having in his possession certain utensils designed and intended for use in the unlawful

manufacture of intoxicating liquor"—and that "the fact that they had not been completely assembled or arranged for the purpose would seem to make no difference under the language of the statute." Also it is noted that now the word "designated" as it then appeared in the statute has been deleted, and the word "designed" substituted in lieu of it.

The word "designed" is defined in Webster's New International Dictionary, as "done by design or purposely," that is, "opposed to accidental or inadvertent." Hence as used in the statute, G.S. 18-4, the phrase "property designed for the manufacture of liquor" means property "fashioned according to a plan" (Webster) for that purpose.

In the light of the provisions of the statute, as interpreted by these decisions of the Court, in passing upon the question now being considered, it must be borne in mind that the verdict of the jury is that defendant is not guilty as to the ownership and operation of the three stills described in the warrant, but that he is "guilty as to the possession of the materials and things found at the house for use in manufacturing liquors."

Thus in the light of the verdict the question now is whether the evidence, taken most favorably to the State, as is done in considering demurrer to the evidence, G.S. 15-173, is sufficient to take the case to the jury in respect of the charge to which the verdict of guilty relates. When so considered, the evidence appears to be sufficient, and it is held that it is sufficient to take the case to the jury—particularly the testimony relating to the barrel, referred to as the container barrel with holes in it. The testimony is that the officers found it "at the barn" on defendant's premises, and that a barrel of this type, in the manufacture of whiskey, is "known as a worm barrel or condenser barrel."

3. The next question is based on exceptions to the rulings of the trial court in respect to the remarks of the solicitor, hereinabove quoted, made in the course of his argument to the jury. The challenge so made is well founded.

The record and case on appeal show that defendant's wife and three other women, and several men testified in his behalf, but that he did not testify. Hence to say that he was "hiding behind his wife's coat tail" is tantamount to comment on his failure to testify, which is not permitted by the statute, G.S. 8-54. This statute declares that in the trial of all indictments, or other proceedings, against a person charged with the commission of a crime, the person so charged is, at his own request, but not otherwise, a competent witness, and that his failure to make such request shall not create any presumption against him. And the decisions of this Court have uniformly interpreted its meaning as denying the right of counsel to comment on the failure of a person so charged to testify. Among authoritative decisions are: *S. v. Humphrey,* 186 N.C. 533, 120

S.E. 85; *S. v. Tucker,* 190 N.C. 708, 130 S.E. 720; *S. v. Bovender,* 233 N.C. 683, 65 S.E. 2d 323, and cases cited.

Moreover, unless a defendant in a criminal prosecution testifies as a witness, thereby subjecting himself to impeachment, or produces evidence of his good character to repel the charge of crime, the State may not show his bad character for any purpose. See Stansbury on North Carolina Evidence—Section 104; also *S. v. Nance,* 195 N.C. 47, 141 S.E. 468; *S. v. McKinnon,* 223 N.C. 160, 25 S.E. 2d 606.

In the *Humphrey case, supra,* it appeared "that on the trial the solicitor was allowed, over defendant's objection, to make adverse comment on the fact that the defendant did not take the stand as a witness in his own behalf, and also as to the bad character of the defendant as a substantive fact tending to show his guilt, when the defendant had not himself put his character in evidence on the issue," the Court declared that both objections must be sustained under the statute, then C.S. 1799, now G.S. 8-54, and decisions appertaining to the subject.

And in the *Bovender case, supra, Chief Justice Devin,* then an *Associate Justice,* reviews the authorities. There the presiding judge declined to permit defendant's counsel to state to the jury that "the law says no man has to take the witness stand." The ruling of the court was sustained.

Moreover, in *S. v. Howley,* 220 N.C. 113, 16 S.E. 2d 705, it is held that it is the duty of the presiding judge to interfere when the remarks of counsel are not warranted by the evidence and are calculated to mislead or prejudice the jury.

In the present case, the court overruled the objections, and inadvertently ruled that it was "a question for the jury." True, the court, later, in charging the jury adverted to the right of defendant not to testify, but, in doing so, no reference is made to the remarks of the solicitor on which the above ruling was made.

Other matters to which exceptions were taken need not now be considered since for error pointed out there must be a new trial.

However, in this Court defendant moves in arrest of judgment for that the warrant, upon its face, fails to sufficiently charge a crime under G.S. 18-4, in that it fails to allege that defendant "possessed property designed for the manufacture of liquor intended for use in violating this article, or which has been so used." While the form of the charge as set out in the affidavit on which the warrant issued, and in the amendment thereto, is not here approved, this Court holds that it is not wholly insufficient. Hence the motion in arrest of judgment is denied.

But since the case goes back for a new trial, it may be deemed expedient to amend the warrant to more completely follow the statute G.S. 18-4.

Let there be a

New trial.

TOWN OF MOUNT OLIVE v. CHARLES G. COWAN AND WIFE, MARY WOOTEN COWAN.

(Filed 19 March, 1952.)

1. Eminent Domain § 5—

The power of eminent domain is inherent in the State, and the power can be delegated by the General Assembly only when the purposes for which it may be exercised are enumerated and the procedure for such exercise prescribed.

2. Eminent Domain § 2—

The exercise of the power of eminent domain is always subject to the principle that there must be definite and adequate provision made for reasonable compensation to the owner.

3. Eminent Domain § 6—

A municipal corporation can exercise the right of eminent domain only when and to the extent authorized by its charter or by general law.

4. Same—

A municipality is given the right to condemn land for street purposes by general law, G.S. 160-205, and such right is not limited by the provisions of G.S. 40-10, which applies to those corporations named in the preceding sections of that statute, in exercising the power of eminent domain under that act, and therefore that the land sought to be condemned for street purposes by the city was a part of respondents' premises, consisting of yard and garden, and upon which their dwelling is located, is not a bar to the proceedings by the municipality.

APPEAL by respondents from *Bennett, Special Judge,* October Term, 1951, of WAYNE.

The petitioner, Town of Mount Olive, instituted this proceeding in the Superior Court of Wayne County to condemn certain property of the respondents, situate in the Town of Mount Olive, for street purposes, after the petitioner was unable to agree with the respondents for the purchase thereof. The land sought to be condemned is a part of the respondents' premises, consisting of their yard and garden, and upon which their dwelling house and garage are located.

The respondents filed an answer to the petition and pleaded in bar of the right of the petitioner to condemn any portion of their premises, the provision of G.S. 40-10. The Clerk of the Superior Court appointed Commissioners to appraise the property of the respondents, and upon filing of the Commissioners' report, the respondents filed exceptions thereto. The Clerk overruled the exceptions and confirmed the report. The respondents appealed to the Superior Court. The trial judge, after hearing the arguments of counsel on both sides, held the plea in bar insufficient to prevent the Town of Mount Olive from proceeding with the condemnation of the land involved and entered an order to the effect that

the petitioner is entitled to proceed to trial on the issue of damages resulting from the condemnation of the land described in the petition.

The respondents appeal and assign error.

Dees & Dees, Charles O. Whitley, and Julian T. Flythe for petitioner, appellee.

Paul B. Edmundson, James N. Smith, and J. Melville Broughton for respondents, appellants.

DENNY, J. The charter of the Town of Mount Olive contains no provision authorizing it to condemn land for street purposes. Hence, the petitioner brought this proceeding pursuant to the provisions of G.S. 160-204 and 160-205 which authorize municipalities to condemn land for various purposes.

The question raised and presented for decision on this appeal is whether a municipality may condemn a dwelling house, yard, kitchen or garden, or any part thereof, for the purpose of widening or extending a street under the authority granted by the above statutes, or is such authority subject to the limitation contained in G.S. 40-10?

The limitation contained in G.S. 40-10 was enacted by the General Assembly of 1852, chapter 92, section 1, which was an act to define the duties and powers of turnpike and plankroad companies. It was codified in the Revised Code of 1855, chapter 61, section 21, and read as follows: "No such corporation shall be allowed to have condemned to its use, without the consent of the owner, his dwelling house, yard, kitchen, garden or burial ground." This exact language was carried forward in section 1701, chapter 38, in the Code of 1883. The provision later became a part of section 2578 of the Revisal of 1905, chapter 61.

The right to exercise the power of eminent domain, as set forth in General Statutes, chapter 40, article 1, sections 1 through 10, was given to certain corporations, as defined therein, for the purpose of enabling them to construct the works or projects enumerated in the article and which involve a public use or benefit, among them being as follows:

"1. Railroads, street railroads, plankroads, tramroads, turnpikes, canal, pipe lines originating in North Carolina for the transportation of petroleum products, telegraph, telephone, electric power or lighting, public water supply, flume, or incorporated bridge companies.

"2. Municipalities operating water systems and sewer systems and all water companies operating under charter from the State or license from municipalities, which may maintain public water supplies, for the purpose of acquiring and maintaining such supplies."

The right to exercise the power of eminent domain belongs to every independent government exercising sovereign power as a necessary inci-

dent to its sovereignty. And this power, unless otherwise provided in the organic law, rests solely in the state unless by Legislative action the power is delegated and the purposes for which it may be exercised enumerated and the procedure for such exercise prescribed. The right to exercise the power of eminent domain, however, is always subject to the principle that there must be definite and adequate provision made for reasonable compensation to the owner of the property proposed to be taken. *Jeffress v. Greenville,* 154 N.C. 490, 70 S.E. 919; *Durham v. Rigsbee,* 141 N.C. 128, 53 S.E. 531; *Morganton v. Hutton,* 187 N.C. 736, 122 S.E. 842; 18 Am. Jur., Eminent Domain, section 19, page 645, and section 304, page 949; 29 C.J.S., Eminent Domain, section 2, page 777, *et seq.*, and section 100, page 904.

Therefore, a municipal corporation, being a creature of the Legislature, can only exercise the right of eminent domain when authorized to do so by its charter or by the general law. *Lloyd v. Venable,* 168 N.C. 531, 84 S.E. 855; *In re Southern R. Co. Paving Assessment,* 196 N.C. 756, 147 S.E. 301. Consequently, until 1917, it was a general practice to grant to towns and cities, in their charters, the right to exercise the power of eminent domain in order to obtain property for the construction or widening of streets, and for various other purposes. *Long v. Town of Rockingham,* 187 N.C. 199, 121 S.E. 461; *Lee v. Town of Waynesville,* 184 N.C. 565, 115 S.E. 51; *Jeffress v. Greenville, supra; Rosenthal v. Goldsboro,* 149 N.C. 128, 62 S.E. 905. Finally, the General Assembly, by the enactment of chapter 136, Public Laws of 1917, sub-ch. 4, section 1, codified as C.S. 2791 and 2792 (now G.S. 160, sections 204 and 205), gave this right to all cities and towns. *Raleigh v. Hatcher,* 220 N.C. 613, 18 S.E. 2d 207; *Charlotte v. Heath,* 226 N.C. 750, 40 S.E. 2d 600, 169 A.L.R. 569. See also *Winston-Salem v. Ashby,* 194 N.C. 388, 139 S.E. 764. Likewise, other acts have been passed by the General Assembly giving various public agencies and public utility companies more comprehensive power to condemn land than those granted in chapter 40, article 1, of our General Statutes.

The "Revision Commission" appointed pursuant to the provisions of chapter 252 of the Public Laws of 1917, for the purpose of "the compiling, collating, and revising of the public statutes of North Carolina," in its report to the General Assembly, having codified various statutes giving to certain corporations the power to condemn land for purposes not included in section 2575 of the Revisal of 1905, chapter 61, among them being sub-ch. 4, section 1, of chapter 136 of the Public Laws of 1917, as sections 162 and 163, ch. 56, art. 16—Municipal Corporations, in such report, added to section 2578 of the Revisal of 1905, the following provision, "unless condemnation of such property is expressly authorized." The section was further amended, it appears, after the report of the

Revision Commission was received by the General Assembly, since it was codified as section 1714 in the Consolidated Statutes of 1919, and contains the following language: "No such corporation shall be allowed to have condemned to its use, without the consent of the owner, his dwelling house, yard, kitchen, garden or burial ground, unless condemnation of such property is expressly authorized in its charter or by some provision of the Consolidated Statutes." This section is now codified as G.S. 40-10. And sections 162 and 163 in the report of the Revision Commission, referred to above, were codified as sections 2791 and 2792 of the Consolidated Statutes, and brought forward in G.S. 160, sections 204 and 205.

G.S. 160-204 authorizes the governing body of any city, or any board, commission, or department of the government of such city having the management and control of the streets, parks, playgrounds, electric lights, gas, power, sewerage or drainage systems, or other public utilities, to purchase such land, either within or without the city, when in the opinion of the governing body of the city, or other board, commission, or department of the government of such city having control of its streets, or other utilities, such purchase "shall be necessary for the purpose of opening, establishing, building, widening, extending, enlarging, maintaining, or operating any such streets, parks, playgrounds," or other public utilities, and to pay such compensation therefor as may be agreed upon.

G.S. 160-205 provides: "If such governing body, board, commission or department of the government of such city are unable to agree with the owners thereof for the purchase of such land, right of way, privilege, or easement, for the purposes mentioned in the preceding section, or for a site for city hall purposes, condemnation of the same for such public use may be made in the same manner and under the same procedure as is provided in chapter Eminent Domain, article 2; and the determination of the governing body, board, commission, or department of government of such city of the land necessary for such purposes shall be conclusive."

In the case of *Selma v. Nobles, et als.*, 183 N.C. 322, 111 S.E. 543, the Town of Selma undertook to condemn certain property for cemetery purposes. The area sought to be condemned belonged to one of the defendants. The other defendants owned and occupied residences near the area sought to be condemned. No water was available to these defendants for domestic use and consumption except from wells on their respective premises. It was contended that the location of a cemetery in this particular area would constitute a nuisance, so affecting the homes of the defendants as to bring the case within the exceptions contained in C.S. section 1714 (now G.S. 40-10).

The Town of Selma had obtained an amendment to its charter by chapter 116, Private Laws of 1915, giving it the power to condemn land for the purposes of a cemetery, "in the same manner as lands are con-

demned by railroads and public utility companies." This Court held that since railroads and public utility companies were subject to the limitation contained in C.S. section 1714 (now G.S. 40-10), so was the Town of Selma. However, the Court said: "Undoubtedly, the Legislature could confer the power to condemn property for a public purpose, even to the extent of taking a man's home, for all private property is liable to be appropriated for the public use in the reasonable exercise of the police power. *Thomas v. Sanderlin,* 173 N.C. 329, citing 6 R.C.L. 193." *Jeffress v. Greenville, supra.*

In *Lee v. Waynesville, supra,* the plaintiff undertook to restrain the defendant from condemning a portion of plaintiff's yard for street purposes. The plaintiff and her husband had erected a large and expensive residence on the premises approximately thirty years prior thereto and were occupying it as their home at the time of the institution of the action. This Court held that the provisions contained in the charter of the defendant, Public Laws 1885, ch. 127, section 16; Public-Local Laws, Extra Session 1921, ch. 28, sec. 3; C.S. 2791 and 2792 (now G.S. 160, sections 204 and 205), gave the Board of Aldermen of the Town of Waynesville ample authority to make the proposed street improvements and to condemn the needed portion of plaintiff's property for the purpose, on payment of reasonable and just compensation, citing *Jeffress v. Greenville, supra,* and *Waynesville v. Satterthwait,* 136 N.C. 226, 48 S.E. 661.

It will be noted that G.S. 40-10 is a part of article 1, chapter 40, of our General Statutes which grants the right to exercise the power of eminent domain in connection with the construction of the projects enumerated in said article. Municipalities were not included among the corporations authorized to condemn land under the provisions of what is now chapter 40 of our General Statutes, article 1, until 1911. Chapter 62, section 25, of the Public Laws of 1911 reads in pertinent part as follows: "All municipalities operating water systems and sewer systems, . . . may acquire by condemnation such lands and rights in lands and water as are necessary for the successful operation and protection of their plants, said proceedings to be the same as prescribed by law for acquiring right of way by railroad companies." No such limitation on the right of a municipality to condemn land for the purposes enumerated in G.S. 160-204, is included in G.S. 160-205. Therefore, in our opinion the limitation contained in G.S. 40-10 is a limitation only upon such corporations as are defined and named in the preceding sections in the article, when exercising the power of eminent domain granted in the act, or the amendments thereto, in connection with the construction of the works or projects enumerated therein, and pursuant to the authority granted thereby.

It would be illogical to assume that the General Assembly intended to place a limitation upon the power of a municipality to condemn land for

street purposes when such municipality was not given the power to condemn land for such purposes in the original act, of which the limitation was a part, or by any amendment thereto. A municipality, at the present time, could not condemn land for street purposes under the substantive power granted in G.S. 40, article 1, sections 1 through 9, even if the limitation contained in G.S. 40-10 had never been enacted. And the mere fact that the procedure outlined in chapter 40, article 2 of the General Statutes, sections 40-11 to 40-29, must be followed in condemning property for the purposes enumerated in G.S. 160-204, does not impose upon the municipality the limitation contained in G.S. 40-10. *In re Housing Authority,* 233 N.C. 649, 65 S.E. 2d 761.

In our opinion, the power granted to a municipality to condemn land for street and other purposes by G.S. 160-204 and 160-205, is not limited or restricted by G.S. 40-10.

In view of the conclusion we have reached, the judgment of the court below is

Affirmed.

C. W. PUCKETT AND F. L. McCOLLUM, CO-PARTNERS TRADING AS FARMERS FLAG WAREHOUSE, v. ALBERT R. SELLARS.

(Filed 19 March, 1952.)

1. Statutes § 8—

A remedial statute must be construed as a whole in the light of the evils sought to be eliminated, the remedies intended to be applied, and the objective to be attained.

2. Statutes § 5a—

The intention of the lawmaking body is the heart of a statute.

3. Same—

The word "may" will be construed "must" when necessary to effectuate the intent of a statute designed for the protection of public and private interests.

4. Agriculture § 16—

In construing 7 USCA sec. 1314 in the light of the evils sought to be eliminated, the remedies intended to be applied, and the objective to be attained, *it is held* that its provision that a warehouseman, in paying the producer for tobacco, "may" deduct the penalty assessed for production of tobacco in excess of the quota allotted to the producer's farm, means "shall," and imposes the imperative duty on the warehouseman to deduct, in every instance, the penalty imposed.

5. Statutes § 5a—

The courts will not adopt a construction that results in palpable injustice when the language of the statute is susceptible to another reasonable

construction which is just and is consonant with the purpose and intent of the act.

6. Taxation § 35—

Payment of an amount less than the penalty due the Federal Government because of error made by an agent of the Government in figuring the penalty, does not discharge the debt to the Government.

7. Agriculture § 16: Money Paid § 1—

Because of error in figuring by the agent of the Government, an amount less than the penalty due was deducted by the warehouseman in paying defendant for his tobacco. Upon later demand by the Government, the warehouseman paid the balance due on the penalty. *Held:* The warehouseman is entitled to recover from defendant the additional sum paid.

APPEAL by defendant from *Hatch, Special Judge,* January Term, 1952, LEE.

Civil action to recover money paid to the use of defendant.

Defendant is a producer of tobacco and in 1950 planted and harvested tobacco in excess of his allotment. As a consequence he was issued a "pink slip" marketing card which indicated that tobacco marketed by him on said card was subject to penalty to be deducted by the warehouse through which the tobacco was marketed. The penalty was ten cents per pound and the color of the card put plaintiffs on notice the penalty was due.

A representative of the Production and Marketing Administration of the U. S. Department of Agriculture is present in the office of every warehouse during the marketing season to check the marketing card, fill in the sales coupons and determine the penalty, if any, due. He enters the required information on the official coupons and also notes the amount of penalty due on the warehouse sales slip or bill of sale and then passes it to the warehouse representative who issues check to the producer for the amount of his sale less warehouse charges and the penalty noted by the PMA representative.

On 8 September defendant sold on the warehouse floor of plaintiffs 3,596 pounds of tobacco. The PMA representative estimated the tax at $35.96 rather than $359.60, the correct amount due; that is, by misplacing his decimal he figured the tax at the rate of one cent rather than ten cents per pound. He entered the amount of tax so estimated on the warehouse sales slip, tore out of the marketing card his coupon or memorandum of sale, and passed the card and sales slip to the warehouseman who issued check for the sale less the penalty noted by the PMA representative.

Thereafter, when the error was called to their attention, plaintiffs accounted for and paid to the proper Government officials the full sum which should have been deducted. They interviewed defendant with respect to the error and defendant promised to reimburse them. Later he

declined to make payment. Thereupon plaintiffs instituted this action to recover $325.64, the amount of penalty plaintiffs failed to deduct and for which they have been required to account to the U. S. Department of Agriculture.

Defendant admits the essential facts alleged and pleads voluntary payment with full knowledge of the facts. In an amended answer defendant pleads that the plaintiffs are the ones who are required to pay the penalty and that, while they may, they are not compelled to deduct same from the sales price of the tobacco, and that said plaintiffs failed to exercise their optional right to deduct the penalty at the time of the sale and may not now recover therefor.

Proper issues were submitted to the jury and were answered in favor of plaintiffs. The court entered judgment on the verdict and defendant excepted and appealed.

Gavin, Jackson & Gavin for plaintiff appellees.

J. G. Edwards and Hoyle & Hoyle for defendant appellant.

BARNHILL, J. The tobacco production program is a comprehensive plan to assure the orderly flow of tobacco into the stream of interstate and foreign commerce, and it has been approved by more than two-thirds of the tobacco producing farmers of the nation. The objective of the legislation putting the plan into operation, 7 USCA Ch. 35 B, is to eliminate the disparity between the prices of tobacco in interstate and foreign commerce and the prices of industrial products in such commerce, and to prevent the indiscriminate dumping on the national market of excessive supplies of tobacco at ruinously low prices which spell bankruptcy for the farmers, adversely affect the economy of the whole nation, disrupt the orderly marketing of tobacco, and substantially burden interstate and foreign commerce. 7 USCA sec. 1311; *Mulford v. Smith*, 307 U.S. 38, 83 L. Ed. 1092. The act is administered by the U. S. Department of Agriculture through the Production and Marketing Administration, commonly known as PMA.

Under the plan each producer of tobacco is allotted annually a tobacco acreage quota. The tobacco produced on the acreage quota thus allotted may be marketed without penalty. However, to discourage overproduction and to assure the success of the program, the marketing of any kind of tobacco in excess of the quota allotted for the farm on which the tobacco is produced is subject to a penalty of forty per centum of the average market price for such tobacco for the preceding marketing year. 7 USCA sec. 1314 (1951 pocket part).

To the end that the marketing of any excess production may be readily ascertained, every producer is furnished a marketing card which is his

authority to place his tobacco on the market for sale and to sell the same. *Adams v. Warehouse,* 230 N.C. 704, 55 S.E. 2d 331. The card must be produced and a sales memorandum made therein by a PMA representative before the sale may be consummated, without penalty, by the payment of the purchase price.

To facilitate the sale and assure the collection of any penalty due, the producer who has not planted in excess of his acreage quota is issued a white card. The farmer who has overproduced receives a pink card on which the amount per pound penalty is noted. The pink color serves to put the PMA representative and purchaser on notice that a penalty is assessable against the particular sale.

The Act provides that when tobacco is marketed through a warehouseman the "penalty shall be paid by such warehouseman . . . who may deduct an amount equivalent to the penalty from the price paid to the producer." 7 USCA sec. 1314.

The phraseology of this latter provision is the underlying cause of this litigation. The defendant contends that the penalty is assessed against the warehouseman with an option on his part to deduct the assessed penalty from the sales price of the tobacco, and that when the plaintiff failed to exercise his option to make such deduction at the time of the sale he waived his right to claim reimbursement from him.

But when the Act is considered as a whole in the light of the evils sought to be eliminated, the remedies intended to be applied, and the objective to be attained, it becomes apparent that this is not the proper construction of the provision. 50 A.J. 283, sec. 303; *Young v. Whitehall Co.,* 229 N.C. 360, 49 S.E. 2d 797; *Smith v. Davis,* 228 N.C. 172, 45 S.E. 2d 51, 174 A.L.R. 643.

Emphasis should be laid upon the necessity for appraisal of the purposes as a whole of Congress in analyzing the meaning of clauses or sections of general acts. *U. S. v. American Trucking Asso.,* 310 U.S. 534, 84 L. Ed. 1345.

The Congressional intent is to prevent the marketing of excessive amounts of tobacco. The penalty is intended as a deterrent against overproduction. It is the producer who is granted the production quota. It is he who overproduces, and the penalty is intended to penalize him for his overproduction. He markets his tobacco and the penalty is upon the marketing of tobacco produced in excess of the quota allotted. 7 USCA sec. 1314.

The intention of the lawmaking body is the heart of a statute. *Mullen v. Louisburg,* 225 N.C. 53, 33 S.E. 2d 484; *Trust Co. v. Hood, Comr. of Banks,* 206 N.C. 268, 173 S.E. 601; *Dyer v. Dyer,* 212 N.C. 620, 194 S.E. 278.

The provision that the warehouseman must pay the penalty is merely a part of the general scheme for the collection of the penalties assessed. Thus the collection is materially simplified and facilitated and the costs thereof substantially reduced. The "may" in the provision that he may deduct an amount equivalent to the amount paid must be interpreted to mean "shall." It is imperative rather than permissive in import. See *Mulford v. Smith, supra,* where the court declined to enjoin warehousemen against the deduction of penalties due by producers.

"The words 'may' and 'shall,' when used in a statute, will sometimes be read interchangeably, as will best express the legislative intent. The word 'may' will be construed to mean 'shall' where the public or third persons have a claim that the power ought to be exercised . . ." *Canal Comr. v. Sanitary District,* 56 N.E. 953. "The general rule is that the word 'may' will be construed as 'shall,' or as imposing an imperative duty whenever it is employed in a statute to delegate a power, the exercise of which is important for the protection of public or private interests. Whether merely permissive or imperative depends on the intention as disclosed by the nature of the act in connection with which the word is employed and the context." 2 Lewis' Sutherland, Stat. Const. 1153, sec. 640; *Curlee v. Bank,* 187 N.C. 119, 121 S.E. 194; *McGuire v. Lumber Co.,* 190 N.C. 806, 131 S.E. 274; *Battle v. Rocky Mount,* 156 N.C. 329, 72 S.E. 354.

The "may deduct" provision is important in that it (1) provides a means of collecting revenue due the Government, (2) protects the warehouseman who is merely a collecting agent for the Government, and (3) guarantees the payment of the penalty by the nonconforming producer so as to discourage overproduction and protect the conforming farmers. Therefore, the power to deduct the penalty "ought to be exercised" for the protection of both public and private interests. The provision will be so construed as to impose upon the warehouseman the imperative duty to deduct, in every instance, the penalty imposed.

To hold otherwise and conclude that the Congress intended to penalize the innocent warehouseman for the act of the producer in disregarding the limitation of his acreage quota would attribute to it a purpose and intent so fraught with injustice as to shock the consciences of fair-minded men. It is not the way of the courts to impute to a lawmaking agency such intent when another reasonable construction of the language used is consonant with the general purpose and intent of the Act under consideration, is in harmony with the other provisions of the statute, and serves to effectuate the objective of the legislation.

The mistake which led to the deduction of a sum less than the amount due was not the mistake of the warehouseman. It was the mistake of the PMA representative who estimated the penalty and advised the warehouseman of the amount to be deducted from the sale price. And the

mistake of the agent of the Government to which the penalty was payable cannot serve to discharge the debt due the Government.

When demand was made upon the warehouseman for the uncollected balance of the penalty due he paid the same to the use and for the benefit of the defendant, and he is entitled to recover from the defendant the amount thus paid.

In the trial below we find

No error.

MRS. RILDA EDWARDS v. HOOD MOTOR COMPANY AND WILLIAM GRAHAM HOOD, JR.

(Filed 19 March, 1952.)

1. Trial § 42—

While the trial court may refuse to accept an indefinite or inconsistent verdict, a party litigant has a substantial right in a consistent verdict in his favor on issues determinative of the rights of the parties, and where the trial court deprives him of this right by refusing to accept a consistent verdict, such error vitiates all subsequent proceedings and entitles appellant to a remand so that he may move for judgment on the verdict.

2. Negligence § 21—

A verdict to the effect that the driver and passengers in the first car were not injured by the negligence of the driver of the second car, and that the driver of the second car was injured by the negligence of the driver of the first car but was guilty of negligence contributing to his injury, *is held* reconcilable under a permissive application of the doctrine of proximate cause and not essentially inconsistent, and the trial court was without power, as a matter of law, to refuse to accept such verdict.

3. Trial § 48½—

Where error of the trial court in refusing as a matter of law to accept a consistent verdict precluded consideration of motion by appellee to set aside the verdict as a matter of discretion, upon remand so that appellant might move for judgment on the verdict, appellee is entitled to move to set aside the verdict as a matter of discretion, notwithstanding that such motion ordinarily must be considered at trial term.

APPEAL by defendants from *Bennett, Special Judge,* and a jury, at October Civil Term, 1951, of WAYNE.

Civil action to recover damages for personal injuries sustained by the plaintiff in the collision of two automobiles, due to the alleged negligence of the defendants.

By consent this case was consolidated for trial with three companion cases: Mamie Boykin *v.* Hood Motor Company and William Graham Hood, Jr.; Flonnie Fields *v.* Hood Motor Company and William Graham

Hood, Jr.; and Hood Motor Company *v.* Flonnie Fields and Mamie Boykin. The appeal relates only to the case in which Rilda Edwards is plaintiff.

The record discloses that the plaintiff, Rilda Edwards, was a guest rider in an automobile driven by Flonnie Fields but owned by Mamie Boykin, who was also in the car. The other automobile, owned by the defendant Hood Motor Company, was being driven by the defendant William Graham Hood, Jr. The two automobiles were meeting on State Highway No. 70. The collision occurred while the car in which the plaintiff was riding was turning left, across the line of travel of the approaching Hood car, to enter a driveway leading to the home of Flonnie Fields.

The consolidated cases were submitted to the jury on the following issues:

RILDA EDWARDS *v.* HOOD MOTOR COMPANY ET AL.:

"1. Was the plaintiff injured by the negligence of the defendant, W. Graham Hood, Jr., as alleged in the complaint?

"2. What amount, if any, is plaintiff entitled to recover of the defendant?"

MAMIE BOYKIN *v.* HOOD MOTOR COMPANY ET AL.:

"1. Was plaintiff injured by the negligence of the defendant, W. Graham Hood, Jr., as alleged in the complaint?

"2. Did Mrs. Flonnie Fields contribute by her negligence to the injury of the plaintiff, as alleged in the answer?

"3. What amount, if any, is plaintiff entitled to recover of the defendant for personal injuries?

"4. What amount, if any, is plaintiff entitled to recover of the defendants for damage to her automobile?"

FLONNIE FIELDS *v.* HOOD MOTOR COMPANY ET AL.:

"1. Was plaintiff injured through the negligence of the defendant, as alleged in the complaint?

"2. Did plaintiff by her own negligence contribute to said injury, as alleged in the answer?

"3. What amount, if any, is plaintiff entitled to recover of the defendants?"

W. GRAHAM HOOD, JR., *v.* FLONNIE FIELDS AND MAMIE BOYKIN:

"1. Were the plaintiffs damaged by the negligence of the defendants, as alleged in the complaint?

"2. Did plaintiff, W. Graham Hood, Jr., by his own negligence contribute to said injury, as alleged in the answer?

"3. What amount, if any, is plaintiff, W. Graham Hood, Jr., entitled to recover of the defendants for personal injuries?

"4. What amount, if any, are plaintiffs entitled to recover for damages to their automobile?"

The jury, after considering the cases, returned in open court and asked if they could answer the first issue "no" in all four cases. The court gave further instructions, after which the jury returned to their room for further deliberation. Later the jury returned and handed to the presiding judge the issues answered in the four cases as follows: In each of the first three cases, the first issue was answered "No" and the rest of the issues were unanswered; in the fourth case, both the first and the second issues were answered "Yes," and the other issues were left unanswered.

The court, being of the opinion that the answers were inconsistent, refused to accept the verdicts. The court stated to the jury: "By your answers to the first issues (referring to the first issue in each of the three cases against the Hood defendants) you find no negligence on the part of the defendant Hood, and now by your answer to the second issue (referring to the second issue in the fourth case in which the Hoods are plaintiffs) you find he contributed to his own injury . . ."

To the action of the court in refusing to accept the verdicts as so returned, the defendant appellants (Hoods) excepted.

The court, before sending the jury back to the jury room, reinstructed them on the doctrine of intervening or insulated negligence at their request, and thereupon the jury returned to the jury room for further deliberation.

At this point, and for the first time, the plaintiff, Rilda Edwards, through counsel, moved the court that she be permitted to take a voluntary nonsuit. The court declined to allow the motion, to which action she excepted.

Shortly after resuming deliberations, the jury returned with its second group of verdicts. This time the answers were as follows: In the first three cases the answers were identical with those in the first group of verdicts, whereas in the fourth case (1) the first issue was answered "Yes," (2) the second issue "No," (3) the third issue "none," and (4) the fourth issue "$500.00."

The court accepted the verdicts. Thereupon the plaintiff, Rilda Edwards, renewed her motion for leave to take a voluntary nonsuit, and also moved that the verdict be set aside for the reason she was previously denied the right to take a nonsuit. After argument of counsel, the defendants, Hood Motor Company and William Graham Hood, Jr., tendered judgment in the instant case in accord with the verdict. This the court refused to sign. The defendants excepted. Thereupon the court

signed an order setting aside the verdict as a matter of law, assigning as the reason that the court erred in overruling the plaintiff's first motion for leave to take a nonsuit. To the signing of this order the defendants excepted.

Thereupon, the court entered judgment dismissing the action as upon voluntary nonsuit, to which the defendants excepted.

The defendants, having excepted as indicated, appealed to this Court, assigning errors.

J. Faison Thomson and H. T. Ray for plaintiff, appellee.

Taylor & Allen, Lindsay C. Warren, Jr., and Paul B. Edmundson for defendants, appellants.

JOHNSON, J. Before a verdict is complete it must be accepted by the court, but it is the duty of the presiding judge, before accepting a verdict, to scrutinize its form and substance to prevent insufficient or inconsistent findings from becoming a record of the court. Therefore, where the findings are indefinite or inconsistent, the presiding judge may give additional instructions and direct the jury to retire again and bring in a proper verdict, but he may not tell them what their verdict shall be. *Baird v. Ball,* 204 N.C. 469, 168 S.E. 667.

However, a party litigant has a substantial right in a verdict obtained in his favor. Accordingly, where a consistent verdict has been returned on issues which are determinative and is rejected by the court as a matter of law, and such ruling is held to be erroneous, the appellate Court will remand the cause for appropriate proceedings. *Allen v. Yarborough,* 201 N.C. 568, 160 S.E. 833; *Butler v. Gantt,* 220 N.C. 711, 18 S.E. 2d 119; *Ferrall v. Ferrall,* 153 N.C. 174, 69 S.E. 60; *Abernethy v. Yount,* 138 N.C. 337, 50 S.E. 696.

In the trial below, the verdicts first returned may be reconciled under a permissive application of the doctrine of proximate cause (*Luttrell v. Mineral Co.,* 220 N.C. 782, 18 S.E. 2d 412), and this is so, apart from application of the principles of intervening or insulated negligence (*Butner v. Spease,* 217 N.C. 82, 6 S.E. 2d 808).

While the record indicates the jury may have applied the doctrine of intervening or insulated negligence in arriving at their composite verdicts, nevertheless, it does not follow as a matter of law or factual certainty that such was the case. Hence, the verdict in the instant case is not essentially inconsistent. The court may have set the verdict aside as a matter of discretion, but it was error to refuse to accept the verdict as a matter of law. *Allen v. Yarborough, supra.* This error vitiated all subsequent proceedings below, and we so hold. The verdict will be treated as having been received, and the cause will be remanded for further proceedings, with the parties being relegated to their rights as of the coming in

of the verdict to the extent (1) that the plaintiff may move the court to set aside the verdict in the exercise of its discretion, and (2) that the defendants may move for judgment on the verdict. Ordinarily, a motion to set aside a verdict in the discretion of the court must be made and decided at the trial term. *Fowler v. Murdock,* 172 N.C. 349, 90 S.E. 301; McIntosh, N. C. Practice and Procedure, p. 671. However, this rule is subject to exception where, as here, an erroneous ruling of the trial court deprives a litigant of the opportunity to invoke this inherent discretionary power of the court. *Batson v. Laundry Co.,* 202 N.C. 560, 163 S.E. 600; *Tickle v. Hobgood,* 212 N.C. 762, 194 S.E. 461.

Error and remanded.

STATE OF NORTH CAROLINA ON RELATION OF THE UTILITIES COMMISSION, PLAINTIFF, *v.* ATLANTIC COAST LINE RAILROAD COMPANY, DEFENDANT.

(Filed 19 March, 1952.)

1. Utilities Commission § 5—

An order of the Utilities Commission is *prima facie* just and reasonable, and an appeal therefrom is limited to review, without a jury, of the record as certified by the Commission, and its order, supported by findings, may be reversed or modified only if substantial rights have been prejudiced because of findings and conclusions not supported by competent, material and substantive evidence. G.S. 62-26.10.

2. Utilities Commission § 2—

The Utilities Commission has authority to compel common carriers to maintain all such public service facilities and conveniences as may be reasonable and just. G.S. 62-39.

3. Carriers § 1½—

Each application by a common carrier to be permitted to discontinue services or facilities must be determined in accordance with the facts and circumstances of the particular case, weighing the benefit to the carrier against the inconvenience to the public which would result from such discontinuance, and the fact that the particular service is maintained at a loss is not determinative when such service is a part of over-all operations which result in a profit.

4. Same—Evidence held to support finding of Utilities Commission that public convenience required continuance of station agency.

The evidence before the Utilities Commission was to the effect that discontinuance of agency service at the railroad station in question would not only result in inconvenience to consignees in that all freight shipments to them would have to be prepaid, but also that railway express service would be adversely affected and telegraph service discontinued, with further evidence that substantial business was transacted by the agency and that its discontinuance would be detrimental to the community. *Held:* The evi-

dence was sufficient to support the Commission's finding that public convenience and necessity required the continuance of the agency, notwithstanding that its maintenance results in a small loss to the carrier, and order of the Commission denying the carrier's application to discontinue the agency should have been affirmed.

APPEAL by plaintiff from *Harris, J.*, June Term, 1951, of WILSON. Reversed.

This was a proceeding instituted before the North Carolina Utilities Commission by the application of the Atlantic Coast Line Railroad Company for permission to discontinue agency service at Lucama. At the hearing certain citizens of Lucama entered appearance by counsel in opposition. Upon the evidence presented the Utilities Commission found that a non-agency service at Lucama would fail to serve the needs of the public and that public convenience and necessity required continuance of agency service at that station. Accordingly the application of defendant was denied.

On appeal to the Superior Court the order of the Utilities Commission was reversed and the Commission directed to enter order permitting discontinuance of agency service at Lucama.

Plaintiff appealed to this Court.

Attorney-General McMullan and Assistant Attorney-General Paylor for plaintiff, appellant.

Gardner, Connor & Lee for protestants.

R. E. Browne, III, and Murray Allen for defendant, appellee.

Charles Cook Howell, of counsel, for defendant, appellee.

DEVIN, C. J. The statutes governing procedure before the Utilities Commission prescribe the rules and extent of review on appeal from an order of the Commission. The statute now codified as G.S. 62-26.10 provides that on such appeal to the Superior Court the review shall be on the record certified by the Commission and heard by the judge without a jury who may reverse or modify the decision of the Commission if substantial rights have been prejudiced because of findings and conclusions which are unsupported by competent, material and substantial evidence. This statute further provides that upon any appeal to the Superior Court the finding, determination or order of the Commission shall be "*prima facie* just and reasonable."

In the case at bar, on the evidence presented the Utilities Commission denied the application of defendant railroad for permission to discontinue agency service at Lucama, finding that public convenience and necessity required the continuance of agency service at this station, and that a non-agency station there would fail to serve the needs of the public.

On appeal, the judge below reversed the finding and order of the Utilities Commission, on the ground that there was no substantial evidence on the record which would support the conclusion reached by the Commission that public convenience and necessity required continuance of agency service at Lucama. The judge stated in the judgment that his conclusion was influenced by the decision of this Court in *Utilities Com. v. R. R.*, 233 N.C. 365, 64 S.E. 2d 272, where the application of the railroad to discontinue agency service at Stokes was considered and the order of the Utilities Commission denying the application reversed. In that case, however, it was said: "No absolute rule can be set up and applied to all cases. The facts in each case must be considered to determine whether public convenience and necessity require the service to be maintained or permit its discontinuance. The benefit to the one of the abandonment must be weighed against the inconvenience to which the other may be subjected."

The statute confers upon the Utilities Commission the power to require transportation companies to establish and maintain all such public service facilities and conveniences as may be reasonable and just, G.S. 62-39, and the determination and order of the Commission in the performance of this duty must be considered *prima facie* as reasonable and just. This, however, does not preclude the transportation company affected from showing that the order was unsupported by competent, material and substantial evidence. *Utilities Com. v. Trucking Co.*, 223 N.C. 687, 28 S.E. 2d 201. The power conferred upon the Utilities Commission to require transportation companies to maintain substantial service to the public will not be denied even though the service may be unremunerative when singled out and related only to a particular instance or locality, if the loss be viewed in relation to and as a part of the over-all operations of profitable transportation. *Utilities Com. v. R. R.*, 233 N.C. 365, 64 S.E. 2d 272. "The question in each case must be determined in the light of all the facts, and with a just regard to the advantage to be derived by the public and the expense to be incurred by the carrier." *Washington ex rel. Oregon R. & N. Co. v. Fairchild,* 224 U.S. 510.

Hence, the determination of the propriety of the judgment below depends upon the particular facts shown at the hearing before the Commission.

It appears that Lucama is an incorporated town having a population of 425, and is situated in a prosperous agricultural section. The township of which it is a part has a population of 2,774. It is on the main north-south line of the Atlantic Coast Line Railroad, 8.2 miles south of Wilson and 7.2 miles north of Kenly. Agency service for passengers and freight has been maintained here for many years, and in connection therewith Railway Express Agency and a Western Union Telegraph office are maintained in the station and handled by the railroad agent.

The evidence offered by defendant tended to show that the revenue from freight handled to and from Lucama for the twelve months' period ended 30 June, 1951, amounted to $10,546.04. This was calculated from total receipts of about $19,000 as Atlantic Coast Line's share of the total revenue after deducting the proportion due other carriers. The revenue from passenger service was $325.44, and the number of passengers served 820. With other items the net revenue attributable to Lucama was $10,890.70. The cost of transportation, calculated according to the average for the entire Atlantic Coast Line system at the ratio of 77.92%, as against this revenue, was $8,486.03, leaving credit balance of $2,404.67 exclusive of its proportion of fixed charges and taxes. But the salary and incidentals of the station agent was $3,478.47 per annum, showing a net loss for the year of $1,073.80 or $89.48 per month. The salary of the station agent fixed by the terms of the railroad's contract with labor unions could not be reduced, notwithstanding the small amount of work required at this station. Discontinuing agency service would not prevent shipments of freight to and from this station or eliminate passenger service as the same trains would continue to run, but it would occasion some inconvenience as the charges on incoming freight would have to be prepaid and notices mailed from other stations, and passengers would have to pay fares on trains. Railway express service would be affected and telegraph service discontinued. The defendant's superintendent was of opinion that there was no possibility of increased business for the railroad from this station. Numerous trucks and buses operate in and through Lucama by which freight and passenger service would continue to be available. The figures furnished by the railroad were accepted by the Commission and considered in the findings and conclusions of the Commission.

Counsel for citizens of Lucama offered the testimony of several witnesses in opposition to defendant's application. Groves Simpson testified he was in the cotton gin and coal yard business, and that he received freight over defendant's lines and paid bills amounting to $11,000 or $12,000 a year for last three years, 98% of freight received coming collect; that the closing of the station would cause a "lot of inconvenience," and that his business with the Railroad has shown an increase. Robert Pope, the Postmaster, said closing the agency would cause inconvenience and would be detrimental to the community. J. R. Lucas, Mayor of Lucama, testified there were 34 retail businesses in or near the town; that he paid for freight received in carload and less than carload lots, collect and prepaid, $3,042.36; that his freight business has increased for last few years; that business conditions in Lucama have been steadily on the increase, and the effect of closing the agency would be bad; that some shipments are carried by truck, but there is only one regular truck line

operating there. Dewey Simpson testified there was a bank in Lucama with assets of $2,500,000; that he received fertilizer in carload lots prepaid; that discontinuance of agency service "would work hardship on a lot of farmers around there as well as folks in town I think."

E. C. Mercer, the railroad agent, testified that the revenue received from freight shipments for the year totaled $18,934.32, not including passenger business; that no truck line has an agency at Lucama. L. V. Allred, agent in Raleigh of Railway Express Agency, testified the agency at Lucama handled an average of 52 shipments per month with revenue receipts of $122.14 per month; that his agency had joined the Railroad in application for discontinuance of service, but would not have done so if the Railroad had not applied. Protestants also filed in the record statements from Rock Ridge Roller Mills that it paid freight at Lucama station for year 1949 amounting to $2,793.95. Also filed was a statement from Bass Brothers that they paid freight on shipments received collect $1,185.43, prepaid $600.57.

It is obvious that the factual situation at Lucama is materially different from that shown by the record in the *Stokes case* relied on by defendant, and that the decision in that case is not controlling upon the facts shown in the case at bar.

There was substantial evidence presented at the hearing to support the finding of the Utilities Commission that a non-agency service station at Lucama would fail to serve the needs of the public, and that public convenience and necessity required continuance of agency service. The order of the Commission based on these findings should be upheld. The Superior Court was in error in reversing this order and directing allowance of defendant's application.

Judgment reversed.

MARY SWAIM AND BETTY ROYAL v. ELLEN SWAIM.

(Filed 19 March, 1952.)

Husband and Wife § 14—

A husband owned land and conveyed it, with the joinder of his wife, in consideration of the grantees' supporting and maintaining grantors for life. Thereafter the grantees reconveyed the land to the husband and wife upon consideration of one dollar and the further consideration to restore the *status quo*, with warranty to defend title against claims of all persons "in so far as they are obligated under the premises, and to restore the *status quo*." *Held:* The second deed conveyed an estate by entireties to the husband and wife, and upon the husband's death, the wife is the sole owner.

APPEAL by plaintiffs from *Gwyn, J.*, at November Term, 1951, of YADKIN.

Special proceeding instituted by petitioners, heirs at law of Milas A. Swaim, deceased, for allotment of dower to defendant as widow of Milas A. Swaim, deceased. Defendant, answering, pleads sole seizin of land involved.

When the case came on for hearing in Superior Court the parties waived trial by jury, and agreed that the court hear the evidence, find the facts, and render judgment pursuant to such findings.

The court found these facts:

1. On 1 May, 1922, Milas A. Swaim acquired title in fee simple to 28.5 acres of land as described in the complaint.

2. On 3 March, 1931, Milas A. Swaim and wife, Ellen R. Swaim, acquired title in fee simple as tenants by the entirety to nine acres of land.

3. On 16 December, 1949, Milas Swaim and wife, Ellen R. Swaim, conveyed both of said tracts to Guthrie C. Pinnix and wife Lula Pinnix, in fee simple, reserving a life estate to themselves, Exhibit C, attached.

(In Exhibit C, registered in Yadkin County in Book 70 of Deeds at page 156 (a) the parties named are "Milas A. Swaim and wife, Ellen R. Swaim . . . of the first part, to Guthrie C. Pinnix . . . of the second part"; (b) the recited consideration is: "One dollar and other valuable considerations"; (c) the granting clause reads: "To said Guthrie C. Pinnix, his heirs and assigns . . . a certain tract of land . . .," the first tract being specifically described as in the complaint, containing 28.50 acres more or less; (d) the *habendum* reads: "To have and to hold the aforesaid tract or parcel of land, and all privileges and appurtenances thereto belonging, to the said Guthrie C. Pinnix, his heirs and assigns, to their only use and behoof forever"; (e) the covenants are "with said Guthrie C. Pinnix, his heirs and assigns."

(And after the description, and before the *habendum* in this deed Exhibit C, there appears the following: "The consideration of this conveyance being as follows: 'That the said Milas A. Swaim and wife, Ellen R. Swaim, grantors herein, do hereby reserve unto themselves and to the survivor of them a life estate in both of the above described tracts of land. That the said Guthrie C. Pinnix, the grantee herein, shall well and truly look after and care for the said Milas A. Swaim and wife, Ellen R. Swaim, for and during their natural lifetime, shall properly support and maintain them and shall see to it that they are both well cared for during their lifetime and shall see to it that all doctors' bills are paid, a decent funeral given to each of the grantors herein and shall erect at their graves a suitable monument, and after the death of both the said Milas A. Swaim and wife, Ellen R. Swaim, the said Guthrie C. Pinnix shall then own the said lands in fee simple.' "

(Also after the covenant of warranty—"against the claims of all persons whomsoever," the following appears: "Except that the said Milas A.

Swaim and wife, grantors herein, do hereby reserve unto themselves and to the survivor of them a life estate in the above described lands, and said Guthrie C. Pinnix, grantee herein, shall well and truly do and perform the duties as herein stated.")

4. On 19 December, 1949, Guthrie C. Pinnix and wife Lula Pinnix, conveyed both tracts to the original grantors, Milas Swaim and wife, Ellen R. Swaim, by separate deeds in fee simple, which deeds are attached as Exhibits A and B, respectively, and made a part of the findings of fact as fully as if set forth *verbatim*.

(In Exhibit A, (a) The parties named are "Guthrie C. Pinnix and wife, Lula Pinnix . . . of the first part, to Milas A. Swaim and wife, Ellen R. Swaim . . . of the second part"; (b) the recited consideration is "one dollar and other valuable considerations Dollars to them paid by Milas Swaim and wife, Ellen R. Swaim"; (c) the granting clause reads: "to the said Milas A. Swaim and wife, Ellen R. Swaim, their heirs and assigns"; (d) the description is the 28.50 acre tract described in the complaint; (e) the *habendum* reads: "To have and to hold the aforesaid tract or parcel of land, and all privileges and appurtenances thereto belonging, to the said Milas A. Swaim and wife, Ellen R. Swaim, their heirs and assigns, to their only use and behoof forever"; (f) the covenants are "with the said Milas A. Swaim and wife, Ellen R. Swaim, their heirs and assigns."

(And after the description, and before the *habendum* in the deed Exhibit A, there appears the following: "The further considerations of this deed being to reconvey to the said Milas A. Swaim all of the right, title and interest that the said Guthrie C. Pinnix has in and to said lands by reason of said deed recorded in Book 70, at page 156, Record of Deeds for Yadkin County, North Carolina, and to restore all parties hereto to all rights and privileges existing between the said parties heretofore and to release and discharge each and all of said parties from any and all obligations stated in said deed, and to restore the *status quo* to all parties hereto as existing at the time of the making of said deed. The above described lands were conveyed to grantors by Milas A. Swaim and wife. See Book 70, page 156."

(Also, the covenants of warranty conclude with the following: "Against the claims of all persons whomsoever in so far as they are obligated to do under the premises, and to restore the *status quo* to all parties hereto as existing at the time of making said deed as recorded in Book 70 at page 156, Record of Deeds for Yadkin County, North Carolina.")

(In Exhibit B: (a) The parties, (b) the recited consideration, (c) the granting clause (except to land described), (d) the *habendum,* and the parties with whom covenants are made, are the same as in the deed Ex-

hibit A as above set forth. The land conveyed is the "second tract" in the deed Exhibit C.

(Also there are inserted in the deed Exhibit B (1) a paragraph after the description, and before the *habendum* which reads as follows: "The further considerations of this deed being to reconvey to the said Milas A. Swaim and wife, Ellen R. Swaim, all of the right, title and interest that the said Guthrie C. Pinnix has in and to said lands by reason of the said deed recorded in Book 70 at page 156, Record of Deeds for Yadkin County, North Carolina, and to restore all parties hereto to all rights and privileges existing between the said parties heretofore and to release and discharge each and all of said parties from any and.....obligations stated in said deed and to restore the *status quo* to all parties hereto as existing at the time of making of said deed. The above described lands were conveyed to grantors by Milas A. Swaim and wife. See Book 70, page 156;" and (2) covenants of warranty concluding in identical language to that appearing similarly in Exhibit A, all as above set forth.)

5. Milas Swaim is now dead, and plaintiffs, his heirs, claim title to the land and seek to have partition subject to the dower of Ellen R. Swaim.

6. The parties hereto claim title from a common source, and it is agreed that the rights of the parties depend upon the legal interpretation of the deeds of conveyance hereinabove described.

The court being of the opinion that the clause contained in the deed from Guthrie C. Pinnix and Lula Pinnix, to Milas Swaim and wife, Ellen R. Swaim, marked Exhibit A, conveying to the grantees the 28.5 acres of land, which reads as follows: " 'The further consideration of this deed being to reconvey to the said Milas A. Swaim all of the right, title and interest that the said Guthrie C. Pinnix has in and to said lands . . . and to restore all parties hereto to all rights and privileges existing between the said parties hereto, and to release and discharge each and all of said parties from any and all obligations stated in said deed, and to restore the *status quo* to all parties hereto, as existing at the time of the making of said deed,' is repugnant to the premises, and the *habendum,* and is therefore void to the extent of its repugnancy; and further, that the term 'to restore the *status quo* to all parties' refers to the status as between the grantors on the one hand and the grantees on the other, and not as between the grantors themselves," ordered and adjudged that the defendant Ellen R. Swaim is the sole owner in fee simple of the 28.5 acre tract, and also the 9-acre tract.

"To the findings of fact, the conclusions of law and the signing of the foregoing judgment and rulings of the court, plaintiffs object. Objection overruled, and plaintiffs except," and appeal to Supreme Court and assign error.

Hall & Zachary for plaintiffs, appellants.

A. T. Grant and Thad Reece for defendant, appellee.

WINBORNE, J. Since the sole error assigned by appellants on this appeal is to the signing of the judgment appearing of record, this is the pivotal question: Did the deed, Exhibit A, from Guthrie C. Pinnix and wife, Lula Pinnix, to Milas A. Swaim and wife, Ella R. Swaim vest in Milas A. Swaim and his wife, Ella R. Swaim, an estate by the entirety in fee simple in and to the 28.5 acre tract of land therein conveyed? The judgment is based upon an affirmative answer to this question. The ruling is in keeping with, and will be upheld upon authority of *Artis v. Artis,* 228 N.C. 754, 47 S.E. 2d 228, and *Pilley v. Smith,* 230 N.C. 62, 51 S.E. 2d 923, and the statute G.S. 39-1, which provides that a conveyance of real estate shall be held and construed to be a conveyance in fee "unless such conveyance, in plain and express words shows, or it is plainly intended by the conveyance or some part thereof, that the grantor meant to convey an estate of less dignity."

Affirmed.

ERNEST MATTHEWS v. CATHRYN FORREST, TRADING AS ANGIER FLORIST.

(Filed 19 March, 1952.)

1. Trespass § 1a—

Every unauthorized entry on land in the peaceable possession of another constitutes a trespass, without regard to the degree of force used, and entitles the person in actual or constructive possession to nominal damages, at least.

2. Trespass § 2—

Plaintiff need not allege damages in order to be entitled to recover for a trespass, since a technical trespass alone entitles him to nominal damages, but he must plead actual damages in order to be entitled thereto, and that the trespass was malicious or wanton in order to be entitled to punitive damages.

3. Trespass § 1a—

A person is in the actual possession of land when he exercises dominion over it by using it for the purposes for which it is ordinarily adaptable and by taking the profits of which it is susceptible, and he is in constructive possession if the land is not in the actual possession of anyone and he has title giving him the right to assume its immediate actual possession.

4. Trespass § 2—

Allegations to the effect that defendant went to plaintiff's cemetery lot while no one was there is sufficient to support the inference that the lot

was in plaintiff's constructive possession; and allegations to the effect that plaintiff maintained the lot for the burial of his dead pursuant to permission given him by the owner of the fee, is sufficient to allege that the lot was in plaintiff's actual possession.

5. Same—

Allegations to the effect that defendant went to plaintiff's cemetery lot without authority from plaintiff and wrongfully and unlawfully carried away floral designs from the grave of plaintiff's wife are sufficient to allege an unauthorized and wrongful entry on plaintiff's grave lot.

6. Trespass § 6: Damages § 1a—

Compensatory damages may be awarded to plaintiff for mental suffering endured by him as the natural and probable consequences of a trespass to his burial lot.

APPEAL by defendant from *Godwin, Special Judge,* at the October Term, 1951, of HARNETT.

Civil action in the nature of trespass *quare clausum fregit* heard on a demurrer to the complaint.

This action originated in the Recorder's Court of Harnett County.

The complaint alleges facts substantially as follows:

The plaintiff's wife died 14 November, 1951, and was interred the next day in "the plaintiff's grave lot" at Neill's Creek Baptist Church in Harnett County. At least 56 beautiful floral designs donated by the plaintiff and the friends and relatives of the deceased were placed upon the grave immediately after the burial. While the flowers were still fresh and useful, the defendant wrongfully and unlawfully and without authority from the plaintiff went to the grave, and wrongfully and unlawfully carried away and destroyed all the floral designs, leaving the new-made grave bare and ugly. The plaintiff's sight of his wife's denuded grave and his knowledge that passersby and visitors identified it as "a new grave without . . . flowers" caused him great embarrassment, humiliation, and mental anguish, and damaged him in the sum of $1,000.

The plaintiff "prays judgment against the defendant for the sum of $1,000.00, for the costs of the action, and for such other and further relief as he may be entitled to receive in the premises."

The defendant demurred in writing to the complaint on the ground that it does not state facts sufficient to constitute a cause of action.

The demurrer was overruled in the recorder's court, and the defendant appealed to the Superior Court, where Judge Godwin made a like ruling. The defendant thereupon appealed to the Supreme Court, assigning Judge Godwin's judgment as error.

Wilson & Johnson for plaintiff, appellee.

Neill McK. Salmon for defendant, appellant.

ERVIN, J. The demurrer was rightly overruled even if the defendant's thesis that the plaintiff cannot recover damages for mental suffering unaccompanied by physical injury be accepted as valid.

The essence of a trespass to realty is the disturbance of possession. In consequence, every unauthorized entry on land in the peaceable possession of another constitutes a trespass, without regard to the degree of force used and irrespective of whether actual damage is done. *Lee v. Stewart,* 218 N.C. 287, 10 S.E. 2d 804; *Brame v. Clark,* 148 N.C. 364, 62 S.E. 418, 19 L.R.A. (N.S.) 1033, 16 Ann. Cas. 73; *Dougherty v. Stepp,* 18 N.C. 371.

A complaint states a good cause of action for trespass to specific realty when its allegations show these ingredients:

1. That the plaintiff was either actually or constructively in possession of the land at the time the alleged trespass was committed. *Gordner v. Lumber Co.,* 144 N.C. 110, 56 S.E. 695; *Drake v. Howell,* 133 N.C. 162, 45 S.E. 539; *Frisbee v. Town of Marshall,* 122 N.C. 760, 30 S.E. 21; *S. v. Reynolds,* 95 N.C. 616; *McLean v. Murchison,* 53 N.C. 38; *Patterson v. Bodenhammer,* 33 N.C. 4; *Cohoon v. Simmons,* 29 N.C. 189; *McMillan v. Hafley,* 4 N.C. 186; *Kennedy v. Wheatley,* 3 N.C. 402.

2. That the defendant made an unauthorized, and therefore an unlawful, entry on the land. 63 C.J., Trespass, section 149.

3. That the plaintiff suffered damage by reason of the matter alleged as an invasion of his rights of possession. McIntosh on North Carolina Practice and Procedure in Civil Cases, section 398.

A complaint stating a claim for compensatory damages presents a right to recover at least nominal damages. *Hutton v. Cook,* 173 N.C. 496, 92 S.E. 355. Indeed, a complaint states a cause of action for the recovery of nominal damages for a properly pleaded trespass to realty even if it contains no allegations setting forth the character and amount of damages. *Harris v. Sneeden,* 104 N.C. 369, 10 S.E. 477; *Womack v. McDonald,* 219 Ala. 75, 121 So. 57; *McGill v. Varin,* 213 Ala. 649, 106 So. 44; 25 C.J.S., Damages, section 130. This is true because an unauthorized entry upon the possession of another entitles him to nominal damages at least. *Cotton Co. v. Henrietta Mills,* 218 N.C. 294, 10 S.E. 2d 806; *Lee v. Stewart, supra; Kinsland v. Kinsland,* 188 N.C. 810, 125 S.E. 625; *Lee v. Lee,* 180 N.C. 86, 104 S.E. 76; *Hutton v. Cook, supra; Brame v. Clark, supra; Lumber Co. v. Lumber Co.,* 137 N.C. 431, 49 S.E. 946; *Little v. Stanback,* 63 N.C. 285; *Dougherty v. Stepp, supra.*

It is otherwise, however, with respect to compensatory and punitive damages. If a plaintiff would recover compensatory damages for a trespass to realty, he must allege facts showing actual damage; and if he would recover punitive damages for such a trespass, he must allege circumstances of aggravation authorizing punitive damages. 63 C.J., Tres-

pass, section 155. The complaint in the instant case does not charge that the act of trespass was malicious or wanton. *Brame v. Clark, supra; Wylie v. Smitherman,* 30 N.C. 236; *Duncan v. Stalcup,* 18 N.C. 440. This being true, it alleges no grounds for punitive damages. *Remington v. Kirby,* 120 N.C. 320, 26 S.E. 917.

When the present complaint is read in the light of the relevant rules of law, it is manifest that the plaintiff has stated a valid cause of action for trespass to realty.

To be sure, he does not allege in express terms any possession by him of the property involved in the case. It is not necessary for him to make this essential averment in any special form of words. His complaint is susceptible of two constructions, either of which is ample to withstand the demurrer on this aspect of the case and to permit the introduction of evidence to establish the first ingredient of the alleged trespass.

The two permissible interpretations become apparent when due regard is had for the distinction between actual and constructive possession of real property. This distinction is thus delimited in the recent case of *S. v. Baker,* 231 N.C. 136, 56 S.E. 2d 424: "Actual possession is a tangible fact, and constructive possession is a legal fiction. Actual possession of land consists in exercising acts of dominion over it, and in making the ordinary use of it to which it is adapted, and in taking the profits of which it is susceptible. Constructive possession is that theoretical possession which exists in contemplation of law in instances where there is no possession in fact. When land is not in the actual enjoyment or occupation of anybody, the law declares it to be in the constructive possession of the person whose title gives him the right to assume its immediate actual possession."

The two permissible constructions of the complaint are somewhat alternative in character, and are set forth in paragraphs 1 and 2 below.

1. The complaint impliedly asserts that at the time of the alleged trespass the property involved in the action was "the plaintiff's grave lot," and there was no one in its actual possession claiming adversely to him. This assertion is tantamount to an allegation that at the time at issue the plaintiff had title to the property, and by reason thereof was in its constructive possession. *Gordner v. Lumber Co., supra; S. v. Reynolds, supra; McLean v. Murchison, supra; Cohoon v. Simmons, supra; McMillan v. Hafley, supra;* 63 C.J., Trespass, section 150.

2. The complaint alleges by implication rather than in direct terms that the plaintiff maintained and used the spot of ground designated as his grave lot as a place for the burial of his dead pursuant to permission given him by the owner of the fee, *i.e.*, Neill's Creek Baptist Church. This implied averment is equivalent to an allegation that the plaintiff had actual possession of the grave lot at the time of the alleged trespass. This

is necessarily so because one cannot well exercise acts of dominion over a place of sepulture or put it to the ordinary use for which it is adapted except by maintaining and using it as a place for the burial of the dead. The Supreme Court of South Carolina undoubtedly had this factual truth in mind when it held that one who has been permitted to bury his dead in a cemetery acquires such possession in the spot of ground in which the bodies are buried as will entitle him to maintain trespass against the owners of the fee or strangers who, without his consent, negligently or wantonly disturb it. *Kelly v. Tiner,* 91 S.C. 41, 74 S.E. 30.

The allegations that the defendant wrongfully and unlawfully and without authority from the plaintiff went to the grave of the plaintiff's wife and wrongfully and unlawfully carried away and destroyed the floral designs sufficiently charge that the defendant made an unauthorized and unlawful entry on the plaintiff's grave lot. Moreover, the complaint will justify and require an award of nominal damages if the plaintiff merely shows an unauthorized entry by defendant at the trial.

The complaint lays claim, however, to more than nominal damages. It alleges with positiveness that the plaintiff is entitled to recover compensatory damages for embarrassment, humiliation and mental anguish inflicted upon him by the defendant's desecration of his wife's grave.

The question whether mental suffering unaccompanied by any corporal injury to the plaintiff constitutes a proper element of damages in an action for trespass to realty has sharply divided the courts of the land. 63 C.J., Trespass, section 230. The general debate on the question has provoked the citing of many legal authorities and the splitting of many legal hairs. We forego entry into the general debate and confine our decision to the precise problem at hand. The law must heed the realities of life if it is to fulfill its function. As *Justice Barnhill* so well said in his able opinion in *Lamm v. Shingleton,* 231 N.C. 10, 55 S.E. 2d 810, "the tenderest feelings of the human heart center around the remains of the dead." In recognition of this reality, we hold that compensatory damages may be awarded to a plaintiff for mental suffering actually endured by him as the natural and probable consequence of a trespass to his burial lot, even though his mental suffering may not be accompanied by any physical injury. This conclusion is supported in principle by well considered decisions of this Court. *Lamm v. Shingleton, supra; Sparks v. Products Corp.,* 212 N.C. 211, 193 S.E. 31; *Stephenson v. Duke University,* 202 N.C. 624, 163 S.E. 698; *May v. Telegraph Co.,* 157 N.C. 416, 72 S.E. 1059, 37 L.R.A. (N.S.) 912.

The judgment overruling the demurrer is

Affirmed.

MRS. BITHA N. POINDEXTER, ADMINISTRATRIX OF MANLEY C. NEVILLE, DECEASED, v. JOHNSON MOTOR LINES, INC.

(Filed 19 March, 1952.)

1. Master and Servant § 41—

In an action by the personal representative of a deceased employee against the third person tort-feasor, defendant is entitled to set up actual negligence of the employer, as distinguished from imputed negligence under the doctrine of *respondeat superior*, as a bar *pro tanto* to plaintiff's right to recover in behalf of the employer, G.S. 97-10, but contributory negligence on the part of the employee is a complete bar to the entire action, without reference to any rights of the employer to share in the recovery.

2. Same: Pleadings § 31—

Where defendant sets up the contributory negligence of intestate as a bar to plaintiff's right to recover for his intestate's death, defendant is not entitled to set up the further defense that compensation had been paid for intestate's death by his employer and that intestate's negligence was a bar *pro tanto* to the action in so far as the employer is entitled to share in the recovery under G.S. 97-10, since negligence of intestate may be presented as a complete bar under the plea of contributory negligence, and the further defense was properly stricken on motion as being mere repetition and surplusage.

3. Appeal and Error § 51c—

Every opinion of the Supreme Court should be considered in the light of the facts of the case in which it was delivered.

APPEAL by defendant from *Sharp, Special Judge,* September Term, 1951, LEE. Affirmed.

Civil action to recover damages for alleged wrongful death, heard on motion to strike allegations in defendant's answer.

On 9 June 1951, plaintiff's intestate was operating a tractor-trailer belonging to G. N. Childress, going north on U. S. Highway 1 near Dinwiddie, Va. His vehicle collided with a tractor-trailer belonging to defendant, traveling in the opposite direction. As a result of the collision, plaintiff's intestate suffered injuries which caused his death.

In its answer to plaintiff's complaint, after pleading a counterclaim for damages to its truck and cargo, defendant pleads as "a second further answer and defense" that (1) plaintiff's intestate and his employer were subject to the Workmen's Compensation Act, (2) the insurance carrier of G. N. Childress, the employer, has paid or entered into a contract to pay compensation as required by said Act, (3) this action is maintained to the extent of such payment in behalf of said Childress and his insurance carrier, (4) said Childress, through his agent, plaintiff's intestate, was guilty of contributory negligence as specifically alleged in the answer, and (5) plaintiff's right to recover, to the extent of the interest of said em-

ployer and his insurance carrier, is barred by said contributory negligence of plaintiff's intestate.

Defendant likewise pleaded the contributory negligence of plaintiff's intestate as a complete bar to plaintiff's right to recover.

Plaintiff moved to strike said second further defense. The motion was allowed. Defendant excepted to the order striking said further defense and appealed.

Gavin, Jackson & Gavin, Ruark & Ruark, and Joseph C. Moore for plaintiff appellee.

Smith, Leach & Anderson, W. W. Seymour, and J. G. Edwards for defendant appellant.

BARNHILL, J. The defendant alleges that plaintiff's intestate and his employer were subject to the provisions of the Workmen's Compensation Act; that the employer or his insurance carrier has paid or admitted liability for payment of the compensation provided by said Act; and that this action, to the extent of such payment or admitted liability, is being maintained for and on behalf of the employer or his insurance carrier as authorized by statute, G.S. 97-10. Apparently the facts thus alleged are not denied. In any event, for present purposes we may assume the facts are as alleged, and in discussing the same we will treat the question as if the payment were made by the employer.

Upon this showing of the right of the employer to share, *pro tanto,* in any recovery had in this cause, defendant pleads the negligence of the employer, as such, in bar of his right to recover herein. But the negligence alleged was the negligence of plaintiff's intestate.

Defendant pleads the negligence of plaintiff's intestate as a proximate contributing cause of his injury and death in bar of any recovery by plaintiff. This plea fully presents the question for decision at the trial. If the issue bottomed on this plea is answered by the jury in favor of the defendant, the verdict will put an end to the case. In that event plaintiff is not and will not be entitled to recover in any amount, either in his own behalf or in behalf of the employer.

The further and repeated plea of contributory negligence as against the employer alone is mere repetition and surplusage. Certainly the deceased could not have been guilty of conduct which constitutes contributory negligence as against his employer but not as against him or his estate. Any conduct on his part which bars the right of the one bars the right of the other.

On the allegations made the employer has committed no act of negligence which proximately caused the death of plaintiff's intestate. The negligence, if any, was the negligence of the deceased employee and that

negligence constituted no bar to plaintiff's right to compensation under the Workmen's Compensation Act. *Archie v. Lumber Co.*, 222 N.C. 477, 23 S.E. 2d 834. It cannot be made the basis of an independent plea in bar of the right of the employer to recover over against the original and primary wrongdoer. If relied upon at all, it must be relied upon as a complete bar to the right of plaintiff to recover in any amount.

The defendant, however, cites and relies on *Brown v. R. R.*, 204 N.C. 668, 169 S.E. 419; *Eledge v. Light Co.*, 230 N.C. 584, 55 S.E. 2d 179, and *Essick v. Lexington*, 233 N.C. 600, 65 S.E. 2d 220, in which, it says, this Court has expressly approved the plea of contributory negligence on the part of the employer as a bar, *pro tanto*, in an action such as this. It stressfully insists that those cases are controlling here.

But "the law discussed in any opinion is set within the framework of the facts of that particular case," *Light Co. v. Moss*, 220 N.C. 200, 17 S.E. 2d 10; *S. v. Crandall*, 225 N.C. 148, 33 S.E. 2d 861; *Bruton v. Smith*, 225 N.C. 584, 36 S.E. 2d 9; *Brown v. Hodges*, 233 N.C. 617, 65 S.E. 2d 144; or, as expressed by *Chief Justice Marshall* in *U. S. v. Burr*, 2 L. Ed. 684, at p. 690: "Every opinion, to be correctly understood, ought to be considered with a view to the case in which it was delivered." *Brown v. Hodges, supra.* The cases cited by defendant, when so considered, are clearly distinguishable.

In the *Brown case*—a railroad crossing accident case—the negligence alleged was the negligence of the employer in that he furnished the employee with a truck with worn and defective brakes which rendered it impossible for the employee to stop before entering the zone of danger after he saw or should have seen the approaching train.

In the *Eledge* and *Essick cases*, it was alleged that the employer negligently breached its nondelegable duty to furnish the employee a safe place in which to work and to warn him of the dangers and hazards of his employment. It was further alleged in each case that the employer, through the negligent conduct of a fellow servant of the deceased, proximately contributed to and caused the death of the plaintiff's intestate. That is to say, the negligence of the employer relied on by the defendant was independent of any act of commission or omission on the part of the deceased employee.

So then, it comes to this: Any alleged negligence of the employer which is entirely independent of the negligence imputed to him under the doctrine of *respondeat superior* on account of the negligent or wrongful conduct of the employee, who was injured or killed, may be pleaded in bar of the plaintiff's right to recover, *pro tanto*, in behalf of the employer or his insurance carrier. On the other hand, any alleged negligence of such employee who has received, or whose estate has received compensation from the employer under the Workmen's Compensation Act, must be

pleaded, if at all, as a bar to the whole action without reference to any rights of the employer to share in the recovery.

For the reasons stated the judgment entered in the court below is Affirmed.

CONSTANCE L. HOWARD v. A. S. CARMAN.

M. L. HOWARD v. A. S. CARMAN.

(Filed 19 March, 1952.)

1. Trial § 31b—

It is prejudicial error for the trial court to fail to charge the law on substantive features of the case arising on the evidence, even in the absence of a request for instructions, G.S. 1-180, and the requirements of the statute are not met by a mere statement of the contentions of the parties.

2. Automobiles §§ 8i, 18i—

In an action involving a collision at an intersection upon conflicting evidence of the parties as to which vehicle was first in the intersection, it is error for the court to fail to explain the law as to the rights of the parties upon defendant's evidence that he was first in the intersection, even though plaintiff's car approached from defendant's right.

3. Same—

Where plaintiff's evidence is to the effect that he was driving his car at a speed of about ten miles per hour and could have stopped in about two feet, and that plaintiff, as he was entering the intersection, saw defendant's car some twenty-five yards away approaching the intersection from plaintiff's left at a rapid speed, but that plaintiff did not stop, *is held* to require the court to charge the jury as to the law of contributory negligence arising on the evidence, and a mere statement of the contentions of the parties is insufficient.

APPEAL by defendant from *Clement, J.*, May Term, 1951, MOORE.

These are civil actions to recover personal injury and property damages arising out of an automobile collision and were without objection consolidated for trial.

The collision occurred about 7:30 p.m. on 25 June, 1948, in the intersection of Ashe Street and Massachusetts Avenue in the town of Southern Pines. Ashe Street runs in general north-south direction. Massachusetts Avenue runs in general east-west direction. Both the street and the avenue are approximately thirty feet in width and at the intersection there was no traffic light or sign to indicate the priority of either street. The automobile, owned by the *feme* plaintiff and operated with her permission by her husband, M. L. Howard, was traveling in a northerly direction along Ashe Street. The defendant was driving his automobile in an easterly direction along Massachusetts Avenue.

Upon the trial in the Superior Court, the plaintiff's testimony was substantially as follows: "I got to the intersection and I slowed down . . . I looked that way and I saw him coming, he was possibly about 50 yards from me. I slowed down because I could see around here . . . Mr. Carman was approaching me on my left . . . I got there first . . . I was two-thirds across when he hit me . . . Mr. Carman did not slow down any at all . . . In my opinion, he was going at least 40 miles per hour. I slowed down and wasn't going over 10 miles per hour when I went across the intersection . . . It . . . was just about dusk . . . I was familiar with the intersection. I had been over it many times . . . I did not have my lights on at that time. Mr. Carman did not have his lights on. I was proceeding along Ashe Street in a northern direction and I could see Mr. Carman's car coming along Massachusetts Avenue in an eastern direction . . . Mr. Carman was about approximately 25 yards, I'd say, or something like that, when I first saw him—25 yards back up Massachusetts Avenue . . . west of where I was. I was coming up in the intersection. I mean I was just entering the intersection . . . when I saw him up there. He was 25 yards away . . . when I came into the intersection I was almost completely stopped. . . . When I got over into Massachusetts Avenue, I could see he was coming on, and continuing to come on. I was the nearest one in the intersection. I was on the right hand . . . His speed was increasing as he was coming . . . I saw the man coming at 40 miles per hour right where I was crossing. Driving my car at 10 miles per hour I could have stopped it in 2 feet, approximately 2 feet, and yet when I saw that car coming 25 yards from me, coming on directly, and right in front of me, I did not stop."

The defendant testified by deposition, without objection, the pertinent parts of which are as follows: "As I approached the intersection . . . on this occasion, I know I was not exceeding 25 miles an hour . . . It was twilight and the lights on my car were on. I was driving . . . approximately six feet from the right-hand curb of the street . . . The collision occurred at the intersection . . . in the center of the street,—although his car was slightly beyond the center of the intersection . . . As I approached Ashe Street, on the corner to my right, there was a house . . . There was also an obstruction in the way of a very tall spruce tree . . . that obstructs the view of the street . . . Except for the obstruction of the tree at the corner, I had a clear vision of the road ahead. I wouldn't have a clear view of Ashe Street until a distance of approximately 10 to 20 feet from the corner . . . I couldn't estimate how fast the plaintiff's car was traveling . . . other than I didn't see him as he approached the corner and he shot out in front of me and that caused the collision; so, I must judge that he was traveling at a high rate of speed . . . I had gone into the intersection . . . approximately 12 feet inside the inter-

section, before the plaintiff's car crossed in front of me . . . The plaintiff's car did not slow up and did not give any signal at any time."

Issues of negligence, contributory negligence and damages were submitted to the jury and answered in favor of the plaintiffs. From the judgment entered, defendant appealed, assigning errors.

H. F. Seawell, Jr., for plaintiffs, appellees.

Spence & Boyette for defendant, appellant.

VALENTINE, J. The only exceptions appearing in the record requiring express consideration are those based on these exceptions:

(1) Assignment No. 11: "The court, after making the statement to the jury . . . regarding certain principles of law applicable to the trial of the cause, directed the jury to answer the first issue in the manner the jury might find the facts to be without explaining and directing the jury as to the law applicable to the evidence elicited upon the trial of the cause; and failed to explain to the jury and give instructions as to the rights of defendant if the jury should find from the evidence, for instance, that the defendant had reached and entered the intersection . . . before plaintiff M. L. Howard had reached it, and failed to direct the jury as to the rights of the defendant and the liability of the plaintiff in other material aspects of the evidence introduced on the trial of the cause."

(2) Assignment No. 12: "In the charge of the court upon the second issue, the court simply called attention to some of the contentions of the parties and directed the jury to answer the issue as they might find the facts to be without any attempt to apply the law to the evidence before the court and the jury applicable to this issue." The second issue relates to contributory negligence, alleged against plaintiff M. L. Howard in his case.

It is provided in G.S. 1-180, as amended by Chapter 107 of 1949 Session Laws, that in jury trials the judge "shall declare and explain the law arising on the evidence given in the case." And the decisions of this Court are uniform in holding that the failure of the presiding judge to declare and explain the law arising upon the evidence is and will be held for error. See *Ryals v. Contracting Co.*, 219 N.C. 479, 14 S.E. 2d 531, and cases cited. See also, among many later cases to like effect, *S. v. Ardrey*, 232 N.C. 721, 62 S.E. 2d 53. It is there stated that "in interpreting this statute the authoritative decisions are to the effect that it 'confers upon litigants a substantial legal right and calls for instructions as to the law upon all substantial features of the case;' and, further, that the requirements of the statute 'are not met by a general statement of legal principles which bear more or less directly, but not with absolute directness upon the issues made by the evidence,' " citing *Williams v. Coach*

Co., 197 N.C. 12, 147 S.E. 435; *S. v. Groves*, 121 N.C. 563, 28 S.E. 262; *Nichols v. Fibre Co.*, 190 N.C. 1, 128 S.E. 471.

It is also held that the failure of the court to instruct the jury on substantial features of the case arising on the evidence is prejudicial, and this is true even though there be no request for special instruction to that effect. See *Spencer v. Brown*, 214 N.C. 114, 198 S.E. 630; *S. v. Ardrey, supra*, and numerous other cases.

In the light of the provision of the statute as so interpreted by this Court, and the evidence offered by the respective parties being in sharp conflict, it became the duty of the trial judge to declare and explain the law arising upon the evidence in the case, as the jury should find the facts to be.

The evidence is susceptible of an inference that the defendant entered the intersection before the plaintiff, M. L. Howard, did, and hence, defendant is entitled to have the trial judge declare and explain the principles of law applicable to rights of parties at an intersection. See *S. v. Hill*, 233 N.C. 61, 62 S.E. 2d 532, where in opinion by *Ervin, J.*, such principles are set forth. It does not appear that the court so charged the jury.

Likewise, it appears that assignment of error No. 12 is well taken. The testimony of M. L. Howard, if found to be true, is susceptible of the inference that, after seeing the automobile of defendant, he failed to exercise reasonable care to avoid a collision. This is a question for the jury under proper instructions from the court.

The questions presented by the other exceptions may not arise at the next trial and for that reason will not be discussed here.

The failure of his Honor to properly charge the jury as above indicated constitutes reversible error and entitles the defendant to a new trial, and it is so ordered.

New trial.

OSCAR WRENN v. TOWN OF KURE BEACH, A MUNICIPAL CORPORATION; BOARD OF COMMISSIONERS OF THE TOWN OF KURE BEACH; ED LEWIS, G. TAFT RUSS AND JOHN O'BIERNE, COMMISSIONERS OF THE TOWN OF KURE BEACH; W. L. FLOWERS, MAYOR OF THE TOWN OF KURE BEACH; AND KENNETH L. HUNN, TOWN CLERK AND TREASURER OF THE TOWN OF KURE BEACH.

(Filed 19 March, 1952.)

1. Municipal Corporations § 11a: Taxation § 4—

Although provision of a municipal charter that nonresident freeholders should be entitled to vote in its elections, is void, Art. VI of the Constitution of North Carolina, where only voters possessing the qualifications prescribed by the Constitution actually vote in a bond election in the munici-

pality, the election is valid, and approval of the issuance of bonds by the voters in such election is effective.

2. Municipal Corporations § 11b: Public Officers § 5a—

Where the offices of mayor and commissioners of a municipality are created by the General Assembly, and in accordance with the town charter, the Governor appoints to these offices men selected by an election in which nonresident freeholders were allowed to vote under the charter provisions of the town, and such officers are recognized as such and their acts acquiesced in by the residents of the town and the public generally, such officers are at least *de facto* officers of *de jure* offices.

3. Public Officers § 9—

The official acts of *de facto* officers cannot be collaterally attacked.

APPEAL by plaintiff from *Burney, J.*, January Term, 1952, of NEW HANOVER. Affirmed.

Rountree & Rountree for plaintiff, appellant.

Royce S. McClelland for defendants, appellees.

DEVIN, C. J. Plaintiff, a resident and taxpayer of the Town of Kure Beach, instituted this action to restrain the town from issuing municipal bonds for the acquisition and installation of water and sewer systems for the use and benefit of the town. Plaintiff alleged that the bonds if issued would not constitute valid obligations of the town.

The case was heard below upon stipulations from which the following pertinent facts were made to appear: The Town of Kure Beach is and was a duly created and existing municipal corporation by virtue of Chap. 906, Session Laws 1947, and Chap. 587, Session Laws 1949, the governing body consisting of three Commissioners and a Mayor appointed by the Governor of North Carolina. In June, 1951, the defendants Lewis, Russ and O'Bierne were appointed by the Governor members of the Board of Commissioners of the town for a term of two years, said appointment having been made in accord with section 12 of the town charter. Defendant Flowers was chosen as Mayor, upon the resignation of a previous incumbent, by the Governor pursuant to election and recommendation of the Board of Commissioners, according to the provisions of the charter. Defendant Hunn was appointed Clerk and Treasurer by the Board of Commissioners.

On 10 September, 1951, the defendants acting as Commissioners of Kure Beach adopted appropriate resolutions and enacted ordinances for issuing water and sewer bonds in the sum of $260,000, and ordered an election to be held 23 October, 1951, on the question of the approval of the bonds for the purposes declared. Notice of election was duly published and new registration of voters ordered. At the election all persons

qualified to vote under Art. VI of the Constitution of North Carolina were permitted to vote. A majority of the votes cast were in approval of the proposed issue of bonds and the result declared.

Section 4 of the Charter of Kure Beach contains the following provision: "All owners of lots within the town limits and all *bona fide* residents of said town shall have the right to vote in any election held under this Act, and shall be denominated a qualified voter, and shall have the right to vote in any election as in this Act and by the laws of the State of North Carolina provided."

Section 12 of the Charter provides in substance that the Governor shall appoint as Mayor and members of the Board of Commissioners of Kure Beach those recommended for these positions as the result of a ballot in which nonresident freeholders as well as legal residents of the town were permitted to vote.

The plaintiff alleged that the bonds if issued would be invalid for two reasons: (1) that the Charter of the Town of Kure Beach permitted nonresident owners of lots in the town to vote in all elections, and (2) that the Mayor and members of the Board of Commissioners, who adopted the bond resolution and ordered the election, were chosen in the manner prescribed by the Charter in which nonresident freeholders were permitted to participate in the selection of those recommended for appointment by the Governor, and that hence the bond resolutions and election were not legally authorized.

1. While the provision contained in sec. 4 of the Town Charter permitting nonresident freeholders to vote in all municipal elections was void because in conflict with Art. VI of the Constitution (*Smith v. Carolina Beach,* 206 N.C. 834, 175 S.E. 313), it is stipulated that those who were permitted to vote in the bond election on 23 October, 1951, did possess the qualifications prescribed by the Constitution, and there is no suggestion that any person not so qualified was permitted to vote or voted in the election. Since this provision of the Town Charter to which appellant's objection is pointed in no way affected or influenced the election, the validity of bonds voted by a majority of the qualified electors of the town may not be successfully challenged on the ground that the election was void.

2. The indirect method of selecting a mayor and town commissioners for the Town of Kure Beach by primary balloting, upon the outcome of which the Governor must appoint, is objectionable for the reason that the ballots of nonresident freeholders would be counted in the selection of those recommended for appointment by the Governor to fill these offices. However, we think the official acts of those persons who were appointed by the Governor and who were acting under that appointment should be

upheld for the reason that if not *de jure* they were *de facto* officers of the Town of Kure Beach.

The offices they held were *de jure*. The General Assembly created the public offices of Mayor and members of the Board of Commissioners of the Town of Kure Beach. The incumbents of those offices who adopted the bond resolutions and ordered the election and declared the result were acting under color of a valid appointment as such officers. They were recognized as such, and their acts acquiesced in by people of Kure Beach and the public generally. They exercised openly and without question the duties of these offices. Under these circumstances their acts done in furtherance of the interest of the town they were serving must be upheld. This is in accord with numerous well considered decisions of this Court. *Norfleet v. Staton*, 73 N.C. 546; *S. v. Lewis*, 107 N.C. 967, 12 S.E. 457; *Markham v. Simpson*, 175 N.C. 135, 95 S.E. 106; *Smith v. Carolina Beach*, 206 N.C. 834, 175 S.E. 313; *In re Wingler*, 231 N.C. 560, 58 S.E. 2d 372; *Hinson v. Britt*, 232 N.C. 379, 61 S.E. 2d 185; *Idol v. Street*, 233 N.C. 730 (734), 65 S.E. 2d 313. Nor may their right to hold these offices be indirectly attacked. *Markham v. Simpson, supra* (139); *Smith v. Carolina Beach, supra; In re Wingler, supra.*

We conclude that the grounds upon which the aid of the Court was sought to restrain the issue of bonds of the Town of Kure Beach for the purposes declared were insufficient, and that the judgment below declaring that these bonds when issued pursuant to applicable statutes would be valid obligations of the Town of Kure Beach should be affirmed, and it is so ordered.

Affirmed.

COIN MACHINE ACCEPTANCE CORPORATION, PLAINTIFF, v. SAM PILLMAN, DEFENDANT.

(Filed 19 March, 1952.)

1. Chattel Mortgages and Conditional Sales § 17—

A complaint alleging that plaintiff is entitled to recover a stipulated sum as the holder in due course of a conditional sales contract executed by defendant is not demurrable for failure of the complaint to allege that plaintiff is also the owner of the note or notes secured thereby.

2. Reference § 3—

The Superior Court is without authority to order a compulsory reference in an action seeking to recover a specified amount alleged to be due plaintiff from defendant under the terms of a conditional sales contract, no equitable relief being sought. G.S. 1-189.

APPEAL by defendant from *Burgwyn, Special Judge*, October Term, 1951, of HERTFORD.

The plaintiff instituted this action against the defendant to recover the sum of $10,450.09 and interest alleged to be due and owing to the plaintiff as the holder in due course of a conditional sales contract alleged to have been executed and delivered by the defendant to Harvey Distributing Company, Inc., and assigned to the plaintiff for value and before maturity. Claim and delivery was issued at the time of the institution of the action for possession of the personal property to which title had been retained in the conditional sales agreement. The property was seized by the sheriff of Hertford County and the defendant filed bond as required by the statute and retained possession thereof. The defendant, thereafter, filed an answer to the complaint in which he denied the execution of the conditional sales agreement, denied that such conditional sales contract was assigned to the plaintiff, denied that plaintiff was entitled to the possession of the personal property seized; admitted that he had made no payment to the plaintiff and denied that he was indebted to the plaintiff as a holder of such conditional sales contract in any amount.

When this cause came on for hearing at the April Term, 1951, of the Superior Court of Hertford County, a compulsory reference was ordered by the court to which order both the plaintiff and defendant excepted.

When the hearing was held before the referee, the defendant demurred *ore tenus* on the ground that the complaint did not state a cause of action. The demurrer was overruled. The defendant filed exceptions to the referee's report and tendered certain issues.

The cause came on to be heard at the October Term, 1951, of the Superior Court of Hertford County. The defendant moved to strike out the complaint and to dismiss the action on the ground that the complaint was not properly verified. The motion was denied. The case was submitted to the jury on the evidence introduced before the referee which resulted in a verdict for the plaintiff. Judgment was entered accordingly and from which the defendant appeals, assigning error.

Jones & Jones and John R. Jenkins, Jr., for defendant, appellant.

Joseph D. Blythe, W. D. Boone, and Stuart A. Curtis for plaintiff, appellee.

DENNY, J. The defendant interposed a demurrer *ore tenus* in this Court on the ground that the complaint does not state facts sufficient to constitute a cause of action against the defendant.

Among the grounds upon which the defendant contends the demurrer should be sustained is the fact that the complaint does not allege that the plaintiff is the owner of the note or notes secured by the conditional sales agreement. As a matter of fact, it does not appear on the face of the complaint that any note or notes were executed in connection with the

conditional sales agreement upon which the action is bottomed. The demurrer is without merit and will not be sustained. However, the plaintiff may desire to recast its pleadings so as to allege that it is the owner and holder for value and in due course of any note or notes secured by the conditional sales agreement.

The defendant presents a more serious question by his exception to the order of compulsory reference. The relief which the plaintiff seeks in the instant action and the issues raised on the pleadings, are not such as to authorize a compulsory reference within the purview of G.S. 1-189. *Alston v. Robertson,* 233 N.C. 309, 63 S.E. 2d 632.

The plaintiff contends, however, that the court may, in the exercise of its equitable powers, order a reference irrespective of the provisions contained in G.S. 1-189, citing North Carolina Practice and Procedure by McIntosh, section 525, page 567. Even so, there is no equitable relief involved in this action to sustain such an order. The defendant is entitled to a new trial and it is so ordered.

New trial.

COIN MACHINE ACCEPTANCE CORPORATION, PLAINTIFF, v. SAM PILLMAN, DEFENDANT.

(Filed 19 March, 1952.)

APPEAL by defendant from *Halstead, Special Judge,* October Term, 1951, of HERTFORD.

Jones & Jones and John R. Jenkins, Jr., for defendant, appellant.

Joseph D. Blythe, W. D. Boone, and Stuart A. Curtis for plaintiff, appellee.

PER CURIAM. This is an action instituted by the plaintiff to recover of the defendant the sum of $10,449.32 with interest from 13 March, 1948, until paid.

The claim is based upon a conditional sales contract executed by the defendant to the Pioneer Distributing Company and assigned to the plaintiff, presenting a factual situation similar to that set forth in *Acceptance Corp. v. Pillman, ante,* 295. This appeal involves the same legal questions presented and disposed of in that case. For the reasons stated therein, the defendant will be granted a new trial in this action.

New trial.

SCOTT DILLINGHAM v. MINNIE LEVY KLIGERMAN AND HUSBAND, A. J. KLIGERMAN, OSCAR PITTS, ELON SMAWLEY, LAURA L. PENLEY, E. F. VESS, JERRY CALDWELL, WILLIAM C. BRIGHT AND ARCHIE L. SURRETT.

(Filed 19 March, 1952.)

1. Vendor and Purchaser § 23—

In an action for specific performance of a contract of sale of real estate or for damages in lieu thereof, demurrer of those defendants other than vendors is properly sustained in the absence of allegation that they have or claim any interest in the land or that they were in anywise obligated to plaintiff, certainly where it appears of record that the contract of the *feme* vendor, who owned the land, had not been acknowledged.

2. Pleadings § 19c—

The rule that a pleading will be liberally construed upon demurrer does not permit the court to construe into the pleading that which it does not contain. G.S. 1-151.

3. Appeal and Error § 29—

An exception not discussed in appellant's brief and in support of which no authority is cited, will be deemed abandoned. Rule of Practice in the Supreme Court No. 28.

APPEAL by plaintiff from *Bennett, Special Judge,* December Term, 1951, of BUNCOMBE.

Civil action by the plaintiff for specific performance of alleged contract for the sale and purchase of real estate, or for damages in lieu thereof, heard on demurrers *ore tenus* for failure of the complaint to state facts sufficient to constitute a cause of action.

It appears from the complaint that the action is predicated upon a contract allegedly made between the plaintiff and the defendant Minnie Levy, widow (now Minnie Levy Kligerman), registered in the Public Registry of Buncombe County, by the terms of which it is alleged that the *feme* defendant Kligerman contracted and agreed to convey to the plaintiff for a named consideration certain real estate therein described. The contract is incorporated in the complaint by reference.

When the case came on for trial, the defendants, who had previously filed answers, demurred *ore tenus* to the complaint on the ground that it fails to state facts sufficient to constitute a cause of action as to each of the defendants. Following the hearing, the court entered judgment overruling the separate demurrers of the defendants Minnie Levy Kligerman and husband, A. J. Kligerman, but sustaining those of the other defendants, namely: Oscar Pitts, Elon Smawley, Laura L. Penley, E. F. Vess, Jerry Caldwell, William C. Bright and Archie L. Surrett, and as to these defendants canceling the notice of *lis pendens* filed in the Clerk's office and dismissing the action.

To so much of the judgment as sustains the demurrers of Oscar Pitts and the other named defendants and as to them cancels the *lis pendens* and dismisses the action, the plaintiff excepted and appealed.

Scott Dillingham, plaintiff, appellant, in propria persona.

Shuford, Hodges & Robinson for defendants Oscar Pitts and Elon Smawley, appellees.

Narvel J. Crawford for other defendants, appellees.

JOHNSON, J. There is no allegation in the complaint that any one of the defendants whose demurrers were sustained has or claims any interest in the lands referred to in the complaint, nor that any one of these defendants is in anywise obligated to the plaintiff. It nowhere appears on the face of the complaint that the plaintiff is entitled to relief of any sort against any of these defendants. Besides, it appears upon the face of the record that there was no acknowledgment or proof of the execution of the contract by Mrs. Minnie Levy (now Mrs. Minnie Levy Kligerman), the seller who allegedly contracted to convey the disputed lands to the plaintiff. Therefore, the court properly sustained the demurrers filed by the appellees. As to them, the complaint was wholly insufficient to allege a cause of action. The statute (G.S. 1-151) which requires liberal construction in favor of the pleader, neither requires nor permits the court to construe into a pleading that which it does not contain. *Jones v. Furniture Co.*, 222 N.C. 439, 23 S.E. 2d 309; *Bank v. Gahagan*, 210 N.C. 464, 187 S.E. 580.

The question whether on demurrer sustained the action was dismissed prematurely is not presented for decision. This question, if raised by the exception to the judgment, not being discussed in appellant's brief nor supported by authority, will be treated as abandoned. Rule 28, Rules of Practice in the Supreme Court, 221 N.C. 562 *et seq.* See also *Gray v. Cartwright*, 174 N.C. 49, top p. 52, 93 S.E. 432; *S. v. Howley*, 220 N.C. 113, 16 S.E. 2d 705; *Maynard v. Holder*, 219 N.C. 470, 14 S.E. 2d 415.

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 19 March, 1952.)

1. Courts § 2—

Where it appears upon the face of the complaint that the court has no jurisdiction of the subject matter of the action, the action should be dismissed.

2. Pleadings § 22c—

Where it appears on the face of the complaint that the court has no jurisdiction of the subject matter of the action, the trial court may not allow an amendment, since such defect cannot be cured by waiver, consent, amendment, or otherwise. G.S. 1-134.

3. Same—

The trial court may not allow an amendment which sets up a wholly different cause of action or changes substantially the form of the action originally alleged. G.S. 1-163.

APPEAL by defendants from *Hatch, Special Judge,* January Term, 1952, of JOHNSTON.

This action was originally instituted to recover land under and by virtue of the alleged provisions contained in the last will and testament of Andrew Atkinson, which purported will was lost or destroyed after the death of Andrew Atkinson, and has never been admitted to probate.

The defendants demurred to the complaint in writing on the following grounds: (1) That the court had no jurisdiction of the subject matter of the action; (2) that the complaint did not state facts sufficient to constitute a cause of action. G.S. 1-127.

The demurrer was overruled and the defendants appealed to this Court. The ruling of the court below was reversed in an opinion filed 10 October, 1951 (*Anderson v. Atkinson,* 234 N.C. 271, 66 S.E. 2d 886).

Thereafter, at the November Term, 1951, of the Superior Court of Johnston County, the plaintiffs moved to amend their complaint. The motion was granted and the plaintiffs were allowed thirty days in which to file an amended complaint. The defendants excepted to this ruling.

The amended complaint was not filed within the time allowed. However, at the January Term, 1952, of the Superior Court of Johnston County, the plaintiffs moved to be allowed to file such complaint. The court, after finding the delay in filing was due to excusable neglect, allowed the motion. To this ruling the defendants also excepted.

The plaintiffs allege in their amended complaint that the paper writing in question was not executed with the formality required by the law of North Carolina so as to operate as a will, but allege that the paper writing was and is effectual as a contract to convey the property involved to them, and pray for specific performance.

The defendants appeal from the rulings of the court below, assigning error.

E. Reamuel Temple and Leon G. Stevens for plaintiffs, appellees.

Wellons, Martin & Wellons for defendants, appellants.

DENNY, J. The defendants' exceptions and assignments of error challenge the authority of the court below to allow an amendment to a complaint in an action in which the court has no jurisdiction of the subject matter of the original action. The exceptions are well taken and will be sustained.

In the former opinion (reported in 234 N.C. 271, 66 S.E. 2d 886), *Ervin, J.*, speaking for the Court, said: "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."

Whenever it appears upon the face of the complaint that the court has no jurisdiction of the subject matter of the action, the action should be dismissed. *Burroughs v. McNeill,* 22 N.C. 297; *Branch v. Houston,* 44 N.C. 85; *Henderson County v. Smyth,* 216 N.C. 421, 5 S.E. 2d 136.

A defect in jurisdiction over the subject matter cannot be cured by waiver, consent, amendment, or otherwise. G.S. 1-134; *Burroughs v. McNeill, supra; Garrett v. Trotter,* 65 N.C. 430; *Mastin v. Marlow,* 65 N.C. 695; *Tucker v. Baker,* 86 N.C. 1; *Hunter v. Yarborough,* 92 N.C. 68. "An amendment presupposes jurisdiction of the case." *Hodge v. Williams,* 22 How. 87, 16 L. Ed. 237. "There can be no waiver of jurisdiction over the subject matter, and objection may be made at any time during the progress of the action." *McCune v. Manufacturing Co.,* 217 N.C. 351, 8 S.E. 2d 219; *Miller v. Roberts,* 212 N.C. 126, 193 S.E. 286; *Raleigh v. Hatcher,* 220 N.C. 613, 18 S.E. 2d 207.

Furthermore, if we were not confronted with the question of jurisdiction on this appeal, the plaintiffs would not be entitled to maintain their present alleged cause of action. The right to amend pleadings does not permit the litigant to set up a wholly different cause of action or change substantially the form of the action originally sued upon. G.S. 1-163; *Perkins v. Langdon,* 233 N.C. 240, 63 S.E. 2d 565; *Bank v. Sturgill,* 223

N.C. 825, 28 S.E. 2d 511; *Goodwin v. Fertilizer Works,* 123 N.C. 162, 31 S.E. 373.

However, since the Superior Court had no jurisdiction of the subject matter of this action at the time it was originally instituted, the orders entered below, to which the defendants excepted, are vacated and the action is dismissed. *Brissie v. Craig, supra.*

Appeal dismissed.

STATE v. L. C. PARKER.

(Filed 19 March, 1952.)

1. Criminal Law § 21—

Acquittal on a charge of possession of intoxicating liquor in Recorder's Court upon a warrant issued subsequent to the institution of a prosecution in the Superior Court for possession of intoxicating liquor for the purpose of sale will not support a plea of former acquittal.

2. Criminal Law §§ 57b, 81a—

Motion for a new trial for newly discovered evidence is addressed to the sound discretion of the trial court, and its refusal of the motion is not reviewable in the absence of abuse of discretion.

APPEAL by defendant from *Sharp, Special Judge,* December Term, 1951, of JOHNSTON. Affirmed.

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

J. R. Barefoot and E. Reamuel Temple for defendant, appellant.

DEVIN, C. J. On defendant's former appeal in this case (*S. v. Parker,* 234 N.C. 236, 66 S.E. 2d 907), his conviction on the charge of possession of intoxicating liquor for the purpose of sale was upheld by this Court and the case remanded to the Superior Court "to the end that proper judgment be entered in accordance with this opinion." Judgment has now been rendered within the terms of the statute and in accordance with the decision of this Court. From this no appeal would lie.

Defendant, however, moved in arrest of judgment and interposed plea of former jeopardy, on the ground that subsequent to defendant's conviction in the Superior Court he was acquitted in the Recorder's Court of the charge of possession of intoxicating liquor. His motion was denied and plea overruled, and properly so, we think, for the reasons set out in the opinion in the former appeal. *S. v. Parker, supra; S. v. Lippard,* 223 N.C. 167, 25 S.E. 2d 594. See also *S. v. Bell,* 205 N.C. 225, 171 S.E. 50.

Defendant's motion for new trial for newly discovered evidence was presented to the court below and was denied in the court's discretion. Abuse of discretion is not suggested. No question is presented for our decision. *S. v. Lea,* 203 N.C. 316, 166 S.E. 292.

The judgment imposing sentence is

Affirmed.

PAUL COCKRELL, ADMINISTRATOR OF K. B. COCKRELL, DECEASED, v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 19 March, 1952.)

Railroads § 4—

Evidence tending to show that plaintiff's intestate could have seen one-fourth of a mile in the direction from whence defendant's train was approaching, without evidence that the condition of the crossing caused his vehicle to stall or prevented him from looking before entering upon the crossing, *held* to disclose contributory negligence barring recovery as a matter of law.

APPEAL by plaintiff from *Hatch, Special Judge,* January Term, 1952, JOHNSTON. Affirmed.

Civil action to recover damages for the alleged wrongful death of plaintiff's intestate who was killed when he drove his truck in front of an oncoming train at a neighborhood public road crossing.

At the conclusion of plaintiff's evidence in chief, the court, upon motion of defendant, dismissed the cause as in case of nonsuit. Plaintiff excepted and appealed.

Levinson & Batton for plaintiff appellant.

Shepard & Wood for defendant appellee.

PER CURIAM. While the details, as always, are somewhat different, there is nothing in the testimony in this case which serves to distinguish it from the long line of railroad crossing cases appearing in our reports in which judgments of nonsuit were either affirmed or directed. Plaintiff's intestate could see clearly for at least one-fourth mile down the track in the direction from which the train approached. Unfortunately he failed to look, or, looking, failed to heed the presence of the oncoming train. It does not appear that the condition of the crossing caused his vehicle to stall or prevented him from looking before entering the zone of danger. Therefore, the judgment of nonsuit must be affirmed on authority of the line of decisions represented by *Parker v. R. R.,* 232 N.C. 472, 61 S.E. 2d

370; *Herndon v. R. R.*, 234 N.C. 9; *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.

Affirmed.

EVERETT A. MINTZ v. TOWN OF MURPHY.

(Filed 26 March, 1952.)

1. Negligence § 1—

Actionable negligence is the failure to exercise proper care in the performance of some legal duty which the defendant owes plaintiff under the circumstances, which proximately causes injury to plaintiff.

2. Negligence § 5—

Proximate cause is that cause which produces the result in continuous sequence and from which a man of ordinary prudence could have foreseen that such result was probable under the facts as they existed.

3. Negligence § 19a—

Negligence is a question of law, and when the facts are admitted or established the court may say whether there has been a negligent breach of duty and also whether it was a proximate cause.

4. Negligence § 19b (1)—

Nonsuit is proper in an action for negligence when all the evidence taken in the light most favorable to plaintiff fails to show any one of the elements of actionable negligence.

5. Negligence § 19d—

Nonsuit is proper in a negligence action when it clearly appears from the evidence that the injury complained of was independently and proximately produced by the wrongful act, neglect, or default of an outside agency or responsible third person.

6. Municipal Corporations § 12—

In supplying electricity for private advantage and emolument a municipality is regarded as a private corporation and is liable for actionable negligence of its servants, agents and employees.

7. Electricity § 6—

An electric company is held to the standard of care of an ordinarily prudent person under the circumstances, which, in regard to wires carrying a strong and lethal current, is the duty to exercise the utmost care and prudence consistent with the practical operation of the business.

8. Same—

An electric company is not required to maintain insulation on wires at places where it cannot be contemplated that any person could come in contact with them.

9. Electricity § 11—Evidence held to show that injury resulted from independent act of responsible third party, and nonsuit was proper.

The evidence tended to show that in the construction of a highway it became necessary for defendant municipality to move its poles, that the municipality was co-operating with the Highway Commission to this end, but that before the question of right of way had been settled, plaintiff's employer began work in the construction of a culvert, and that in the progress of the work plaintiff was injured by an electric shock when current from defendant's uninsulated wires jumped a gap of some twelve inches to the beam of the derrick in connection with which plaintiff was working. *Held:* The evidence discloses that the injury resulted from the independent intervening act of those in control of and operating the derrick, over which defendant had no control, and nonsuit was properly entered.

APPEAL by plaintiff from *Rudisill, J.*, November Term, 1951, of CHEROKEE.

Civil action to recover damages for personal injury allegedly resulting from actionable negligence of defendant.

From the case on appeal it appears to be uncontroverted that plaintiff was injured on forenoon of 11 September, 1948, by electric shock while working as an employee of T. F. Houser, in pouring concrete in constructing a culvert at Haney Branch on State Highway No. 64, Project 9171, in Cherokee County, North Carolina, under an electric transmission line of defendant Town of Murphy.

The acts of negligence with which plaintiff charges defendant as proximate causes of his injury as alleged in the complaint, and as summarily stated, are: (1) Defective construction of its transmission line,—poles and cross-arms of wood too small to carry high tension wires, and failure to insulate wires; (2) failure to maintain its transmissions line,—thereby permitting poles to decay, and wires to sag, thereby creating hazard to those it might expect to work in close proximity thereto; (3) failure to remove the line when ordered by State Highway and Public Works Commission, or to cut off the current, having knowledge of conditions surrounding the work being done at the Haney Branch culvert; and (4) failure to give notice of existent danger.

Defendant, answering, denies all allegations of negligence on its part, and pleads as further defenses, summarily stated, among other things, intervening negligence of T. F. Houser, his agents and servants, as the sole proximate cause of plaintiff's injury.

Upon the trial in Superior Court plaintiff offered evidence tending to show the following:

The State Highway and Public Works Commission of North Carolina had previously, to wit 28 July, 1948, awarded a contract to Asheville Contracting Company, as independent contractor, "to repair, alter, change, relocate and rebuild" certain portions of Highway No. 64 from

its junction with Highway No. 60 at or near Ranger northerly to the Town of Murphy, all in Cherokee County and known as Project No. 9171, in accordance with standard rules and specifications for roads and structures, of date 1 January, 1946. (Contract and specifications were not introducted in evidence).

The Asheville Contracting Company sublet to T. F. Houser, or Houser Construction Company, as sometimes referred to, contract to construct culverts on this project 9171. Paul Cook was foreman for T. F. Houser, and plaintiff was employed by T. F. Houser on this job.

The Town of Murphy, a municipal corporation, owning an electric distribution system through which it distributes electric current for pay to customers within and outside its corporate limits,—the current being purchased by it from Tennessee Valley Authority at wholesale price, maintained a part of its distribution system along Highway 64 over and beyond Haney Branch on State Highway Project 9171. And E. G. Hughes was the manager of the electric department of the Town of Murphy with authority to supervise the maintenance of the transmission lines, to purchase material, etc.

T. B. Wilson was principal right of way engineer of the State Highway and Public Works Commission, and F. L. Hutchinson was its resident engineer on Project 9171.

And under the contract between State Highway and Public Works Commission and Asheville Contracting Company it was "the business and obligation" of the Commission, and not of the contractor, to have obstructions, like electric transmission lines or poles, removed from the right of way where Project 9171 was to be located or constructed.

And on 14 August, 1948, T. B. Wilson, in official capacity, wrote a letter to E. G. Hughes, of the electric department of the Town of Murphy, on the subject of "Pole Conflict—Town of Murphy" on Project 9171, as follows:

"I am advised by our Mr. Snelson that it will be necessary to move approximately 39 poles which conflict with the construction of the above project and investigation of the status of right of way for these poles indicates that the line was originally erected by the Southern States Power Company in 1932 or 1933, and that a right of way was secured and recorded for this line. However, we find that the poles were not placed on private right of way, but were erected on the public right of way of the highway; therefore, it would appear that the cost of relocation of these poles should be borne by the town.

"Mr. Snelson advised that due to some minor changes in alignment of this project that it is possible the number of poles which are to be moved may vary somewhat from the number given above, and I would suggest that you keep in touch with the Resident Engineer or Mr. Snelson, so that some of the poles may not be unnecessarily moved.

"It is requested that you please arrange to move these poles as soon as possible, as the contract for the construction of this project has been awarded."

Thereafter on 25 August, 1948, Hughes, as such manager, replied thereto by letter, which Wilson received 28 August, 1948. This letter reads as follows:

"I contacted Mr. F. L. Hutchinson, after receiving your letter dated August 14, 1948 on above subject. We went over the project with Mr. Hutchinson's maps and he feels that we will be able to re-locate on State Highway right of way, between the highway and railroad without conflict to either, if it will be agreeable with your Commission. He states that I should contact you with reference to Contract Forms and that you could probably furnish same.

"I will have to re-locate within the next forty-five days to not conflict with the progress of your contractor. Will you please advise me the proper procedure, so that I may make immediate steps as it will take some time for a survey and re-locating line.

"Thanking you for your immediate attention."

Wilson testified: "It wasn't determined at the time how many poles it was necessary to remove, the number given in the letter was just approximate. . . . There were negotiations going on between the Town of Murphy and the State Highway Commission for the Town of Murphy to remove this electrical line. Mr. Hughes or the town was co-operating with the resident engineer, Mr. Hutchinson, about clearing the right of way and removing the poles. I would qualify that statement 'from the correspondence we had they were doing all they could' . . . I do not know of my own knowledge just what the Town of Murphy and Mr. Hughes did in regard to this line. I transferred that to our resident engineer . . ."

And in this respect, Hutchinson, on cross-examination, after testifying that he received copy of letter from Wilson to Hughes, said: "After I received that letter, Mr. E. G. Hughes, an employee of the Town of Murphy, contacted me and discussed with me the question of a removal of the transmission line that was maintained by the Town of Murphy. In my conversation with Mr. Hughes . . . it was discussed that it would take possibly some 2 or 3, some few weeks or days due to the fact that before the town could remove its transmission line and replace it, that they had to acquire a right of way upon which to place it. There was also a question undetermined as to just how many poles that it was necessary to remove. . . . It was necessary that the town acquire poles on which to place the transmission line when it was moved . . . Mr. Hughes . . . went out with me over the project to determine the poles to be removed and Mr. Hughes and his crew started work in the area of Haney Branch . . . dug several holes in that area and I believe . . .

set several poles, and I asked him why he didn't continue with his locating, and he said he could not continue to set the poles until he could get a right of way for the new location. The plaintiff was injured during the period of time that Mr. Hughes or the Town of Murphy was endeavoring to remove its transmission line. . . . At the time I received the letter copy dated August 14, 1948, from Mr. Wilson, we knew that the poles at Haney Branch should be removed. We knew they had to be removed, prior to the injury of Mr. Mintz. . . . They would only have to have moved two poles, one on the east side and the one on the west side of Haney Branch culvert to have moved the line away from the crane being operated . . . From what I have observed and what I believe I do know it would be more efficient operation with good operating practice for the operator of an electrical distribution line similar to the distribution line maintained by the town of Murphy to move the whole system than it would be to just move a portion of the system. On the morning that plaintiff was injured I looked over the culvert at Haney Branch. I was there afterwards and observed the location of the poles, etc. . . ."

And this witness further testified: "Mr. Houser had been working and pouring concrete culverts on the far west end of the project . . . doing work where the Town of Murphy didn't have its electric line."

And Paul Cook, foreman on this job for T. F. Houser, testified: "In connection with building the culverts on Highway 64, Project 9171, we began this project sometime about August 12th, 1948, west of the Haney Branch. We had some shovel work and labor to do before we moved to the Haney Branch structure. We moved to this place September 9th. Mr. Hutchinson . . . submitted to me the plans and specifications for the work . . . I do not know E. G. Hughes or any of the governing officials of the town of Murphy. Neither Mr. Hughes or any of the officials . . . gave me instructions as to any of the switches. I can't recall that I saw Mr. E. G. Hughes on the operation before the accident but did see him after that. The power line was on the poles. I didn't see any posters or publications or warnings attached to or about the power line anywhere . . ."

And in this connection, witness, Thomas West, testified: "I recall the time about September 11, 1948, when Everett Mintz was injured . . . about that time or immediately preceding it I was there clearing the right of way for the new highway location . . . I saw Mr. E. G. Hughes down there during the operation as the work progressed. When we started to cut the right of way through that Haney Branch section, where there was a deep cut, the wires were in the way and I saw Mr. Hughes about moving the wires from that section and he said that he could not get to it at that particular time but made a date when he talked to me

later, that he would cut the power off so I could cut the trees and he did and I cut the trees."

Plaintiff also offered evidence tending to show that defendant's electric transmission line was constructed in 1930 or 1931; that the poles were 30 feet in height above the highway where it crossed Haney Branch and the wires then carried 5900 volts; that in 1946 the poles were about same height; that at time of plaintiff's injury and in the Haney Branch section some of the poles were leaning and the wires between the poles were sagging; that one pole 100 to 150 feet from point where plaintiff was injured was propped up; that some of the original poles had rotted off at the ground, and new post bases inserted and old poles spliced to them; and that the wires there were uninsulated.

And in respect to the place of plaintiff's injury, and the surrounding circumstances at the time it occurred, and how it occurred, plaintiff offered evidence tending to show the following:

The Haney Branch culvert involved the excavation, setting of forms, and pouring concrete to complete the job. The work at the Haney Branch was an extension of the culvert that ran under Highway 64. The approximate length of the culvert was 33 feet. From the edge of the old highway to the center of the new highway location was approximately 30 feet. The power line was over the new structure being built, and over the end of the old one. At that point the pavement of the old highway was 16 feet wide. The pole on the east side of the culvert at the Haney Branch was 27 feet from the center, and 19 feet from the edge of the old highway. The one on the west side was 28 feet from the center of the old highway. These two poles were 250 feet apart,—(later said by same witness to be 150 feet apart). The old road at that point was on a fill approximately 3½ feet high, and these poles were down below the fill—the bases of the poles being approximately 3½ feet below the surface of the old road. And the electric wire "was at least 25 to 30 feet from the ground level."

Plaintiff testified in pertinent part: "I am 47 years old . . . carpenter by trade and had 20 years experience up until September 11, 1948. I was employed by T. F. Houser as a carpenter, building and setting forms and concrete culverts on Highway No. 64. My injury occurred at Haney Branch culvert on old highway No. 64. This was an extension of the old culvert on the north side of the old highway to widen and straighten the highway. The highway engineers had already located the new highway. . . . I was down under the bank of the old road at the end of the old culvert when I got hurt . . . At the time I was injured I was working almost under the center of the new highway location. I had been working at that culvert 3 days. We first built and set forms and footings before starting the other part of the culvert. . . . The concrete mixer was set just off the bank of the old highway about 40 feet east of the

culvert where I worked. A crane with boom and metal cable attached from fly wheel drum to the beam to which a metal bucket was fastened so that the bucket could be lifted and lowered, was used. The crane swung around north with the bucket to the mixer where the bucket was filled with concrete and then swung back to me and I dumped the concrete to the right place in the form. The work assigned to me which I was doing when injured was dumping the concrete in the forms 2 or 3 feet from the end of the old culvert at the edge of the old highway. The power line ran almost directly overhead when I was working at the time . . . I dumped two (2) buckets and on the third bucket I took hold of the handle to dump the third bucket, and that was the last I knew. The two handles were on the outside of the bucket (and) when operated would spill the concrete through the bottom. I was closer under the line when I emptied the first two buckets than when I was injured. Before dumping the concrete we set the top of the beam at 18 inches under the power wire and dogged it at 18 inches under the line. By dogging it I mean that it fixed it so it would not go higher . . . ."

Then on cross-examination plaintiff testified that his foreman, Paul Cook, had said something to him about being careful about the beam—boom—under these wires; that he knew they were electric wires carrying electricity; and that in working on jobs for contractors for 12 to 15 years some of the work was "around where they had overhead electric wires." Then plaintiff concluded: "James Mallory was operating this crane for T. F. Houser, my employer. The question of how high the beam was, Mr. Mallory would know what angle or degree he had it, I do not know the degree. . . . Every time I tipped this bucket letting this heavy weight concrete out, it had a tendency to pull it down a little bit and then it went up." Q. "When the concrete was released from the bucket that let the bucket go up?" A. "Not let it go up any farther than where it was dogged off. When the weight comes out of it, it naturally goes up."

And the foreman, Paul Cook, testified: ". . . We moved to the Haney Branch structure . . . September 9th. Mr. Hutchinson was engineer for the State Highway Commission and submitted to me the plans and specifications for the work. . . . And when we were ready to pour our concrete and the bucket was attached first to our crane then the boom with the bucket was moved under the power line. Jim Mallory was the operator. I signalled the operator of the derrick to lower the boom and swing it under the line with the empty bucket. I know about operating the crane . . . I set the boom or the operator set the boom at a fixed distance which was 2 feet from the power line or wire. The space between the boom and wire was 2 feet with an empty bucket. And then we moved the bucket to the mixer, loaded it with concrete and brought it back. There had been 2 buckets emptied in the form before the acci-

dent happened which was on the third bucket. Everett Mintz's job that morning was to place the concrete in the form and dump it out of the bucket. He stood in the form when a bucket was swung in place. He took hold of the 2 levers which opened the bottom of the bucket and the concrete poured out. . . . The 2 buckets were dumped and then the crane was moved back from the line approximately 3 to 5 feet. The end of the boom had been back out clear from under the line in position when the plaintiff received the injury. The boom could not have touched the line at any height because it was out from under the line at the time plaintiff was hurt. I was approximately 30 feet away when the accident happened. I was watching the operation of the crane as it moved the concrete in the place and about the time he tipped the bucket the arc occurred. I saw the arc leave the power line and connect somewhere on the beam. It appeared like a streak of lightning and came on a 45 degree angle from the line to the boom. The arc appeared to be 12 inches long and came to the arm of the beam when it occurred. I saw Everett Mintz was holding the bucket . . . He was still holding the bucket until the operator swung the boom, then he sank down, and appeared to be dead."

And this witness Cook further testified: "With reference to the elevation of the surface of the highway, . . . the crane was sitting . . . approximately 4 feet below the old highway."

Then on cross-examination, this witness, the foreman of T. F. Houser, continued: "The work that was being carried on by T. F. Houser had no connection with the town of Murphy. We had been excavating with the crane two days before the plaintiff was injured, at this place, excavating for the culvert. The line of the town of Murphy was on the lower edge of old 64. The crane was set up on the bank . . . I was there in charge as foreman for the Houser Construction Co. I had warned the operator of the crane, Mallory, not to come in contact with these wires. I also warned the plaintiff himself that those wires were dangerous and not to come in contact with them . . . . The electric transmission that was maintained by the defendant was visible to me . . . At the time the accident occurred this beam of the crane came up the side of the power line. It didn't pass it from what I could see of the arc it was under the line. When I saw the arc occur, the beam was in this position and I didn't see the beam go up or down . . . I was standing under the line." Q. "You had authority to give directions to the operator of this crane?" A. "I did, and also Mr. Mintz did." And, continuing, "The beam was standing still at the time he took hold of the bucket to dump the concrete." And in reference to setting or dogging the beam, the witness repeated that the beam was set so it could not get closer than 2 feet of those wires; that "at that particular place" he "considered 2 feet safe, which would give us room to work above and below"; but that when he heard the arc and looked up "it looked 12 inches on an angle of approximately

45 degrees from the end of the beam to the wire"; and that he had "worked on electricity for a period of several years before this time" . . . but "nothing directly in connection with the electrical operations."

At the close of all plaintiff's evidence, motion of defendant for judgment as of nonsuit was allowed. Plaintiff excepted, and from judgment as of nonsuit appeals to Supreme Court and assigns error.

F. O. Christopher, O. L. Anderson, T. M. Jenkins for plaintiff, appellant.

Edwards & Leatherwood and John M. Queen for defendant, appellee.

WINBORNE, J. The sole question here is this: Considering the evidence shown in the record on this appeal in the light most favorable to plaintiff, is there sufficient evidence to take the case to the jury as against the defendant Town of Murphy? The trial court did not consider it sufficient for this purpose. And in this ruling error is not made to appear.

In an action for recovery of damages for injury resulting from actionable negligence of defendant, plaintiff must show: (1) That there has been a failure on the part of defendant to exercise proper care in the performance of some legal duty which the defendant owed the plaintiff under the circumstances in which they were placed. And (2) that such negligent breach of duty was the proximate cause of the injury, a cause that produced the result in continuous sequence, and without which it would not have occurred, and one from which a man of ordinary prudence could have foreseen that such result was probable under the facts as they existed. *Whitt v. Rand*, 187 N.C. 805, 123 S.E. 84; *Murray v. R. R.*, 218 N.C. 392, 11 S.E. 2d 326; *Mills v. Moore*, 219 N.C. 25, 12 S.E. 2d 661; *Luttrell v. Mineral Co.*, 220 N.C. 782, 18 S.E. 2d 412; *Mitchell v. Melts*, 220 N.C. 793, 18 S.E. 2d 406; *Harris v. Montgomery Ward*, 230 N.C. 485, 53 S.E. 2d 536; *McIntyre v. Elevator Co.*, 230 N.C. 539, 54 S.E. 2d 45; *Spivey v. Newman*, 232 N.C. 281, 59 S.E. 2d 844; *Baker v. R. R.*, 232 N.C. 523, 61 S.E. 2d 621.

If the evidence fails to establish either one of the essential elements of actionable negligence, the judgment of nonsuit is proper. *Luttrell v. Mineral Co., supra; Mitchell v. Melts, supra; Thomas v. Motor Lines*, 230 N.C. 122, 52 S.E. 2d 377.

And the principle prevails in this State that what is negligence is a question of law, and when the facts are admitted or established, the court must say whether it does or does not exist. "This rule extends and applies not only to the question of negligent breach of duty, but also to the feature of proximate cause." *Hoke, J.*, in *Hicks v. Mfg. Co.*, 138 N.C. 319, 50 S.E. 703; *Russell v. R. R.*, 118 N.C. 1098, 24 S.E. 512; *Lineberry v. R. R.*, 187 N.C. 786, 123 S.E. 1; *Clinard v. Electric Co.*, 192 N.C. 736,

136 S.E. 1; *Murray v. R. R., supra; Reeves v. Staley,* 220 N.C. 573, 18 S.E. 2d 239; *Luttrell v. Mineral Co., supra; Baker v. R. R., supra.*

In *Lineberry v. R. R., supra,* in opinion by *Clarkson, J.,* it is said: "It is well settled that where the facts are all admitted, and only one inference may be drawn from them, the court will declare whether an act was the proximate cause of the injury or not." See also *Nichols v. Goldston,* 228 N.C. 514, 46 S.E. 2d 320; *Baker v. R. R., supra.*

Furthermore, it is proper in negligence cases to sustain a demurrer to the evidence and enter judgment as of nonsuit under provision of G.S. 1-183, "(1) When all the evidence taken in the light most favorable to the plaintiff, fails to show any actionable negligence on the part of defendant . . . (2) When it clearly appears from the evidence that the injury complained of was independently and proximately produced by the wrongful act, neglect, or default of any outside agency or responsible third person . . . ," *Stacy, C. J.,* in *Smith v. Sink,* 211 N.C. 725, 192 S.E. 108, and cases cited in respect to each principle. See also *Boyd v. R. R.,* 200 N.C. 324, 156 S.E. 507; *Powers v. Sternberg,* 213 N.C. 41, 195 S.E. 88; *Butner v. Speas,* 217 N.C. 82, 6 S.E. 2d 808; *Murray v. R. R., supra; Luttrell v. Mineral Co., supra; Riggs v. Motor Lines,* 233 N.C. 160, 63 S.E. 2d 197.

In *Smith v. Sink, supra,* it is also said: "We had occasion to examine anew this doctrine of insulating the conduct of one, even when it amounts to passive negligence, by the intervention of the active negligence of an independent agency or third party, as applied to variant fact situations, in the recent case of *Beach v. Patton,* 208 N.C. 134, 179 S.E. 446," and others cited. Then, continuing, "These decisions, and others, are in full support and approval of Mr. Wharton's statement in his valuable work on Negligence (Sec. 134): 'Supposing that if it had not been for the intervention of a responsible third party the defendant's negligence would have produced no damage to the plaintiff, is the defendant liable to the plaintiff? This question must be answered in the negative, for the general reason that causal connection between negligence and damage is broken by the interposition of independent responsible human action. I am negligent on a particular subject matter. Another person, moving independently, comes in, and either negligently or maliciously so acts as to make my negligence injurious to a third person. If so, the person so intervening acts as a nonconductor, and insulates my negligence, so that I cannot be sued for the mischief which the person so intervening directly produces. He is the one who is liable to the person injured.' " Then there follows, to like effect, a quotation from *R. R. v. Kellogg.* 94 U.S. 469. See also *Butner v. Speas, supra; Riggs v. Motor Lines, supra.*

A municipal corporation, engaged in the business of supplying electricity for private advantage and emolument is, as to this, regarded as a private corporation,—and, in such capacity is liable to persons injured

by the actionable negligence of its servants, agents and employees. *Fisher v. New Bern,* 140 N.C. 506, 53 S.E. 342; *Harrington v. Wadesboro,* 153 N.C. 437, 69 S.E. 399; *Rice v. Lumberton, ante,* 227.

And this Court declared in *Helms v. Power Co.,* 192 N.C. 784, 136 S.E. 9, that: "Electric companies are required to use reasonable care in the construction and maintenance of their lines and apparatus. The degree of care which will satisfy this requirement varies, of course, with the circumstances, but it must always be commensurate with the dangers involved, and where the wires maintained by a company are designed to carry a strong and powerful current of electricity, the law imposes upon the company the duty of exercising the utmost care and prudence consistent with the practical operation of its business to avoid injury to those likely to come in contact with the wires."

And in *Small v. Utilities Co.,* 200 N.C. 719, 158 S.E. 385, it is said that, "Due to the deadly and latently dangerous character of electricity, the degree of care required of persons, corporate or individual, furnishing electric light and power to others for private gain, has been variously stated." Then after reciting such expressions, the Court said: "In approving these formulæ as to the degree of care required in such cases, it is not to be supposed that there is a varying standard of duty by which the responsibility for negligence is to be determined . . . The standard is always the rule of the prudent man, or the care which a prudent man ought to use under like circumstances. What reasonable care is, of course, varies in different cases and in the presence of different conditions."

Moreover, we find it stated in 18 Am. Jur. 491-2, subject Electricity, Sec. 97, "That the duty of providing insulation should be limited to those points or places where there is reason to apprehend that persons may come in contact with the wires, is only reasonable. Therefore, the law does not compel companies to insulate . . . their wires everywhere, but only at places where people may legitimately go for work, business, or pleasure, that is, where they may be reasonably expected to go. The same rule applies with equal, if not greater, force in regard to placing warning signs." This principle is recognized by this Court in *Ellis v. Power Co.,* 193 N.C. 357, 137 S.E. 163. See also 29 C.J.S. 582—Electricity, Sec. 42.

The mere maintenance of high tension transmission line is not wrongful, and in order to hold the owner negligent, when an injury occurs, he must be shown to have omitted some precaution which he should have taken. 18 Am. Jur. 490—Electricity, Sec. 96.

On the other hand, the law imposes upon a person *sui juris* the obligation to use ordinary care for his own protection, and the degree of such care should be commensurate with the danger to be avoided. Since the danger from uninsulated or otherwise defective wires is proportionate to the amount of electricity so transmitted, contact with such wires

should be avoided where their existence is known. Where a person seeing such a wire knows that it is, or may be highly dangerous, it is his duty to avoid coming in contact therewith . . . . See 18 Am. Jur. 471, Electricity 76. See also *Rice v. Lumberton, ante,* 227.

Furthermore, it may be conceded, for purposes of this appeal, that the State Highway and Public Works Commission is vested with authority to control the uses to which the easements acquired by the State for public highway purposes, may be put, *Hildebrand v. Telegraph Co.*, 219 N.C. 402, 14 S.E. 2d 252; and that in the exercise of such authority the Commission had the right to call upon the Town of Murphy to remove so much of its electric transmission line as interfered with the re-location and improvement of portions of Highway No. 64. And the evidence discloses that the Town of Murphy was co-operating with the request of the Commission in this respect.

And applying the principles of law here stated to the evidence offered by plaintiff, such evidence fails to make out a case of actionable negligence. If it should be conceded that the evidence tends to show that defendant failed to maintain its transmission line in accordance with its legal duty, the evidence fails to show that such failure was a proximate cause of the injury to plaintiff. On the other hand, it clearly appears from the evidence that the injury of which plaintiff complains was "independently and proximately produced by the wrongful act, neglect, or default of an outside agency or responsible third person." There would have been no injury to plaintiff but for the intervening wrongful act, neglect or default of those in control of and operating the derrick, over which defendant had no control, and of which defendant had no knowledge.

The judgment below is

Affirmed.

SAM SINGLETON (EMPLOYEE) v. D. T. VANCE MICA COMPANY (EMPLOYER), ST. PAUL MERCURY INDEMNITY COMPANY (CARRIER).

(Filed 26 March, 1952.)

1. Master and Servant § 43—Claim for disablement from silicosis held timely filed.

The evidence was to the effect that claimant was sent a copy of a letter written by the Director of the Division of Industrial Hygiene to the employer stating that an examination of claimant revealed "evidence of dust disease" and merely suggesting that he be transferred to some other location where dust hazard would be negligible, and that less than a year before filing claim, claimant received a copy of a letter from a physician to the Health Department categorically stating that claimant had advanced

silicosis. *Held:* The first letter was insufficient to put claimant on notice that he had silicosis, and the evidence sustains the finding of the Industrial Commission that claimant was first advised by competent medical authority that he had silicosis at the time of receiving the second letter and that the claim was timely filed.

2. Master and Servant § 40f—Evidence held sufficient to sustain finding that claimant was disabled from silicosis within two years from last exposure.

Medical expert evidence to the effect that claimant was suffering from advanced silicosis prior to the termination of his employment, together with testimony by claimant that less than two years after his last injurious exposure to the hazards of silicosis in the employment, claimant was unable to work more than a few hours at a time because of shortness of breath, *is held* sufficient to support the finding of the Industrial Commission that claimant became disabled within the meaning of G.S. 97-54 within two years of his last injurious exposure to the hazards of the disease, G.S. 97-58 (a). The distinction between disablement as defined by G.S. 97-54 and ordinary disability as defined by G.S. 97-2 pointed out.

3. Same—

The existence of silicosis must be established by competent medical authority, but where the existence of the disease is established by medical expert evidence, the time at which claimant later became disabled therefrom may be established by non-medical testimony, it being competent for claimant to testify as to his lessened capacity to work, shortness of breath, and the effect that physical exertion had upon him.

APPEAL by defendants from *Gwyn, J.*, October Term, 1951, of AVERY.

This is a proceeding for compensation under the provisions of the North Carolina Workmen's Compensation Act, for disability due to silicosis.

The first hearing on this proceeding was before Commissioner J. W. Bean, at Newland, North Carolina, on 10 August, 1950, upon the testimony of the plaintiff and his wife, Margaret E. Singleton, and Dr. C. D. Thomas, Medical Director of the Western North Carolina Sanatorium, admitted to be a medical expert, and Dr. Otto J. Swisher, Director of Industrial Hygiene of the State of North Carolina, an admitted medical expert, together with certain documentary evidence.

Claimant, Sam Singleton, 69 years of age at the time of the hearing, a man unable to read or write, and whose memory was very poor, testified that he was employed by David T. Vance for about a year and a half, and left his employment, "I believe it was in 1945"; that about one year after leaving David T. Vance he became disabled to work. "I stayed able to work for right around a year after I quit the mill. . . . I am now unable to do a thing and have been totally disabled for right smart over a year. About a year and a half ago I could work for two or three hours and then have to quit. Now it hurts me to walk a few steps and I can't

work at all. My breath gets so short I can't climb a little hill or steps. I guess I spend half of the time or more in bed now. . . . I was first informed that I had silicosis when that letter there was mailed (referring to letter sent to him by the Health Department, Newland, North Carolina, on or about 5 March, 1949). It's been a little bit over a year ago that I had first notice. . . . This letter is the first time that I ever thought about having silicosis at all." He further testified that while employed by David T. Vance, his duties were those of grinding and bolting mica; that he looked after sacking mica and that there was always mica dust around where he was working. "I worked at the sacker. When a sack weighing 100 pounds was filled, I would take it off and tie it. The dust was pretty bad about all the time right there at the hopper where the mica fell through. It came out right there at your face almost as a continuous condition." He also testified that before working for David T. Vance, he was employed by Vance & Barrett Mica Company for about eight years; that his duties were bolting and sacking mica for this company. That prior to his employment by the Vance & Barrett Mica Company he was employed for ten or twelve years by the English Mica Company.

Margaret E. Singleton, wife of the claimant, testified that her husband could not read or write; that she and her daughter did the reading and writing for him, and, as far as she knew, the first information the claimant had that he had silicosis, or any dust disease, was when he received a copy of a letter dated 21 February, 1949, from Dr. J. A. Byrnes, addressed to the Health Department, Newland, North Carolina. This letter was introduced in evidence by the plaintiff, and was enclosed in an envelope addressed to Mr. Sam Singleton, Pyatte, North Carolina, from the Health Department, Newland, North Carolina, postmarked 5 March, 1949.

Dr. C. D. Thomas testified that he examined the claimant on 24 June, 1949, and diagnosed his case as being advanced silicosis. He further testified he did not mail any of his reports directly to the claimant; that he mailed his reports to the Health Department.

In a report made by Dr. Thomas, dated 7 July, 1949, to Dr. W. B. Burleson, Plumtree, North Carolina, copies of which report were mailed to Dr. Otto J. Swisher and Mr. Hughes, attorney for the claimant, Dr. Thomas in describing the claimant's condition at that time, said: "There is marked accentuation of the trunks and nodulation in their outline. Over the inner mid-zone of the lung, below the level of the fourth rib anteriorly there are some fuzzy densities. When compared with the previous films made at the District Health Department at Spruce Pine, N. C., on 6-3-49 and 5-9-49 and 2-10-49, there has been no appreciable change. The densities in these films are, I feel, due to advanced silicosis.

There is no evidence of tuberculosis. It is my opinion that this man has advanced silicosis which is not complicated, and that the changes due to this disease are the cause of his symptoms. I feel that he is totally disabled, and should, of course, have no further exposure to dust." The report stated his blood pressure was 116 systolic and 78 diastolic, and his pulse 84.

Dr. Otto J. Swisher testified for the plaintiff: "I have not made a physical examination of Sam Singleton. As Director of the Division of Industrial Hygiene, I have studied the record of his physical examination in 1936 by Dr. Easom, his examination on August 10, 1942, by Dr. Grislow, his examination on October 8, 1943, by Drs. Vestal and Quickel, and the examination by Dr. Thomas. In my opinion, based on the study of these several examinations and medical history and record, is that Mr. Singleton has silicosis second stage. I have prepared a case history and medical report on Mr. Singleton and filed it with the Industrial Commission. On July 19, 1948 (1949), I filed a supplemental report adopting Dr. Thomas' report. . . . I have an opinion that Mr. Singleton is now totally disabled."

The report filed with the Industrial Commission by Dr. Swisher, which was introduced in evidence by the plaintiff, discloses the following pertinent information: (1) Dr. Easom examined the claimant on 18 November, 1936. This was the first examination of the claimant by the Division of Industrial Hygiene. This report states that Singleton had been a mica grinder for the past twenty-four years and that the X-ray interpretation revealed, "final diagnosis of pneumonoconiosis, second stage, without definite symptoms." It was also stated that his blood pressure was 130 systolic and 88 diastolic, and his pulse 60. (2) That Dr. Vestal examined the claimant on 10 August, 1942. It was stated in the report that the claimant was 61 years of age; that he was employed by Ira Vance Mica Company at Plumtree; that claimant stated, "he has had the specific job of mica grinder for the past four years giving him a total of 30 years in the dusty trades at the mica mill. . . . States he has been short of breath for the past 2 years." Interpretation of the X-ray taken at that time, "as compared with the previous film of 18 November, 1936, reveals a slight increase in fibrosis with final diagnosis of moderately advanced silicosis." Blood pressure was 130 systolic and 90 diastolic, and his pulse was 72. Dr. Vestal, on 17 August, 1942, wrote Singleton's employer that his examination of the claimant, "reveals evidence of dust disease, and we would like to suggest that, if possible, he be transferred to some other location in your organization where the dust hazard will be negligible." This letter was signed by Dr. T. F. Vestal as Director of the Division of Industrial Hygiene. A copy of this letter was marked, "I.C. COPY ONLY," and carried this additional information to the Industrial Com-

mission: "This man is 61 years old. He has a history of approximately 30 years in mica. He now has moderately advanced silicosis. Unless his present employer can transfer him to some suitable location, where his dust exposure will be negligible, we have little to suggest for him. We doubt the advisability of trying to rehabilitate him. TFVestal." (3) Drs. Vestal and Quickel examined the claimant on 8 October, 1943. The report states that Singleton was employed at that time by the David T. Vance Company at Plumtree; that his occupational history gave him 31 years and 2 months in dusty trades and that the interpretation of his X-ray, made at that time, "as compared with the film of August 10, 1942, revealed slight progression with final diagnosis of Silicosis II, progressing. Recommendation made that he be employed with present employer only and no work card was issued." This report stated his blood pressure was 160 systolic and 100 diastolic, and his pulse 78.

In addition to the above report, letters were introduced written by Dr. C. D. Thomas on 24 May, 1948, and 9 June, 1948. The letter written on 24 May, 1948, was from the Avery-Mitchell-Yancey District Health Department, to the County Health Department, Spruce Pine, N. C., with respect to chest X-ray film of Sam Singleton. Dr. Thomas stated the film was not technically very satisfactory and recommended that another film be made. This was done and the report mailed to the County Health Department, Newland, N. C., 9 June, 1948. Dr. Thomas stated: "Chest X-ray film of Sam Singleton, . . . shows on each side from the fourth rib anteriorly to the base increased densities which are fuzzy in appearance, and over the remainder of the chest is accentuation of the trunks and nodulation in their outline. This film gives the impression of a moderately advanced silicosis, with associated infection at the base on each side which is probably the results of chronic respiratory infection."

Friel Tate Vance testified for the employer, as follows: "I am General Superintendent for my father, David T. Vance, in the operation of his mica interest. I keep all my father's books and records. According to my records, the plaintiff began work for David T. Vance on October 5, 1943, and quit September 16, 1944. . . . I received a copy of Mr. Singleton's notice of claim somewheres along (*sic*) the 7th day of June, 1949. . . . He left our employment of his own accord and gave no reason."

Upon the stipulations made by the parties and the evidence offered at the hearing, the Commissioner found the following facts: (1) That the parties were subject to and bound by the Compensation Act and that the defendant Indemnity Company was the insurance carrier for the defendant employer. (2) That from 5 October, 1943, until 16 September, 1944, the plaintiff was regularly employed by the defendant employer at an average weekly wage of $16.00. (3) That the plaintiff was exposed to

silica dust in North Carolina for a period of two years or longer, within the last ten years, 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 thirty working days or parts thereof, within seven consecutive calendar months immediately preceding the last date of exposure on 16 September, 1944. (4) That the plaintiff is now suffering from silicosis in its second stage, and his last exposure, as defined in G.S. 97-57, occurred while the plaintiff was in the defendant's employment on and immediately prior to 16 September, 1944. (5) That plaintiff is actually incapacitated because of silicosis from performing manual labor in the last occupation in which remuneratively employed, within the meaning of G.S. 97-54, and that such disablement occurred on or about 16 September, 1945, the same being within two years from the date the claimant was employed by the defendant employer. (6) That plaintiff was first notified by competent medical authority that he had silicosis, on or about 5 March, 1949, when he received in the due course of mail from the Health Department at Newland, N. C., a letter addressed to said Health Department, and signed by Dr. J. A. Byrnes, resident physician of the Western North Carolina Sanatorium at Black Mountain, N. C. (7) That plaintiff filed his claim for compensation under date of 7 June, 1949, and said claim was received by the Industrial Commission on 10 June, 1949. (8) That the plaintiff is a man 69 years of age, possessing no education, unable to read or write, confined to his bed approximately one-half of the time, and totally disabled; that there is no reasonable basis for the conclusion that he possesses the actual or potential capacity of body and mind to work with substantial regularity, during the foreseeable future in any gainful occupation free from the hazards of silicosis; that he is not a fit subject for rehabilitation under the provisions of G.S. 97-61.

Upon the findings of fact, the Commissioner held, as a matter of law, that the claim was filed in apt time and that said claim is not barred by the provisions of G.S. 97-58 (a), and awarded the claimant compensation at the rate of $9.60 per week, commencing as of 16 September, 1945, and continuing for a period not exceeding 400 weeks, or a total sum of $6,000.

The defendants appealed to the Full Commission which affirmed the award of the hearing Commissioner. On appeal to the Superior Court, his Honor overruled the defendants' exceptions to the findings of fact and conclusions of law, and affirmed the conclusions of law and the award entered below. Defendants appealed to the Supreme Court, assigning error.

Charles Hughes for claimant, appellee.

Uzzell & DuMont for defendants, appellants.

DENNY, J. This appeal challenges certain findings of fact made by the hearing Commissioner, which findings were upheld by the Full Commission and sustained by the trial judge on appeal to the Superior Court. The challenge to these findings presents the following questions: (1) Is there any competent evidence to support the finding that the claimant was first notified by competent medical authority on or about 5 March, 1949, that he had silicosis? (2) Is the finding that the claimant became disabled within the meaning of G.S. 97-54, within two years of his last injurious exposure to the hazards of silicosis, as provided in G.S. 97-58 (a), supported by competent evidence? (3) May the Commission consider evidence other than expert medical testimony in finding that disablement of a claimant occurred within two years from date of last exposure to the hazards of silicosis?

There is no evidence on this record to the effect that any notice was given to the claimant advising him that he had silicosis prior to his receipt of a copy of the letter written by Dr. J. A. Byrnes, resident physician, Western North Carolina Sanatorium, Black Mountain, North Carolina, addressed to the Health Department, Newland, North Carolina, dated 21 February, 1949, which copy was forwarded to claimant on or about 5 March, 1949, and received by him in due course of mail. There is an indication that a copy of the letter written by the Director of the Division of Industrial Hygiene, addressed to Vance-Barrett, Inc., Plumtree, North Carolina, dated 17 August, 1942, was mailed to the claimant. The letter was introduced in evidence by the defendants and the following notation appears thereon: "cc: Mr. Sam L. Singleton, N.C. Industrial Commission, Compensation Rating & Inspection Bureau (2)." Conceding that the claimant received a copy of this letter, as the defendants contend, it should be noted that it is only stated in the letter that the examination reveals, "evidence of dust disease," and a mere suggestion, not a recommendation, that the claimant "be transferred to some other location in your organization where the dust hazard would be negligible."

Advising an employee, who has been exposed to free silica dust, that his examination reveals "evidence of dust disease," is not sufficient to put him on notice that he has silicosis. *Autrey v. Mica Co.*, 234 N.C. 400, 67 S.E. 2d 383.

Moreover, the information given in the above letter did not reveal the seriousness of the condition of Sam Singleton at that time. The true condition of the employee was not disclosed in the letter, but was revealed only to the Industrial Commission in a footnote added to a copy thereof. The record report of the examination of Sam Singleton on 10 August, 1942, upon which the information contained in the above letter purports to have been based, shows more than mere "evidence of dust disease." The record reveals that Mr. Singleton stated he had been "short of breath

for 2 years," and the interpretation of the X-ray made at that time revealed, as compared with previous film of 18 November, 1936, "a slight increase in fibrosis with final diagnosis of moderately advanced silicosis." The Director of the Division of Industrial Hygene evidently realized his letter did not disclose the true condition of the employee, otherwise it would not have been necessary to add the following statement on the copy to the Industrial Commission: "This man is 61 years old. He has a history of approximately 30 years in mica. He now has moderately advanced silicosis. Unless his present employer can transfer him to some suitable location, where his dust exposure will be negligible, we have little to suggest for him. We doubt the advisability of trying to rehabilitate him."

Furthermore, there is no evidence in the record showing that the diagnostic findings, resulting from the examination of the plaintiff on 18 November, 1936, which disclosed that he had "pneumoconiosis, second stage, without definite symptoms," or from his examination on 8 October, 1943, which revealed that he had "Silicosis II, progressing," were communicated to him or to his employer.

In our opinion, the evidence does support the finding of the hearing Commissioner to the effect that the claimant was first notified by competent medical authority on or about 5 March, 1949, that he had silicosis.

On the second question, it is apparent from the claimant's testimony and the notice and claim filed by him, that he was under the impression that disablement meant inability to do work of any kind. It is clear he did not comprehend the distinction between disablement as defined in G.S. 97-54, and ordinary disability as defined in G.S. 97-2. This distinction was clearly pointed out in the case of *Young v. Whitehall Co.*, 229 N.C. 360, 49 S.E. 2d 797, by *Justice Ervin* speaking for the Court, in which he said: "It is to be noted that there is a radical difference between the criterion of disability in cases of asbestosis and silicosis and that of disability in cases of injuries and other occupational diseases. An employee is disabled by injury or an ordinary occupational disease within the purview of the Workmen's Compensation Act, only *if he suffers incapacity because of the injury or disease to earn the wages which he was receiving at the time of the injury or disease in the same or any other employment.* G.S. 97-2. But a worker is disabled in cases of asbestosis or silicosis *if he is 'actually incapacitated, because of such occupational disease, from performing normal labor in the last occupation in which remuneratively employed.'* G.S. 97-54." *Duncan v. Carpenter*, 233 N.C. 422, 64 S.E. 2d 410.

The question of claimant's disablement is, therefore, not whether he became incapacitated to do work of any kind within two years of his last exposure to the hazards of silicosis, but whether he became disabled or

incapacitated within two years of his last exposure to free silica dust, "from performing normal labor in the last occupation in which remuneratively employed." G.S. 97-54; *Duncan v. Carpenter, supra.*

The defendants contend there is no causal connection between the plaintiff's alleged disability which occurred after he left the employment of the defendant employer, and his silicotic condition which was contracted prior to November, 1936. This contention is without merit. It is provided in G.S. 97-57: "In any case where compensation is payable for an occupational disease, the employer in whose employment the employee was last injuriously exposed to the hazards of such disease, and the insurance carrier, if any, which was on the risk when the employee was so last exposed under such employer, shall be liable." *Bye v. Granite Co.,* 230 N.C. 334, 53 S.E. 2d 274. And this section further provides, "when an employee has been exposed to the hazards of asbestosis or silicosis for as much as thirty working days, or parts thereof, within seven consecutive calendar months, such exposure shall be deemed injurious . . ." *Haynes v. Feldspar Producing Co.,* 222 N.C. 163, 22 S.E. 2d 275.

There can be no serious question about the plaintiff having been exposed to free silica dust for more than 30 years. Neither can there be any doubt about his having been exposed to the hazards of silicosis for as much as thirty working days or parts thereof, within seven consecutive calendar months, immediately preceding 16 September, 1944, the date he left the employment of the defendant employer.

This plaintiff is clearly entitled to compensation if his disablement occurred within two years from the time he left the employment of David T. Vance, and such disablement resulted from silicosis. *Duncan v. Carpenter, supra.* The plaintiff testified that he became disabled to work about a year after he quit the mill and there is no evidence to the contrary. And the fact that he was not certain when he quit the mill is of no material importance on this record, since that date was definitely established by the employer. The evidence further supports the view that the plaintiff has been totally disabled, due to silicosis, at least since the early part of 1948. Prior thereto, according to his evidence, he could work only two or three hours at a time. His shortness of breath incapacitated him from working longer. There is no evidence of his having held a job of any kind since he left the mica mill. He testified: "I never done much after I quit the mill. I farmed two years after I quit."

We think the evidence was sufficient to support the finding that the claimant was disabled within the meaning of G.S. 97-54, and that such disablement occurred within two years of his last exposure to the hazards of silicosis.

The conclusion we have reached in answer to the second question stated, presupposes an affirmative answer to the third question posed for decision.

In the case of *Duncan v. Carpenter, supra,* it is said: ". . . that the finding of the competent medical authority must be to the effect that disablement occurred within two years from the last exposure in cases of asbestosis, silicosis and lead poisoning, and in claims involving other occupational diseases that disability occurred within one year thereof."

The defendants contend that in view of the above statement, where disablement occurs as defined in G.S. 97-54, and notice of claim is filed in accord with the provisions contained in G.S. 97-58 (a), (b), and (c), as interpreted by this Court in that case, the claimant must be advised by competent medical authority that he has silicosis and that such advice must be given within two years from the date of his last exposure. We decided this precise point to the contrary in *Autrey v. Mica Co., supra.* Moreover, it was not the intention of the Court to hold that no evidence would be admitted or considered in establishing disability within the meaning of G.S. 97-54, except expert medical testimony. Examination of the record in that case, however, will reveal that the examinations of the claimant made prior to the time he quit work, did not disclose any definite evidence that he had developed silicosis. But the expert medical testimony did show conclusively that disability due to silicosis occurred within two years of his last exposure to the hazards of such disease.

Silicosis is an inflammatory disease of the lungs due to the inhalation of particles of silicon dioxide. It is incurable and is one of the most disabling occupational diseases because it makes the lungs susceptible to other infection, particularly tuberculosis. According to the textbook writers, it has been definitely determined that the removal of a man, who has silicosis, from silica exposure, does not stop the progress of the disease at once, but that fibrotic changes continue to develop for another one or two years. This is said to be due to the continuous chemical action of the silica that has been stored in the phagocytic cells and lymphatics. Gray: Attorneys' Textbook of Medicine (3rd Ed.), Volume 2, Chapter 147, pp. 1583-1596; Reed and Harcourt: The Essentials of Occupational Diseases, pp. 161-174; Reed and Emerson: The Relation Between Injury and Disease, pp. 182-186; *Young v. Whitehall Co., supra.*

Gray, in his textbook cited above, on page 1591, says: "The changes within the lung upon inhalation of minute silica particles may best be demonstrated during life by the X-ray. As the 'scavenger cells' carry silica from the alveoli toward the lymphatic glands, damaged cells are gradually replaced with scar tissue. Fibrosis occurs. Deeper and deeper within the lung framework, this replacement goes on. The X-ray pictures the changes, and the findings serve to classify the degree of disease progress."

The defendants insist that the Commission's finding to the effect that claimant's disablement, within the meaning of G.S. 97-54, occurred within

two years of his last exposure, was based on the unsupported testimony of the claimant without any medical corroboration. We do not concur in this view.

The evidence discloses more than the testimony of the claimant that he was disabled to work within one year of the time he left the employment of the defendant employer. It includes the record of various medical examinations made prior to the time of disablement, as well as the interpretations of X-rays made in 1936, 1942, 1943, 1948, and 1949. The X-ray in 1936 revealed that the plaintiff had pneumoconiosis, which term includes the manifestations of all dust inhalations whether the dust is injurious or harmless. Goldstein and Shabat: Medical Trial Technique, page 773. The interpretation of the X-rays made in 1942 and 1943 revealed that the plaintiff had "Silicosis II, progressing," for at least a year before he left the employment of the defendant employer. The interpretation of the X-rays made in 1948 and 1949 revealed total disability due to silicosis.

In our opinion, due to the nature of silicosis, it is essential to establish the presence of the disease by competent medical authority. But, where it has been established that a person who has been exposed to free silica dust has developed silicosis to the extent that it may be disabling, testimony other than that of a medical expert may be admitted and considered in determining when such person actually became disabled to work or disabled "from performing normal labor in his last occupation in which remuneratively employed." G.S. 97-54. Certainly, a victim of silicosis is competent to testify to his lessened capacity to work, his shortness of breath, the effect that physical exertion has upon him—all of which are normal symptoms of silicosis.

When all the evidence on this record is considered, including the fact that the plaintiff has been totally disabled from silicosis since 1948, and enfeebled to the extent that he could not work more than two or three hours at a time for a considerable time prior thereto, we think such evidence, together with the inferences that may be fairly and reasonably drawn therefrom, the findings of the Commission and the conclusions of law drawn from such findings, must be upheld. *Hildebrand v. Furniture Co.*, 212 N.C. 100, 193 S.E. 294; *Lockey v. Cohen, Goldman & Co.*, 213 N.C. 356, 196 S.E. 342; *Blassingame v. Asbestos Co.*, 217 N.C. 223, 7 S.E. 2d 478; *McGill v. Lumberton*, 218 N.C. 586, 11 S.E. 2d 873; *Kearns v. Furniture Co.*, 222 N.C. 438, 23 S.E. 2d 310; *Hegler v. Mills Co.*, 224 N.C. 669, 31 S.E. 2d 918; *Rewis v. Insurance Co.*, 226 N.C. 325, 38 S.E. 2d 97; *Riddick v. Cedar Works*, 227 N.C. 647, 43 S.E. 2d 850.

The judgment of the court below is

Affirmed.

FIRST-CITIZENS BANK & TRUST CO., SUCCESSOR GUARDIAN OF THE ESTATE OF HENRY A. HODGES, INCOMPETENT, v. JAMES D. PARKER.

C. I. D. #5496.

FIRST-CITIZENS BANK & TRUST CO., SUCCESSOR GUARDIAN OF THE ESTATE OF HENRY A. HODGES, INCOMPETENT, v. J. D. PARKER AND WIFE, AGNES A. PARKER.

C. I. D. #5584.

JAMES D. PARKER AND WIFE, AGNES A. PARKER, v. FIRST-CITIZENS BANK & TRUST CO., GUARDIAN; H. V. ROSE, TRUSTEE; J. H. STRICKLAND, ET ALS.

C. I. D. #5620.

(Filed 26 March, 1952.)

1. Judgments § 39: Guardian and Ward § 14—

A successor guardian may maintain suits to renew judgment against the former guardian and to renew judgment on a note secured by deed of trust executed by the former guardian and his wife to secure money borrowed from the ward's estate, included in the recovery under the first judgment, care being given in entering credits on the judgments and in the charging of interest so that no injury results to either party.

2. Adverse Possession § 9a—

A commissioner's deed to the purchaser pursuant to decree of foreclosure of a deed of trust is color of title notwithstanding later adjudication that the foreclosure decree was defective because the trustee had not been made a party to the suit, and where the grantee in the commissioner's deed enters thereunder upon the land in good faith and holds same openly, adversely and continuously for more than seven years, title vests in him by adverse possession. G.S. 1-38.

3. Same—

A paper writing which on its face professes to pass title to land but fails to do so because of want of title in the grantor or defect in the mode of conveyance, is color of title, and possession thereunder for seven years will ripen title in the grantee provided grantee's entry thereunder is made in good faith and he holds same openly, notoriously and adversely for the required period.

4. Adverse Possession § 18—

Upon claim of title by adverse possession it is competent for claimant to introduce evidence tending to show that he had used the land for the only purpose of which it was susceptible, and also tax abstracts showing that he had listed and paid taxes on the land.

5. Same—

Upon claim of adverse possession under color of a commissioner's deed, claimant may introduce opinion evidence as to the value of land at the time of sale for the purpose of showing that his entry under the deed was in good faith.

6. Equity § 3—

Where the action is barred by the applicable statute of limitations, the question of laches does not arise.

7. Appeal and Error § 39a—

A new trial will not be awarded for error which is not prejudicial to some substantive right of appellant.

APPEAL by Mrs. Agnes A. Parker, Executrix of James D. Parker, and Mrs. Agnes A. Parker, from *Godwin, Special Judge,* November Term, 1951, of JOHNSTON. Affirmed.

The three above captioned suits were consolidated for trial. These cases will be referred to by the numbers originally given them on the civil issue docket of Johnston Superior Court.

Nos. 5496 and 5584 were instituted by the First-Citizens Bank & Trust Company, Guardian, to renew judgments heretofore rendered against James D. Parker and Agnes A. Parker.

No. 5620 was instituted by James D. Parker and wife Agnes A. Parker to redeem land which previously had been conveyed by them in a deed of trust to secure a debt. It was alleged that the land is now in the possession of defendant Brick & Tile Company under an attempted foreclosure of the deed of trust by First-Citizens Bank & Trust Company, Guardian, and that the deed therefor to defendant Brick Company's predecessor in title was void.

It was agreed that jury trial be waived, and that the presiding judge should find the facts and render judgment thereon. Pursuant to this agreement, after hearing the evidence, the judge noted his findings in the form of answers to issues wherein and whereby he found these material facts:

That in No. 5496 the defendant Agnes A. Parker, Executrix of James D. Parker, was indebted to the plaintiff guardian in the sum of $8,023.81, with interest, subject to the credits detailed; that in No. 5584 the defendants were indebted to plaintiff guardian in the sum of $4,000, with interest, less credits detailed, including proceeds of sale of lot known as office lot, in the year 1946, with the provision that "the amount paid in satisfaction of judgment No. 5584" should be credited on the judgment in 5496.

In No. 5620 it was found that Clifton Beasley and his successors in title, to and including defendant Brick & Tile Company, had occupied, used and possessed the 37.5-acre tract of land referred to, under known and visible lines and bounds, adversely and continuously, under color of title for more than seven years next preceding the institution of action No. 5620.

It was also found that defendant Parker was not estopped or barred by statutes of limitations or laches to set up the matters alleged in the

answers in No. 5496 and No. 5584; and that the cause of action alleged in No. 5620 and the defenses set up in No. 5496 and No. 5584 were not based on and did not grow out of the failure of James D. Parker, former guardian, to comply with the provisions of the Veterans Guardianship Act. It was also found in No. 5620 that plaintiffs therein were barred by laches.

Thereupon the court rendered judgment as follows:

C.I.D. No. 5620: "That the defendant Riverside Brick & Tile Company is the owner in fee of the 37.5-acre-tract of land described in the pleadings, free from the claims of plaintiffs, and that the defendants go hence without day and recover their costs against the plaintiffs and their sureties. The credits which plaintiffs are entitled to against the defendant Bank, Guardian, is hereinafter provided for as this judgment relates to C.I.D. No. 5584."

C.I.D. No. 5496: "It is further ordered, adjudged and decreed by the Court that the defendant James D. Parker and Mrs. Agnes A. Parker, Executrix upon the estate of James D. Parker, is justly indebted to the plaintiff in the principal sum of $8,023.81 with interest thereon from January, 1932, together with costs of this action to be taxed by the Clerk; less credits as follows: $204.43 on June 28, 1937; $238.49 on June 28, 1938; $256.10 on February 11, 1935; $41.45 on October 8, 1935, and a final credit of $4919.20 on February 28, 1951, and subject to further credits as appear in C.I.D. No. 5584, less interest on $4,000 from January 10, 1929, to January 1, 1932."

C.I.D. No. 5584: "It is further ordered, adjudged and decreed by the Court that the defendants James D. Parker and wife, Agnes A. Parker, and Mrs. Agnes A. Parker, Executrix upon the estate of James D. Parker, are justly indebted to the plaintiff in the principal sum of $4,000 with interest from January 10, 1929, together with the costs of this action, to be taxed by the Clerk, less credits as follows: $352.08 on January 4, 1937; $181.04 on February 1, 1939; $1,176.87 on March 1, 1942, (being derived from $1,610.92 for rent of office building less $434.05 expended by Bank, Guardian, for insurance, repairs and taxes—net $1,176.87, the average date of the rents and credits received and expended by the Bank, Guardian, being March 1, 1942) and a further net credit of $3,671.44 on March 26, 1946, (this being derived from the total amount realized from proceeds of sale of office building, to-wit, $5,000.00, less $1,001.74, for taxes paid to the Town of Smithfield and the County of Johnston and $145.78, paving assessments; and $181.04 heretofore credited on February 1, 1939) on this judgment."

From the judgment rendered Mrs. Agnes A. Parker, Executrix, and Mrs. Agnes A. Parker individually appealed.

Lyon & Lyon for First-Citizens Bank & Trust Co., Guardian of Henry A. Hodges, appellee.

Levinson & Batton for J. H. Strickland and wife, Mabel Strickland, and Riverside Brick & Tile Company, appellees.

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

DEVIN, C. J. The judgment in these cases which the appeal brings up for review is the culmination of a series of transactions, constant litigation and recurring appeals which have extended over a period of twenty years. The primary and persistent purpose of this litigation was the settlement of a guardianship fund which had gone into the hands of James D. Parker, former guardian. Certain legal phases of the controversy have heretofore been considered by this Court. *Trust Co. v. Parker,* 225 N.C. 480, 35 S.E. 2d 489; *Grady v. Parker,* 228 N.C. 54, 44 S.E. 2d 449; *Grady v. Parker,* 230 N.C. 166, 52 S.E. 2d 273; *Trust Co. v. Parker,* 232 N.C. 512, 61 S.E. 2d 441. Thus from the permanent pages of the North Carolina Supreme Court Reports appears in outline the story of these transactions which the present appeal brings up again as the background of appellants' exceptions to the rulings of the court below.

In chronological order the record may be restated as follows:

4 July, 1932, James D. Parker resigned as guardian of Henry A. Hodges, incompetent veteran of World War I, and in 1933 the succeeding guardian instituted suit to recover funds which had gone into the hands of Parker as guardian. In September, 1935, this suit resulted in judgment against Parker for $8,023.81, based on the verdict of the jury that he had mingled the funds of his ward's estate with his own and had not accounted for same.

As belonging to the estate of his ward James D. Parker turned over to the succeeding guardian a note and deed of trust executed by himself and wife, and payable to himself as guardian, in the sum of $4,000, conveying 37.5 acres of land and a lot called office lot in Smithfield. The succeeding guardian obtained judgment of foreclosure of this deed of trust in 1936, and sale of the 37.5 acres of land, under the judgment, by W. B. Wellons, Commissioner, for $600, to Clifton Beasley was confirmed 30 December, 1936. The money was paid, deed delivered and Beasley went into possession 1 January, 1937. The judgment was credited with net proceeds of the sale.

In 1945 the plaintiff Bank as successor guardian instiuted suit to renew the $8,023.81 judgment with interest, subject to all credits. This suit bore civil issue docket No. 5496.

In 1946 the plaintiff Bank as successor guardian instituted suit to renew the $4,000 judgment, subject to credits. This suit bore civil issue docket No. 5584.

On 2 December, 1946, James D. Parker and wife instituted suit to redeem the 37.5-acre tract of land and for an accounting, alleging the sale of the land under judgment of foreclosure was void for the reason that H. V. Rose, the trustee in the deed of trust, had not been made a party. This suit bore civil issue docket No. 5620. Since the death of James D. Parker in 1948 this suit is being carried on by Mrs. Agnes A. Parker individually and as executrix of James D. Parker.

The appeal now brought to this Court, the fifth in the series, is being prosecuted by Mrs. Agnes A. Parker, Executrix of her late husband James D. Parker, and Mrs. Agnes A. Parker individually, defendants in Nos. 5496 and 5584, and plaintiffs in No. 5620.

At the November Term, 1951, of Johnston Superior Court, by consent of all parties, these three cases were consolidated and jury trial waived. It was agreed that the judge presiding at that term should find the facts, answer the issues raised, and render judgment thereon. From the evidence offered the judge set out his findings of fact specifically in the form of answer to issues submitted and rendered judgment disposing of the matters involved in the three cases.

Though the record is unnecessarily voluminous (482 pages), and the assignments of error unduly multiplied, the two principal questions presented involve: (1) the right of the successor guardian to maintain suits to renew former unsatisfied judgments, and (2) the right of appellants to redeem the tract of land sold under foreclosure and for an accounting. To the rulings of the trial judge on the evidence relating to these issues and to his conclusions thereon the zeal of counsel has prompted numerous exceptions.

1. The right of plaintiff Bank, successor guardian, to maintain Suits No. 5496 and No. 5584 to renew the judgments rendered against the former guardian and his executrix finds support in the statute, G.S. 1-47 (1), *Rodman v. Stillman,* 220 N.C. 361 (365), 17 S.E. 2d 336, and is sustained in this instance by the decision of this Court in *Grady v. Parker,* 230 N.C. 166, 52 S.E. 2d 273. All the credits on these judgments warranted by the evidence and found by the court are set out in the judgment appealed from. According to the evidence the notes and choses in action belonging to James D. Parker which were turned over by him to the succeeding guardian to be collected and credited on the original judgment, proved practically worthless, and the court found that credit was given for the small amount collected therefrom. Neither James D. Parker nor his executrix offered objection to the subsequent sale of the office lot conveyed in the deed of trust and joined in quitclaim deed to the purchaser. Credit was duly given on the judgment for the amount of such sale together with rents received less taxes and repairs. It is noted that the amount of the $4,000 deed of trust and the consequent judgment thereon was embraced in the $8,023.81 judgment,

and this fact was duly considered by the judge and entered into the judgment. See *Grady v. Parker*, 230 N.C. 166, *supra*.

It was found, and the evidence supports the finding, that the executrix of James D. Parker was entitled to certain credits on the $8,023.81 judgment, No. 5496, as of the dates set out, derived from collections from other securities turned over by Parker, $256.10 and $41.45, from the surety on Parker's bond $442.92, and from execution sale of other land $4,919.20 (*Trust Co. v. Parker*, 232 N.C. 512, 61 S.E. 2d 441, *supra*), in total sum of $5,659.67.

And the amounts credited on the $4,000 judgment No. 5584 totaled $5,381.43, being the net amount received from sale of 37.5 acres of land, and from rents and sale of the office lot. These credits on the collateral debt of James D. Parker and Mrs. Agnes A. Parker evidenced by the note and deed of trust were adjudged to be credits on the judgment in No. 5496.

Since the principal debt owed by James D. Parker was that represented by the judgment referred to in No. 5496 in the sum of $8,023.81 with interest from 1 January, 1932, and the judgment of $4,000 in No. 5584 on the note and deed of trust of James D. Parker and Agnes A. Parker was embraced in the larger judgment, in determining the balance now due duplication in the charges of interest, which would otherwise result from adding interest on the $4,000 judgment, was avoided by the provision below that the amount paid in satisfaction of that judgment No. 5584 should be credited on the principal judgment in No. 5496. That is, whatever interest is charged on judgment No. 5584 will be credited on the judgment No. 5496, so that no injury will arise to either the executrix of James D. Parker or Mrs. Agnes A. Parker.

Appellants' exceptions to the rulings of the trial judge relating to the suits No. 5584 and 5496 to renew the original judgments have been examined and found to be without substantial merit.

2. It was decided by this Court in 1947, *Grady v. Parker*, 228 N.C. 54, 44 S.E. 2d 449, that the foreclosure suit, under which the 37.5 acre-tract of land was sold, improperly undertook to pass the title to the land for the reason that the trustee in the deed of trust, in whom was the legal title, had not been made a party to the suit. The evidence disclosed, however, that the sale was confirmed December, 1936, and deed delivered, and the grantee entered into possession 1 January, 1937. James D. Parker and wife Agnes A. Parker did not enter suit to redeem until 2 December, 1946. It also appeared from the evidence, and the trial court so found, that the grantee in the Commissioner's deed which described the land by metes and bounds, under and pursuant to that deed, entered into possession of the land in good faith as owner, and he and his successors in title have continued in possession openly, adversely, continuously, putting the land to the only use of which it was susceptible

in its then state (*Locklear v. Savage*, 159 N.C. 236, 74 S.E. 347). There was evidence tending to show that the grantee paid full value for the land; that he and his successors in title listed and paid taxes thereon each year since; that the land lay along the banks of Neuse River, was subject to inundation, and was only valuable for the clay which the possessors used in making brick; that the land was situated near the town of Smithfield where James D. Parker and his wife and the trustee resided; that no objection to the occupancy and use of the land was raised, and no claim was made until suit filed nine years and eleven months after the grantee in the deed had entered into possession. During this period James D. Parker neither listed nor paid taxes on this land.

The appellants, however, urge the view that since the trustee in the deed of trust was not a party to the foreclosure suit and the court held the sale for that reason void and insufficient to pass title, the deed of the Commissioner appointed by the court had only the effect of an equitable assignment of the mortgagee's interest and gave to the possessor only the status of a mortgagee in possession which would not bar an action to redeem in less than ten years. *Eubanks v. Beckton,* 158 N.C. 230, 73 S.E. 1009.

The trial judge, however, was of opinion, and so held, that the deed of W. B. Wellons, Commissioner, constituted color of title, and found that the grantee entered thereunder, and that he and those who succeeded to his title have been in open, adverse and continuous possession of the land for more than seven years, thus vesting a good title. This ruling, we think, is supported by the evidence and is in accord with the decisions of this Court.

Color of title may be defined as a paper writing which on its face professes to pass the title to land but fails to do so because of want of title in the grantor or by reason of the defective mode of conveyance used. *Tate v. Southard,* 10 N.C. 119; *Glass v. Shoe Co.,* 212 N.C. 70, 192 S.E. 899; 1 A.J. 898. If the instrument on its face purports to convey land by definite lines and boundaries and the grantee enters into possession claiming under it and holds adversely for seven years, it is sufficient to vest title to the land in the grantee. G.S. 1-38. No exclusive importance is to be attached to the ground of the invalidity of the colorable title if entry thereunder has been made in good faith and possession held adversely. Though the grantor may have been incompetent to convey the true title or the form of conveyance be defective, it will constitute color of title which will draw to the possession of the grantee thereunder the protection of the statute. G.S. 1-38; *McCulloh v. Daniel,* 102 N.C. 529, 9 S.E. 413; *Seals v. Seals,* 165 N.C. 409, 81 S.E. 613; *Crocker v. Vann,* 192 N.C. 422, 135 S.E. 127; *Eason v. Spence,* 232 N.C. 579, 61 S.E. 2d 608; *Price v. Whisnant,* 232 N.C. 653, 62 S.E. 2d 56. Accordingly it has been held that a fraudulent deed may be color of

title and become a good title if the fraudulent grantee holds actual adverse possession for the statutory period against the owner who has right of action to recover possession and is under no disability. *Seals v. Seals, supra.* And where in a partition proceeding to sell land less than the whole number of tenants in common have been made parties, a deed made pursuant to an order of court to the purchaser is color of title and seven years adverse possession thereunder will bar those tenants in common who were not made parties. *Lumber Co. v. Cedar Works,* 165 N.C. 83, 80 S.E. 982. And in the language of *Justice Brown,* speaking for the Court in *Canter v. Chilton,* 175 N.C. 406, 95 S.E. 660: "So an entry upon and taking possession of land under a judicial decree is good color and this is generally true, although the decree is irregular or even void."

The appellants noted numerous exceptions to the rulings of the trial judge on evidence offered relating to the use of clay from this land for making brick, and the worthlessness of the land for other purposes due to overflow, but we think this evidence competent. The exception to the introduction of tax abstracts showing listing by those in possession and the payment of taxes cannot be sustained in view of what was said by this Court in *McKay v. Bullard,* 219 N.C. 589, 14 S.E. 2d 657; *Graham v. Spaulding,* 226 N.C. 86, 36 S.E. 2d 727. Also exception was noted to opinion evidence as to the value of the land at time of sale, but this was admissible as tending to show the good faith of the purchaser. An examination of these exceptions and of all those noted to the introduction of evidence and brought forward in appellants' assignments of error fails to disclose prejudicial error which would warrant another hearing on these issues. *Collins v. Lamb,* 215 N.C. 719, 2 S.E. 2d 863; *Call v. Stroud,* 232 N.C. 478, 61 S.E. 2d 342.

In view of the holding that defendant Brick Company's title to the land had ripened by adverse possession under color, the ruling of the judge below on the question of laches on the part of James D. Parker and wife becomes immaterial. *Teachey v. Gurley,* 214 N.C. 288, 199 S.E. 83. The inadvertent inclusion of the name of James D. Parker as one against whom judgment was rendered is unimportant.

Without undertaking to discuss appellants' numerous exceptions *seriatim,* we conclude, after a careful examination of the record, the exceptions noted and brought forward in the assignments of error and the briefs, that no error in the rulings of the trial judge is made to appear which we deem prejudicial to the appellants or of substance sufficient to require another hearing. The findings of the judge appear to have been supported by the evidence, and his conclusions determinative of the litigation will not be disturbed.

It may not be out of place to note that during the argument in this Court counsel for the plaintiff Bank chided opposing counsel for bringing forward 472 exceptions, saying "No Superior Court Judge could

make 472 errors in one case." To this counsel for appellants replied, "No Superior Court Judge could rule on 472 objections without making an error."

The numerous suits instituted in connection with the estate of plaintiff's unfortunate ward Henry A. Hodges have been long drawn out, and have occupied the attention of the courts for many years. Collateral and incidental matters have been drawn into the stream of litigation, and have required consideration and decision by the courts. We indulge the hope that the judgment below in these cases, which we now affirm, will mark the end of all active disagreement between the parties as to the matters involved, and that the Court may write in conclusion, *resquiat in pace.*

Judgment affirmed.

ARNOLD JERNIGAN v. HANOVER FIRE INSURANCE CO. OF NEW YORK, AND R. G. YANCEY, AGENT.

(Filed 26 March, 1952.)

1. Insurance § 13a—

Ordinary words in a policy will be given their commonly understood and popular meaning in the absence of language in the policy indicating an intent to use them in a special sense.

2. Insurance § 45¾—

A policy of fire insurance issued to a garage owner on "automobiles owned by insured and held for sale or used in repair service" does not cover a farm tractor purchased by insured for resale, there being no definitions in the policy giving the term "automobile" any meaning other than its ordinary and popular sense. "Car" and "automobile" are synonymous.

APPEAL by defendants from *Bennett, Special Judge,* and a jury, at the August Term, 1951, of WAYNE.

Civil action upon a fire insurance policy covering automobiles or cars.

Since the complaint states no cause of action against R. G. Yancey, Agent, and no judgment was rendered against him in the Superior Court, the term defendant is herein used to describe the Hanover Fire Insurance Company only.

These are the facts:

1. The plaintiff, Arnold Jernigan, owned a garage in a rural section of Wayne County, where he operated a sales and repair service.

2. On 22 March, 1948, the defendant, as insurer, and the plaintiff, as insured, entered into a contract whereby the defendant issued to the plaintiff for a stipulated premium a certain policy of fire insurance, bearing the expiration date 22 March, 1949, and covering "automobiles owned by the insured and held for sale or used in repair service" at the

plaintiff's garage. Subsequent to the fire hereafter mentioned, to wit, on 14 February, 1949, this rider was attached to the insurance policy: "It is hereby understood and agreed that this policy covers used cars and not new cars from the inception date of March 22, 1948."

3. On 28 March, 1948, the plaintiff bought a second-hand farm tractor, namely, a 1947 model John Deere "B" farm tractor, for the purpose of resale. While awaiting that contemplated event, the plaintiff used the farm tractor around the garage "for towing cars and things like that."

4. On 23 July, 1948, the plaintiff's farm tractor was destroyed by a fire which consumed the plaintiff's garage and its contents.

5. The plaintiff gave the defendant immediate notice of the loss of the farm tractor, and the defendant forthwith denied liability to the plaintiff therefor on the ground that the tractor was not covered by its policy of insurance.

6. The plaintiff thereupon brought this action against the defendant, alleging that the policy insured the farm tractor against loss by fire and praying judgment accordingly. The defendant answered, denying the material allegations of the complaint relating to the fire and averring that the farm tractor was not within the coverage of the policy.

7. When the cause was tried in the Superior Court, the presiding judge ruled as a matter of law that the farm tractor was an automobile or a car within the purview of the policy, and submitted issues relating to the destruction of the tractor by fire and the amount of the resultant loss to the jury. The jury answered these issues in favor of the plaintiff. The presiding judge entered judgment for the plaintiff and against the defendant for the amount of the loss as fixed by the jury, and the defendant appealed, assigning the denial of its motion for a compulsory nonsuit and other rulings of the trial judge as error.

J. Faison Thomson and H. T. Ray for plaintiff, appellee.

Taylor & Allen and Lindsay C. Warren, Jr., for defendant, appellant.

ERVIN, J. According to both common usage and statutory definition, a farm tractor is a "motor vehicle designed and used primarily as a farm implement for drawing plows, mowing machines, and other implements of husbandry." G.S. 20-38 (h); *State ex rel. Rice v. Louisiana Oil Co.*, 174 Miss. 585, 165 So. 423; *Davis v. Wright*, 194 Okl. 451, 152 P. 2d 921.

Common knowledge attests that when the term car is applied to a motor vehicle, it is used as a synonym for automobile. *Monroe's Adm'r v. Federal Union Life Ins. Co.*, 251 Ky. 570, 65 S.W. 2d 680; *City of Philadelphia v. Philadelphia Transp. Co.*, 345 Pa. 244, 26 A. 2d 909. This being so, the assignment of error based on the denial of the motion for a compulsory nonsuit raises the question whether a farm tractor is

an automobile within the purview of a fire insurance policy which does not undertake to define the latter term.

An automobile is the vehicle which one exasperated judge said is "too largely owned more or less conditionally by those not more than six lengths ahead of the wolf, infesting the public streets, contemptuous of the rights of pedestrians, like Jehu driving furiously—a rare combination of luxury, necessity, and waste." *U. S. v. One Automobile,* 237 F. 891. While this judicial description of an automobile may contain at least a modicum of truth, it does not furnish a solution of our present problem.

Inasmuch as there is nothing in the policy indicating that the parties intended the word automobile to have a different meaning, it is to be taken and understood in its ordinary and popular sense. *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.

Justice Oliver Wendell Holmes, Jr., asserted with absolute accuracy 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 the time in which it is used." *Towne v. Eisner,* 245 U.S. 418, 38 S. Ct. 158, 62 L. Ed. 372. This observation finds apt illustration in the terminology employed at different times and in varying circumstances to designate the several kinds of self-propelled vehicles, which move about on the surface of the earth otherwise than on fixed rails or tracks.

Common usage has made the words motor vehicle a generic term for all classes of self-propelled vehicles not operating on stationary rails or tracks. As a result, all automobiles are motor vehicles. *Motors Corp. v. Flynt,* 178 N.C. 399, 100 S.E. 693. But the contrary proposition is not true. The term motor vehicle is much broader than the word automobile, and includes various vehicles which cannot be classified as automobiles. 60 C.J.S., Motor Vehicles, section 1.

When motor vehicles made their initial appearance around the turn of the century, they were employed to transport persons or goods, and were called horseless carriages on account of the service they rendered. *Diocese of Trenton v. Toman,* 74 N. J. Eq. 702, 70 A. 606. As the functions and numbers of motor vehicles increased, this homely name fell into disuse, and various terms were adopted or invented to designate sundry sorts of motor vehicles. One of these terms was automobile, which has now acquired both a general and a particular meaning in common usage. When it is employed in its general sense, the word automobile embraces all kinds of motor vehicles, except motorcycles, designed for use on highways and streets for the conveyance of either persons or property. *Bank for Savings & Trusts v. U. S. Casualty Co.,* 242 Ala. 161, 5 So. 2d 618;

Life & Cas. Ins. Co. of Tenn. v. Benion, 82 Ga. App. 571, 61 S.E. 2d 579; *Life & Casualty Co. of Tennessee v. Roland,* 45 Ga. App. 467, 165 S.E. 293; *Carter v. State,* 12 Ga. App. 430, 78 S.E. 205; *Life & Casualty Ins. Co. of Tennessee v. Metcalf,* 240 Ky. 628, 42 S.W. 2d 909; *Baker v. City of Fall River,* 187 Mass. 53, 72 N.E. 336; *Hoover v. National Casualty Co.,* 236 Mo. App. 1093, 162 S.W. 2d 363; *Kellaher v. City of Portland,* 57 Or. 575, 112 P. 1076; *Strycker v. Richardson,* 77 Pa. Super. Ct. 252; *Stanley v. Tomlin,* 143 Va. 187, 129 S.E. 379; *Wiese v. Polzer,* 212 Wis. 337, 248 N.W. 113; 5 Am. Jur., Automobiles, section 3; 60 C.J.S., Motor Vehicles, section 1. When it is used in its particular sense, the term automobile includes such motor vehicles, other than motorcycles, as are intended for use on highways and streets for the carriage of persons only. *American-La France Fire Engine Co. v. Riordan,* 6 F. 2d 964; *Bank for Savings & Trust v. U. S. Casualty Co., supra; Neighbors v. Life & Casualty Ins. Co. of Tennessee,* 182 Ark. 356, 31 S.W. 2d 418; *Paetz v. London Guarantee & Accident Co.,* 228 Mo. App. 564, 71 S.W. 2d 826; *American Mut. Liability Ins. Co. v. Chaput,* 95 N.H. 200, 60 A. 2d 118; Blashfield's Cyclopedia of Automobile Law and Practice (Perm. Ed.), section 2. See, also, in this connection: *Bullard v. Life & Casualty Ins. Co.,* 178 Ga. 673, 173 S.E. 855; *Landwehr v. Continental Life Ins. Co.,* 159 Md. 207, 150 A. 732, 70 A.L.R. 1249; *Colyer v. North American Acc. Ins. Co.,* 230 N.Y.S. 473, 132 Misc. 701; *Deardorff v. Continental Life Ins. Co., St. Louis, Mo.,* 301 Pa. 179, 151 A. 814; *Moore v. Life & Casualty Ins. Co.,* 162 Tenn. 682, 40 S.E. 2d 403.

Although it is a motor vehicle, a farm tractor cannot properly be classified as an automobile in either the general or the particular sense. This is so for the very simple reason that it is neither designed nor suitable for use on highways and streets for the transportation of either persons or property. *Tidd v. New York Cent. R. Co.,* 132 Ohio St. 531, 9 N.E. 2d 509. Hence, this action ought to have been involuntarily nonsuited on the ground that the plaintiff's farm tractor was not covered by the fire insurance policy issued by the defendant.

The policy in the instant case is quite different from that involved in *Koser v. American Cas. Co. of Reading,* 162 Pa. Super. 63, 56 A. 2d 301, where the language employed to express the contract ignored the ordinary and popular meaning of the word automobile, and made that word a general term to cover all motor vehicles except those specifically excluded.

While the matter is not germane to the inquiry presented by the appeal, we note, in closing, that the Motor Vehicle Act enlarges the meaning of the term motor vehicles even beyond that accorded it by common usage. G.S. 20-38 (p). Moreover, the Act divides and subdivides the various sorts of motor vehicles into specific classes with technical precision. G.S. 20-38. It is not likely, however, that the technical definitions employed

by the Act will ever find their way into the everyday language of the people.

The judgment rendered in the Superior Court is hereby

Reversed.

JOHN T. FOSTER v. C. P. SNEAD.

(Filed 26 March, 1952.)

1. Fraud § 10—

The party asserting fraud has the burden of proving each of the essential elements of actionable fraud.

2. Fraud § 1—

Fraud is the representation of a definite and specific fact, which representation is materially false, made with knowledge of its falsity or in culpable ignorance of its truth, with fraudulent intent, which is reasonably relied on by the other party to his deception and damage.

3. Fraud § 12—

Defendant alleged that he was induced to sign the lease of the filling station in question by plaintiff's representation that the filling station did a thousand dollars worth of business per month. On cross-examination, plaintiff admitted that he kept books from which it could be ascertained what volume of business had been done by him at the station and that he was willing to bring the books into court, but defendant did not have plaintiff produce the books at the trial. *Held:* Nonsuit on defendant's cross action for fraud should have been sustained for failure of proof that the representation was in fact false.

APPEAL by plaintiff from *Rousseau, J.*, and a jury, October, 1951, Term, CASWELL.

This is a civil action to recover rent under a written lease.

Plaintiff is the owner of service station and restaurant property on U. S. Highway 86, approximately one mile north of Yanceyville. Only the service station with its driveway and front privileges is involved in this litigation. On 7 January, 1948, plaintiff and defendant entered into a written contract whereby the plaintiff leased to the defendant the service station property for a term of five years, commencing 15 February, 1948, at a monthly rental of $175.00 plus 1c per gallon on all gas sold in excess of 7,000 gallons per month, the total rental not to exceed $200.00 per month.

Defendant took possession of the service station under the provisions of the written contract and occupied the same until 1 March, 1950. Plaintiff voluntarily reduced the rent to $150.00 per month for the period 15 January, 1950, through 15 March, 1950.

Plaintiff seeks to recover of defendant the sum of $6,337.50 representing the accrued rent and the balance of the stated rent as provided in said contract. Defendant filed an answer admitting the execution of the contract and that he went into possession and occupied the premises until about 1 March, 1950. As a further defense, the defendant alleges that the execution of the rental contract was induced by the false and fraudulent representations of the plaintiff and seeks to absolve himself from liability on that ground.

When the defendant closed his evidence, the plaintiff demurred to the cross action and moved for judgment as of nonsuit. This motion was overruled and plaintiff excepted.

The court submitted the issue of fraud, which was answered by the jury in favor of the defendant, and from judgment entered accordingly, plaintiff excepted and appealed, assigning errors.

D. Emerson Scarborough for plaintiff, appellant.
Glidewell & Glidewell for defendant, appellee.

VALENTINE, J. The defendant's allegation of fraud consists of an assertion that the plaintiff falsely and fraudulently stated to him that he sold from six to eight thousand gallons of gas per month in the operation of the filling station and that the business was worth $1,000.00 per month and that defendant acted upon these false and fraudulent statements to his injury. The burden of proving his allegation of fraud rested upon the defendant. *Poe v. Smith*, 172 N.C. 67, 89 S.E. 1003.

The only evidence offered by defendant in support of his charge of fraud is the following conversations between him and the plaintiff: "I said, 'How much is the station pumping a month?,' and he (Mr. Foster) said, 'Six or eight thousand a month.' . . . . I figured over the thing for approximately two weeks and went to his station one afternoon and I said, 'I come to get one bit of information—I figure this station has got to support my loan—I want you to tell me, on your word of honor, how much total business that station is doing a month,' and 'it would have to do $1000 for me to run it.' He said, 'The business is here' and that was his answer. And I said, 'I just wanted to know on your word of honor because I knew you were the one who knew.' He said the $1000 worth of business a month was there."

The determinative question on this appeal is, did the defendant's proof meet the requirements of the rule laid down for the establishment of actionable fraud? On that question in *Harding v. Insurance Co.*, 218 N.C. 129, 10 S.E. 2d 599, *Barnhill, J.*, speaking for the Court, said: "The essential elements of actionable fraud or deceit are the representation, its falsity, scienter, deception and injury. The representation must be definite and specific; it must be materially false; it must be made with

knowledge of its falsity or in culpable ignorance of its truth; it must be made with fraudulent intent; it must be reasonably relied on by the other party; and he must be deceived and caused to suffer loss. Our decisions are uniformly to this effect. *Electric Co. v. Morrison,* 194 N.C. 316, 139 S.E. 455; *Peyton v. Griffin,* 195 N.C. 685, 143 S.E. 525."

Conceding without deciding that the statements attributed to the plaintiff by the defendant are sufficiently definite and specific to come within the rule, there is no evidence to show that these statements were false. *Straus Co. v. Economys,* 230 N.C. 316, 52 S.E. 2d 802; *Peyton v. Griffin, supra.* It will be observed that the quoted language is in the present tense and cannot be stretched to include a promise or declaration that the defendant would do $1,000.00 worth of business a month or that he would sell through the station seven or eight thousand gallons of gas a month. An opportunity for a discovery of the truth or falsity of the statements attributed to the plaintiff was available to the defendant during the cross examination of plaintiff, who admitted that he kept books from which could be ascertained the volume of business done by him and that he was willing to bring the books in after the lunch hour. The record does not disclose that the cross examination was pursued to the point where the books were actually produced at the trial. This could easily have been done.

The operation of a service station, as any other business, produces different results when handled by different persons. The operation of such a business requires both personality and perseverance. It appears from the record that plaintiff and his father kept the station open until late hours of the night and sometimes all night, making the station a gathering place for plaintiff's friends and acquaintances. On the other hand, it appears that the defendant was new in the community and had never operated a station in that section and that he maintained an earlier closing time. He admitted that on some occasions he closed the station before ten o'clock at night. The evidence is replete with indications and implications that the business practices employed by plaintiff and defendant were entirely different, and that may account for a difference in the volume of business. There is no sufficient evidence in the record to prove that the representations attributed to the plaintiff by the defendant were in truth and fact false. The defendant is bound to have known that the plaintiff could not foresee his business success or failure, nor can the plaintiff be held accountable upon an allegation of fraud unless the statements attributed to him are in fact false and so proved by competent evidence. *Williamson v. Holt,* 147 N.C. 515, 61 S.E. 384.

It follows that the court erred in denying the plaintiff's motion, made at the conclusion of the evidence for defendant, to dismiss defendant's cross action or further defense. *Straus Co. v. Economys, supra.* Since

the defendant failed to offer any evidence of fraud as alleged by him, the first issue should not have been submitted to the jury.

New trial.

M. A. HAAS v. J. D. SMITH.

(Filed 26 March, 1952.)

Betterments § 2—

A person making improvements upon land under a parol agreement of the owner to convey same is not entitled to assert claim for betterments as against the purchaser for value under a duly registered deed from the owner. G.S. 47-18.

APPEAL by defendant from *Phillips, J.,* and a jury, at October Term, 1951, of CALDWELL.

Civil action in ejectment to try title to land, involving question of betterments.

It is alleged in the plaintiff's complaint that he is the owner in fee simple and entitled to possession of a tract of land described in and conveyed to him by deed of T. E. Smith dated 23 March, 1950, duly registered in the Public Registry of Caldwell County, and that the defendant is in wrongful possession of part of the land.

The defendant by answer denied the material allegations of the complaint, and by way of further defense set up a counterclaim in which it is alleged in substance: that he is the son of the plaintiff's grantor, T. E. Smith; that in June, 1946, the defendant entered into an oral contract with his father whereby it was agreed that the defendant was to erect a dwelling house on the premises described in the complaint and that the land would be conveyed to the defendant by his father; that pursuant to this agreement and relying wholly upon his father's promise to convey, the defendant went into possession of the property and erected thereon an eight-room residence, at a cost of approximately $5,000, and in addition paid a substantial sum on a mortgage debt against the land; that thereafter the defendant's father, in breach of his agreement, sold and conveyed the property to the plaintiff, and the plaintiff since acquiring deed has ordered the defendant off the premises, without offering to make compensation for the improvements made by the defendant, who alleges he is entitled to recover the costs of the improvements.

When the cause came on for trial, the plaintiff, previously having filed reply, demurred *ore tenus* to the counterclaim for failure to state facts sufficient to constitute a cause of action or defense against the plaintiff. The demurrer was sustained.

The plaintiff then offered his proofs of title and right to possession. As to these, appropriate issues were submitted to and answered by the jury in favor in the plaintiff.

From judgment entered on the verdict, adjudging the plaintiff the owner and entitled to the immediate possession of the land, the defendant appealed, assigning errors.

Benjamin Beach for plaintiff, appellee.

W. H. Strickland for defendant, appellant.

JOHNSON, J. Decision here turns on the defendant's exception to the ruling of the trial court in sustaining the demurrer *ore tenus* to the counterclaim for betterments.

The demurrer was properly sustained under application of the principles of law applied and explained by *Winborne, J.*, in *Grimes v. Guion*, 220 N.C. 676, 18 S.E. 2d 170, where the facts are strikingly similar to those in the instant case.

Further discussion of the controlling principles of law is deemed unnecessary. Suffice it to say, that since the Connor Act, Chapter 147, Public Laws of 1885, now codified as G.S. 47-18, one who goes into possession of land under parol contract to convey and makes improvements thereon, may not assert the right to remain in possession or recover for his improvements as against a purchaser for value from the vendor, holding under a duly registered deed, even though the purchaser had notice of the contract. *Grimes v. Guion, supra,* and cases cited.

The case of *Luton v. Badham*, 127 N.C. 96, 37 S.E. 143, relied on by the defendant, is distinguishable. There, the action was to recover for improvements against the original party who breached the parol agreement. Here, the alleged parol contract was breached by a third person who is not a party to the action. The other cases relied on by the defendant likewise are distinguishable. See *Grimes v. Guion, supra.*

The rest of the defendant's exceptive assignments of error are formal and are without merit.

No error.

CITY OF SHELBY; ZEB MAUNEY, BUILDING INSPECTOR FOR THE CITY OF SHELBY, AND ON BEHALF OF THE CITY OF SHELBY, AS ITS BUILDING INSPECTOR, v. W. D. LACKEY AND WIFE, LILLIAN Z. LACKEY; EVANS LACKEY AND WIFE, MARY I. LACKEY; ISABEL L. MOSER; AND LACKEY PONTIAC, INC.

(Filed 26 March, 1952.)

1. Appeal and Error § 2—

An appeal does not lie to the Supreme Court from an interlocutory order of the Superior Court unless such 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. Same—

In an action by a municipality to enforce a zoning ordinance, order of the court permitting certain property owners to become parties plaintiff and to adopt the complaint theretofore filed by the municipality, upon allegations that the value of their property would be impaired if the zoning ordinance were not upheld, does not deprive defendants of any substantial right and defendants' appeal therefrom is dismissed, the making of additional parties plaintiff being ordinarily within the discretion of the trial judge. G.S. 1-163.

APPEAL by defendants from *Sink, J.*, January Term, 1952, of CLEVELAND.

This is a civil action instituted by the City of Shelby and its Building Inspector for the purpose of enforcing the zoning ordinance of the City of Shelby and restraining the defendants from continuing to use a lot for business purposes, which lot is classified in the zoning ordinance as residential property.

Certain owners of property immediately adjacent to the property of the defendants, filed a petition and motion requesting that they be allowed to become parties plaintiff to the action, and permitted to adopt the complaint theretofore filed in the action by the original plaintiffs. The petition was bottomed on the contention that the petitioners would be injuriously affected by the failure of the court to uphold the zoning law of the City of Shelby, and upon the further allegation that the value of their property has already been impaired by the nonconforming use of the defendants' property for business purposes.

The defendants filed a demurrer to the petition and motion. The demurrer was overruled and the motion was allowed. Defendants appealed to the Supreme Court, assigning error.

Falls & Falls for defendants, appellants.

A. A. Powell for plaintiffs, appellees.

Henry B. Edwards for interveners, appellees.

PER CURIAM. The demurrer interposed in the court below was to the petition and motion only. The defendants did not demur to the pleadings which the additional parties were permitted to adopt.

An appeal does not lie to the Supreme Court from an interlocutory order of the Superior Court, unless such 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; *City of Raleigh v. Edwards,* 234 N.C. 528, 67 S.E. 2d 669.

It is ordinarily within the discretion of the trial judge to make additional parties. G.S. 1-163; *Insurance Co. v. Motor Lines,* 225 N.C. 588, 35 S.E. 2d 879; *Wilmington v. Board of Education,* 210 N.C. 197, 185 S.E. 767.

The order entered below making additional parties plaintiff did not impair any substantial right of the defendants which would warrant an appeal.

Appeal dismissed.

J. E. EDWARDS, BANISTER HENSLEY, HIRAM HENSLEY, YATES BAILEY, FRIEL M. YOUNG, RALPH RAY, ALLISON EDWARDS, REX McINTOSH, L. Q. MILLER, DEWEY HENSLEY, CATHERINE PROFFITT, JAMES PROFFITT, CHARLEY BRADFORD, T. A. BUCHANAN AND JESS BUCKNER v. THE BOARD OF EDUCATION OF YANCEY COUNTY AND FRANK W. HOWELL, SUPERINTENDENT OF SCHOOLS AND EX OFFICIO CLERK TO THE BOARD OF EDUCATION.

(Filed 9 April, 1952.)

1. Schools § 4b—

A county board of education is a corporate body which has legal existence separate and apart from its members even though it may not act except at a meeting attended by a quorum of its *de jure* or *de facto* members and therefore may not act when vacancies reduce its membership below the number required to constitute a quorum.

2. Same: Municipal Corporations § 10—

In the absence of statutory provision to the contrary, the common law rule applies that the quorum of a municipal board is a majority of its whole membership.

3. Schools § 4b—

Vacancies upon the board of education of a county may be filled by county executive committees of political parties or the State Board of Education. G.S. 115-42.

4. Schools § 3a—

A county board of education may not be restrained from exercising its power to consolidate the existing high schools into one county-wide high school with the approval of the State Board of Education, G.S. 115-99, or its power to contract for the erection of the consolidated high school building out of funds available to it for this purpose, G.S. 115-84, and where such funds have been made available by allocation of State funds with the approval of the State Board of Education, the fact that the board of county commissioners had refused to allocate funds for this purpose is immaterial.

5. Schools § 4b: Public Officers § 4b—

A member of a county board of education vacates this office *eo instanti* he accepts the office of mayor of a municipality, since both are public offices under the State within the purview of Art. XIV, sec. 7, of the Constitution of North Carolina, and thereafter he is neither a *de jure* nor a *de facto* member of the board of education.

6. Public Officers § 4b—

A postmaster holds office under the United States and therefore his election or appointment as a member of a county board of education is ineffective, Art. XIV, sec. 7, of the Constitution of North Carolina, and he is neither a *de jure* nor a *de facto* member of the county board of education.

7. Schools § 4b—

A county board of education, sued in its corporate capacity with the sole joinder of the county superintendent of public schools as clerk to the board may not be restrained from doing a lawful act on the ground that

two of its members were mere usurpers and that therefore it was totally incapacitated to perform any official act, the remedy being by suit against the usurpers to restrain them from doing an unlawful act, or by direct proceedings in the nature of *quo warranto* to oust the usurpers, G.S. 1-515 to G.S. 1-530.

APPEAL by defendants from *Pless, J.*, at Chambers in Marion, North Carolina, 29 December, 1951, in action pending in the Superior Court of YANCEY.

Suit by taxpayers of county to restrain county board of education from making a contract for the construction of a school building to house a consolidated high school.

These are the facts:

1. There are five existing high schools for children of the white race in the Yancey County Administrative Unit. They are the Bald Creek High School, the Bee Log High School, the Burnsville High School, the Clearmont High School, and the Micaville High School.

2. Prior to 8 November, 1949, a State Review Panel studied the public school system of Yancey County, and recommended that these five high schools be consolidated into one high school to be operated at Burnsville just as soon as ample facilities for housing the consolidated high school were available at that place.

3. On 8 November, 1949, the Board of Education of Yancey County, which then consisted of three *de jure* members, namely, Fred Ayers, P. M. Hensley, and Jobe Thomas, adjudged that the educational interests of Yancey County would be better served by the consolidation of schools proposed by the State Review Panel, and took corporate action consolidating the high schools mentioned in Paragraph 1 into one county-wide high school for children of the white race, and authorizing the construction of a new school building at Burnsville to house the consolidated high school whenever funds were available for that purpose.

4. On 1 December, 1949, the State Board of Education approved the consolidation made by the Board of Education of Yancey County as set out in the preceding paragraph.

5. Subsequent to these events, the Board of Education of Yancey County requested the Board of Commissioners of Yancey County to provide funds for the construction of a new school building at Burnsville to house the consolidated high school, and the Board of Commissioners refused to furnish such funds for the avowed reason that the consolidation of the five high schools "would not be for the best educational interests of the high school students of Yancey County."

6. Thereafter the State Superintendent of Public Instruction approved plans for a new school building at Burnsville to house the consolidated high school, and the State Board of Education consented for the Board

of Education of Yancey County to use $157,755.74 out of the moneys allocated to Yancey County from the State "School Plant Construction, Improvement, and Repair Fund" for constructing such new school building in accordance with such plans.

7. Pursuant to Chapter 256 of the 1951 Session Laws of North Carolina, Jobe Thomas, Mark W. Bennett, and Clyde Ayers qualified as members of the Board of Education of Yancey County "for a period of two years beginning with the first Monday in April, 1951." On 5 July, 1951, Mark W. Bennett accepted the office of Mayor of the Town of Burnsville, and ever since has undertaken to discharge the duties of the mayoralty as well as those of a member of the Board of Education of Yancey County. On 31 August, 1951, Clyde Ayers resigned as a member of the Board of Education of Yancey County, and was succeeded by R. A. Radford, who was elected a member in his stead by the Democratic Executive Committee of Yancey County in conformity to the provisions of G.S. 115-42. Radford was serving as United States postmaster at Cane River, North Carolina, when he accepted membership upon the Board of Education of Yancey County, and ever since that time he has undertaken to discharge the duties of the postmastership as well as those of a member of the Board of Education of Yancey County.

8. On 1 October, 1951, Jobe Thomas, Mark W. Bennett, and R. A. Radford, professing to act as the Board of Education of Yancey County, declared their purpose to proceed with the immediate construction of the new consolidated high school building at Burnsville in accordance with the plans approved by the State Superintendent of Public Instruction and at a cost not exceeding the $157,755.74 mentioned in paragraph 6. In obedience to this declaration, Frank W. Howell, the Superintendent of Public Instruction of Yancey County, made public advertisement inviting contractors to submit bids "until 2:00 P.M. December 14, 1951, . . . for the construction of a new consolidated high school building at Burnsville" conforming to the approved plans.

9. On 13 December, 1951, the plaintiffs, who are taxpaying citizens and residents of Yancey County, brought this action against the defendants, the Board of Education of Yancey County and Frank W. Howell, the Superintendent of Public Instruction of Yancey County. The complaint is summarized in the opinion. The plaintiffs procured a temporary order on their *ex parte* application restraining the defendants from making any contract for the construction of the proposed consolidated high school building at Burnsville pending further orders of the court. On the return day, *i.e.*, 29 December, 1951, Judge Pless heard the evidence of the parties, made findings of fact accordant with those stated above, and entered an order continuing the temporary restraining order in force until the final hearing. The defendants excepted and appealed, assigning the continuance of the restraining order as error.

Bill Atkins and R. W. Wilson for plaintiffs, appellees.

C. P. Randolph and W. E. Anglin for defendants, appellants.

ERVIN, J. The legal questions arising on this appeal have been unduly complicated and obscured by the manner in which the action has been brought and developed. The issues involved appear in simpler guise if the judicial gaze is focused on certain significant matters at the outset.

The plaintiffs seek the aid of equity. They ask an injunction requiring the defendants to refrain from doing a particular thing. There are only two defendants. They are the Board of Education of Yancey County, and Frank W. Howell, the Superintendent of Public Instruction of Yancey County. The Board of Education of Yancey County is a body corporate which acts through three members. G.S. 115-37; G.S. 115-45; 1951 Session Laws, Ch. 256, Sec. 1. Howell is not a member of the board, and is not in control of the act sought to be enjoined. He is simply secretary of the board. G.S. 115-105.

Since the county board of education is a corporate body, it necessarily has a legal existence separate and apart from its members. *Crabtree v. Board of Education,* 199 N.C. 645, 155 S.E. 550. But the board can exercise the powers conferred upon it by law only at a regular or special meeting attended by at least a quorum of its *de jure* or *de facto* members. *Kistler v. Board of Education,* 233 N.C. 400, 64 S.E. 2d 403; *Crabtree v. Board of Education, supra.* The statute creating the county board of education does not specify in terms the number of members competent to transact its corporate business in the absence of other members. As a consequence, the common law rule that a majority of the whole membership is necessary to constitute a quorum applies. *Hill v. Ponder,* 221 N.C. 58, 19 S.E. 2d 5. The county board of education becomes incapable of performing its corporate functions whenever vacancies reduce its membership below the number required to constitute a quorum. 56 C.J., Schools and School Districts, section 209. In order to obviate the legal paralysis incident to such an eventuality and to maintain the county board of education at its full membership, the Legislature has expressly authorized county executive committees of political parties and the State Board of Education to fill vacancies occurring in the membership of the board. G.S. 115-42.

The complaint in the instant case endeavors to state two grounds for injunctive relief.

It asserts initially that the plaintiffs are taxpaying citizens and residents of Yancey County; that they sue on behalf of all taxpayers of Yancey County; that the Board of Education of Yancey County is about to make a contract for the construction of a consolidated high school building at Burnsville; that the Board of Commissioners of Yancey

County has refused to provide funds for the construction of the building, and by reason thereof no public money whatever is available for its erection; and that the proposed contract, if made, will offend G.S. 115-84, which provides, in essence, that a county board of education has no authority to contract for the construction of a new schoolhouse costing more than the "money . . . available for its erection." It prays an injunction restraining the county board of education and the county superintendent of public instruction from making the proposed contract for the construction of the consolidated high school.

Manifestly these allegations are designed by the plaintiffs to state facts entitling them as taxpayers of Yancey County to maintain an action to enjoin the county board of education as a corporate body from entering into an unauthorized and illegal contract for a public improvement. *Sessions v. Columbus County,* 214 N.C. 634, 200 S.E. 418; *Palmer v. Haywood County,* 212 N.C. 284, 193 S.E. 668; 52 Am. Jur., Taxpayers' Actions, section 17; 43 C.J.S., Injunction, section 112.

When the plaintiffs are put to their proof, it appears that their *allegata* and their *probata,* like Maud Muller's verbs and nouns, do not agree.

The evidence and the findings establish these propositions: That the county board of education consolidated the five existing high schools into one county-wide high school with the approval of the State Board of Education in conformity with G.S. 115-99. That the plans for the new school building to house the consolidated high school have been approved by the State Superintendent of Public Instruction. That public moneys are available for the erection of the new consolidated high school building in accordance with those plans. That such moneys were not furnished by the county commissioners or the taxpayers of Yancey County, but, on the contrary, they were allocated to the county board of education from a State fund known as the "School Plant Construction, Improvement and Repair Fund," which was appropriated by chapters 1020, 1249, and 1295 of the 1949 Session Laws of North Carolina for expenditure and disbursement "under the direction and supervision of the State Board of Education for the construction, improvement, and repair of school plant facilities." That the State Board of Education has consented for the county board of education to use the moneys thus allocated to it for the erection of the new consolidated high school building.

These things being true, the county board of education is vested with plenary power by G.S. 115-84 to contract for the erection of the consolidated high school building. Consequently the plaintiffs have failed to prove the first ground invoked by them as a basis for injunctive relief. Equity will not enjoin a county board of education from exercising its governmental functions in a manner authorized by a valid law. *Kistler v. Board of Education, supra; Messer v. Smathers,* 213 N.C. 183, 195

S.E. 376; *Clark v. McQueen,* 195 N.C. 714, 143 S.E. 528; *McInnish v. Board of Education,* 187 N.C. 494, 122 S.E. 182; *Davenport v. Board of Education,* 183 N.C. 570, 112 S.E. 246; *Pemberton v. Board of Education,* 172 N.C. 552, 90 S.E. 578; *Newton v. School Committee,* 158 N.C. 186, 73 S.E. 886; *Pickler v. Board of Education,* 149 N.C. 221, 62 S.E. 902; *Venable v. School Committee,* 149 N.C. 120, 62 S.E. 902; *Smith v. School Trustees,* 141 N.C. 143, 53 S.E. 524, 8 Ann. Cas. 529.

We deem it advisable to note at this juncture that the plaintiffs have not shown any interest entitling them to maintain an action to enjoin the expenditure of State moneys. They neither allege nor prove that they are taxpayers of the State. *Branch v. Board of Education,* 233 N.C. 623, 65 S.E. 2d 124; *Hughes v. Teaster,* 203 N.C. 651, 166 S.E. 745. We ignore this objection, however, in reaching our conclusion on the present phase of the case because it could undoubtedly be removed by additional allegation and evidence.

The complaint alleges these things as a second ground for the injunctive relief sought:

That Jobe Thomas, Mark W. Bennett, and R. A. Radford are undertaking to exercise the functions of members of the county board of education, and to bind the board by the proposed contract, whose execution the plaintiffs seek to enjoin. That on the first Monday in April, 1951, Bennett duly qualified as a member of the county board of education for a term of two years; that on 5 July, 1951, he accepted the post of mayor of the Town of Burnsville without relinquishing his membership on the county board of education; and that ever since he has been discharging the duties of the mayoralty as well as those of a member of the county board of education. That on or about 31 August, 1951, Radford, who was then United States Postmaster at Cane River, North Carolina, was appointed a member of the county board of education for an unexpired term lasting until the next regular session of the General Assembly; that he forthwith undertook to qualify as a member of the county board of education for such unexpired term without surrendering the postmastership; and that ever since he has been discharging the duties of a member of the county board of education as well as those of postmaster.

The evidence and the findings establish the truth of these allegations.

The plaintiffs and the defendants take different legal positions on this aspect of the case. The plaintiffs assert that Bennett and Radford are mere usurpers in law, and by reason thereof are not members of the county board of education at all or for any purpose. *S. v. Shuford,* 128 N.C. 588, 38 S.E. 808; *Van Amringe v. Taylor,* 103 N.C. 196, 12 S.E. 1005, 23 Am. S. R. 51, 12 L.R.A. 202; *Norfleet v. Staton,* 73 N.C. 546. The defendants insist that they are at least *de facto* members of the county board of education, and in consequence cannot be prevented by

injunction from exercising the functions of such offices pending direct proceedings in the nature of *quo warranto* to determine their titles thereto. *In re Wingler,* 231 N.C. 560, 58 S.E. 2d 372; *Crabtree v. Board of Education, supra; Rogers v. Powell,* 174 N.C. 388, 93 S.E. 917; *Patterson v. Hubbs,* 65 N.C. 119.

A member of the county board of education holds a public office under the State. *Greene v. Owen,* 125 N.C. 212, 34 S.E. 424; *Barnhill v. Thompson,* 122 N.C. 493, 29 S.E. 720. The like observation applies to the mayor of a municipality, for he is the official head of a political subdivision of the State and performs duties under State laws. *S. v. Thomas,* 141 N.C. 791, 53 S.E. 522. A postmaster holds an office under the United States. *McGregor v. Balch,* 14 Vt. 428, 39 Am. Dec. 231. It appears, therefore, that recourse must be had to the rules of law governing double office holding for the determination of the relationships which Bennett and Radford sustain to the county board of education.

The holding of more than one office is expressly prohibited by Article XIV, section 7, of the North Carolina Constitution, which makes this declaration: "No person who shall hold any office or place of trust or profit under the United States, or any department thereof, or under this State, or under any other state or government, shall hold or exercise any other office or place of trust or profit under the authority of this State, or be eligible to a seat in either house of the General Assembly: Provided, that nothing herein contained shall extend to officers in the militia, justices of the peace, commissioners of public charities, or commissioners for special purposes."

This constitutional inhibition against double office holding is enforced in alternative ways, depending on whether the first office is a state or a federal office.

1. Where one holding a first office under the State violates Article XIV, section 7, of the North Carolina Constitution by accepting a second office under either the State or the United States without surrendering the first office, he automatically and instantly vacates the first office, and he does not thereafter act as either a *de jure* or a *de facto* officer in performing functions of the first office because he has neither right nor color of right to it. *S. v. Long,* 186 N.C. 516, 120 S.E. 87; *Whitehead v. Pittman,* 165 N.C. 89, 80 S.E. 976. See, also, in this connection: *In re Advisory Opinion in re Phillips,* 226 N.C. 777, 39 S.E. 2d 217; *Hill v. Ponder, supra; In re Barnes,* 212 N.C. 735, 194 S.E. 499; *Harris v. Watson,* 201 N.C. 661, 161 S.E. 215, 79 A.L.R. 441; *S. v. Wood,* 175 N.C. 809, 95 S.E. 1050; *Midgett v. Gray,* 158 N.C. 135, 159 N.C. 445, 74 S.E. 1050; *Barnhill v. Thompson, supra.*

2. Where one holding a first office under the United States violates Article XIV, section 7, of the North Carolina Constitution by accepting

a second office under the State without surrendering the first office, his attempt to qualify for the second office is absolutely void, and he does not act as either a *de jure* or a *de facto* officer in performing functions of the second office because he has neither right nor color of right to it. *State ex rel. Wimberly v. Barham,* 173 La. 488, 137 So. 862, affirming *State ex rel. White v. Mason,* 17 La. App. 504, 133 So. 809, *State ex rel. Wimberly v. Barham,* 17 La. App. 527, 133 So. 812, and *State ex rel. Gray v. Pipes,* 17 La. App. 502, 133 So. 812.

The necessity for the alternative ways of enforcing the constitutional prohibition of dual office holding is revealed by these remarks of the Supreme Court of Indiana: "It is doubtless the general rule that where a man accepts an office under the state, he vacates another held under the same sovereignty . . . There is reason for the rule where the offices emanate from the same government, but none where the offices are created by different governments . . . Where, as here, a man elected to a state office persists in retaining a federal office, actually remains in it, enjoying its emoluments, and discharging its duties, he does not, in legal contemplation, and certainly not in fact, vacate it by entering into an office existing under the law of the State, and for this plain reason: The laws of the State do not operate upon federal offices. Our laws do not extend to offices created by the general government, and no act that an officer acting under our laws can do can vacate an office upon which our laws do not operate." *Foltz v. Kerlin,* 105 Ind. 221, 4 N.E. 439. See, also, 67 C.J.S., Officers, section 23.

Our conclusions do not conflict with the decision in *Wingler's case, supra.* But the general observation in the opinion in that case that one may be "a judge *de facto* . . . although he holds incompatible offices" is too broad, and is modified so as to conform to the views here expressed. The case at bar is distinguishable from *Berry v. Payne,* 219 N.C. 171, 13 S.E. 2d 217, where the plaintiffs were estopped by their conduct from asserting that the occupants of the municipal offices were mere usurpers.

We are aware that our conclusions on the present phase of the controversy are not in harmony with those reached by some courts in other jurisdictions in somewhat similar cases. 100 A.L.R. 1187-1189. We cannot abandon them, however, without disavowing *S. v. Long, supra,* and *Whitehead v. Pittman, supra.* Besides, they are calculated to prevent the nullification of the constitutional ban on double office holding.

What has been said impels the adjudication that Bennett and Radford are neither *de jure* nor *de facto* members of the county board of education. They are mere usurpers, and their acts are utterly void, both as to the public and as to individuals. *In re Wingler, supra.*

Notwithstanding this, the judge erred in continuing the restraining order to the final hearing. Undoubtedly an injunction will lie in a prop-

erly constituted case to prevent a waste of public funds by usurpers. But this is not such a case. The plaintiffs have the wrong sow by the ear. They do not sue the usurpers to enjoin them from doing an illegal act. They sue the county board of education to restrain it from doing a lawful act. As ground for the relief prayed by them, they show that vacancies exist in two of the three posts on the board, and that as a result the board is totally incapacitated to do the act which they seek to prevent it from doing.

The law affords a sure and speedy cure for the legal paralysis inflicted upon a county board of education by vacancies which reduce its membership below the number required to constitute a quorum. The vacancies can be filled in the summary manner prescribed by G.S. 115-42. Moreover, usurpers can be removed from public offices by judgments of ouster in direct proceedings in the nature of *quo warranto.* G.S. 1-515 to G.S. 1-530; *Barnhill v. Thompson, supra.*

The order continuing the restraining order to the final hearing is Reversed.

LEO MANGUM, JULIA M. ROWE AND HER HUSBAND CLYDE ROWE, T. G. LATTA AND HIS WIFE MAMIE LATTA, HUGH LATTA AND HIS WIFE ESTHER LATTA, PHILLIPS B. LATTA, PATTIE M. SCARBOROUGH AND HER HUSBAND GEORGE W. SCARBOROUGH, J. K. VAUGHAN, EARL C. VAUGHAN, LOUISE V. GARRARD AND HER HUSBAND ERNEST GARRARD, EMMA K. VAUGHAN, SALLIE VAUGHAN SMITH AND HER HUSBAND W. T. SMITH, AND VIVIAN VAUGHAN v. CHARLES WILSON AND HIS WIFE, LENA WILSON.

(Filed 9 April, 1952.)

1. Wills § 31—

The intent of testator as ascertained from the language of the instrument must be given effect unless contrary to some rule of law or at variance with public policy.

2. Wills § 33a—

A devise of the use, income, rents and profits from property indefinitely will be held a devise in fee simple unless it appear in plain and express words of the instrument that testator intended to convey an estate of less dignity.

3. Same—

A devise to testator's wife for life ". . . remainder to stand as it is all together, and the clear rents to be equally divided among all my five children . . . If my children marry and die leaving children their part shall go to their children. If any of my children die without heirs their part shall return to" testator's bodily heirs, *is held* a devise of the remainder in fee to the children of testator as tenants in common.

4. Wills § 33i—

Where testator's children take the fee in remainder as tenants in common, a provision of the devise that ". . . remainder to stand as it is all together, . . . except they all should agree to sell some part of it," *is held* merely a recognition that it might not be practical or desirable to keep the entire estate intact, but if it be construed as a restraint on alienation it is void, and testator's children can convey the fee simple.

5. Wills § 46—

Deed executed by testator's only surviving child and all of testator's grandchildren, all being *sui juris* and under no disability, and there being no great-grandchildren not represented by a living parent, conveys the fee simple in lands devised to testator's children or their heirs regardless of whether testator's child held a life estate or a defeasible fee, since any heir not a party to the deed would be estopped from claiming any interest in the land by the warranty deed of his ancestor.

APPEAL by defendants from *Crisp, Special Judge,* February Term, 1952, of DURHAM.

Controversy without action submitted on an agreed statement of facts.

The plaintiffs and the defendants entered into a written contract for the sale and purchase of certain real property owned by the plaintiffs, situate in the City of Durham, for a consideration of $60,000. The plaintiffs duly executed and tendered to the defendants a deed therefor, sufficient in form to vest the defendants with a fee simple title thereto, and demanded payment in accordance with the terms of the contract, but the defendants declined to accept the deed and pay the purchase price, contending that the plaintiffs' title is defective.

The facts agreed upon, which are necessary to a disposition of this appeal, are as follows:

1. That Priestley Jackson Mangum died on 9 May, 1905, leaving a last will and testament which was duly admitted to probate in the office of the Clerk of the Superior Court of Durham County, North Carolina, and recorded in Book of Wills B, at page 151.

2. That at the time of the death of Priestley Jackson Mangum, he was seized and possessed of certain real estate in the City of Durham, including that certain tract or parcel of land located on the south side of East Main Street, designated as 104 East Main Street, and fully described in deed to P. J. Mangum recorded in Deed Book 2, at page 577, in the office of the Register of Deeds for Durham County.

3. That the said Priestley Jackson Mangum left him surviving his widow, Sallie Anne Mangum, and all of his children, viz.: Hugh Mangum, Leo Mangum, Pattie Mangum Latta (Mrs. C. L. Latta), Lula Mangum, and Sallie Jackson Mangum (Mrs. J. Knox Vaughan).

4. That a strip of land eleven inches in width on the west side of the tract hereinabove referred to, was conveyed to the widow and children

(herein named) of Priestley Jackson Mangum by deed dated 6 July, 1908, to be held "in such manner and upon such conditions as they now hold and take the real estate under the will of P. J. Mangum . . ."

5. That Sallie Anne Mangum, widow of Priestley Jackson Mangum, died without having remarried.

6. That Leo Mangum, a son of the testator, is his only living child, but he has never married and has no children.

7. That Lula Mangum, a daughter of the testator, is now dead, intestate, was never married but legally adopted a niece, Pattie Latta (later Pattie Latta Mangum), and now the wife of George W. Scarborough, and one of the plaintiffs herein; that the question of said Pattie M. Scarborough's right to represent her adopted parent is not here presented inasmuch as her rights have been settled by contract among all the parties plaintiff hereto.

8. Hugh Mangum, a son of the testator, and Anne Mangum, whom he married, are both dead, intestate, and left as their only child Julia E. Mangum, a plaintiff herein, now the wife of Clyde Rowe.

9. That Pattie Mangum, a daughter of the testator, and Charles L. Latta, whom she married, are both now dead, intestate, leaving the following children, each of whom is a plaintiff herein: Thomas Garland Latta, whose wife is Mamie Latta; Hugh Latta, whose wife is Esther Latta; Phillips Brooks Latta (single); Pattie Latta (Mangum) Scarborough, whose husband is George W. Scarborough.

10. That Sallie Jackson Mangum, a daughter of the testator, and John Knox Vaughan, whom she married, are both now dead, intestate, leaving the following children, each of whom is a plaintiff herein: J. K. (Jack) Vaughan (single); Earl C. Vaughan (widower); Louise Vaughan Garrard, whose husband is Ernest W. Garrard; Emma K. (Polly) Vaughan (single); Sallie Vaughan Smith, whose husband is William T. Smith; Lula Vivian Vaughan (single).

11. That the above plaintiffs in this action comprise the sole living child and all of the grandchildren of the testator; that all of the plaintiffs, and the spouse of each who is married, are *sui juris* and more than 21 years of age; that, of the plaintiffs, a number have children who are therefore great-grandchildren of the testator, but there is no great-grandchild of the testator living whose parent of the testator's blood is not also living.

12. That the real estate involved herein is held pursuant to the following item in the will of Priestley Jackson Mangum:

"2nd. My will is that my beloved wife, Sallie Anne Mangum, shall have all my property, both real and personal, during her natural life, and at her death my will is for all my property, both real and personal, to remain as it is until the youngest child, Sallie Jackson Mangum, becomes

twenty-one years of age, and then Lula and Leo Mangum is to have $250.00 each first and remainder to stand as it is all together, and the clear rents to be equally divided among all my five children, except they all should agree to sell some part of it. If my children marry and die leaving children their part shall go to their children. If any of my children die without heirs their part shall return to the Mangum bodily heirs. If my grandchildren die under age their part of my property shall return also to the Mangum bodily heirs."

13. It was agreed and stipulated that this cause might be heard and judgment entered therein upon the pleadings and the agreed statement of facts, and the judgment might be entered in or out of term and in or out of the Tenth Judicial District.

The parties having agreed that the question as to whether plaintiffs can convey a good and indefeasible fee to the property involved is dependent upon a construction of Item Two of the last will and testament of P. J. Mangum, deceased, and the court below being of the opinion that the plaintiffs are authorized and empowered by the provisions of said will to convey to the defendants a good and indefeasible title to the premises in question, entered judgment accordingly and directed the defendants to comply with the terms of their purchase agreement upon delivery to them of the deed heretofore tendered by the plaintiffs.

The defendants appeal, assigning error.

Fuller, Reade, Umstead & Fuller and A. H. Graham, Jr., for defendants, appellants.

W. J. Brogden, Jr., for plaintiffs, appellees.

DENNY, J. It appears from the agreed statement of facts that the plaintiffs, other than Leo Mangum, include all of the grandchildren of P. J. Mangum, the testator, together with the spouse of each grandchild who is married. Each plaintiff is more than 21 years of age and is under no disability. A number of these grandchildren have children who are great-grandchildren of the testator, but no great-grandchild of P. J. Mangum, deceased, is living whose parent of the testator's blood is not also living. Therefore, the appellants concede that the plaintiffs, other than Leo Mangum, are seized in fee simple of an undivided four-fifths interest in the property they have contracted to sell.

The only question for determination is whether Leo Mangum, the sole surviving child of the testator, can convey a good and indefeasible fee simple title to the remaining one-fifth undivided interest in the property. This question necessitates an examination of the provisions of the testator's will in order to ascertain his intent. And his intent should be given effect, unless contrary to some rule of law or at variance with public policy. *Buffaloe v. Blalock,* 232 N.C. 105, 59 S.E. 2d 625, and cited cases.

It appears that the testator assumed that his widow, Sallie Anne Mangum, to whom he gave all his property, both real and personal, during her natural life, would not live until their youngest child had attained the age of 21 years. This interpretation is supported by the language in the will as follows: ". . . at her death (referring to the death of his wife) my will is for all my property, both real and personal, to remain as it is until the youngest child, Sallie Jackson Mangum, becomes twenty-one years of age, and then Lula and Leo Mangum is to have $250.00 each first and the remainder to stand as it is all together, and the clear rents to be equally divided among all my five children, except they all should agree to sell some part of it."

This appeal requires an interpretation of the following portion of the will: ". . . remainder to stand as it is all together, and the clear rents to be equally divided among all my five children, except they all should agree to sell some part of it. If my children marry and die leaving children, their part shall go to their children. If any of my children die without heirs, their part shall return to the Mangum bodily heirs."

Since the enactment of Section 12, Chapter 22 of the Public Laws of 1784 (Potter's Code, Chapter 204, Section 12), now G.S. 31-38, when real estate is devised to any person, the same shall be held and construed to be a devise in fee simple, unless such devise shall, in plain and express words, show, or it shall be plainly intended by the will, or some part thereof, that the testator intended to convey an estate of less dignity. *Lineberger v. Phillips,* 198 N.C. 661, 153 S.E. 118; *Roane v. Robinson,* 189 N.C. 628, 127 S.E. 626; *Barbee v. Thompson,* 194 N.C. 411, 139 S.E. 838; *Patrick v. Morehead,* 85 N.C. 62. "Indeed, it is generally necessary that restraining expressions should be used to confine the gift to the life of the legatee or devisee." *Holt v. Holt,* 114 N.C. 241, 18 S.E. 967; *Lineberger v. Phillips, supra.*

In the case of *Patrick v. Morehead, supra, Ashe, J.,* in speaking for the Court, quoted with approval from the opinion in the New York case of *Jackson v. Robins,* 16 Johnson, 537, as follows: "We may lay it down as an incontrovertible rule that where an estate is given to a person generally or indefinitely, with a power of disposition, it carries a fee, and the only exception to the rule is where the testator gives to the first taker an estate for life only, by certain and express words, and annexes to it a power of disposition." It is also generally held that a devise of the use, income, rents, and profits of property, amounts to a devise of the property itself, and will pass the fee, unless the will shows an intent to pass an estate of less dignity. *Burcham v. Burcham,* 219 N.C. 357, 13 S.E. 2d 615; *Schwren v. Falls,* 170 N.C. 251, 87 S.E. 49; *Perry v. Hackney,* 142 N.C. 368, 55 S.E. 289, 19 Am. Jur., Estates, section 24, page 484.

"A devise generally or indefinitely with power of disposition creates a fee." *Hardee v. Rivers,* 228 N.C. 66, 44 S.E. 2d 476; *Roane v. Robinson, supra; Carroll v. Herring,* 180 N.C. 369, 104 S.E. 892.

Consequently, in view of the rule of construction laid down in G.S. 31-38, and our decisions pursuant thereto, together with the general rule that a devise of the use, income, rents, and profits of property, is tantamount to a devise of the property itself, unless the will shows in plain and express words that the testator intended to convey an estate of less dignity, we hold that P. J. Mangum devised his property to his five children to be held as tenants in common in fee simple. *Taylor v. Taylor,* 228 N.C. 275, 45 S.E. 2d 368; *Croom v. Cornelius,* 219 N.C. 761, 14 S.E. 2d 799; *Hambright v. Carroll,* 204 N.C. 496, 168 S.E. 817. We do not think the expression "except they all should agree to sell some part of it," was intended to be a restriction upon the power of alienation or an indication of the testator's intent to vest in his children less than a fee simple estate. Having stated in his will, ". . . remainder to stand as it is all together, and the clear rents to be equally divided among all my five children," we think the reference to a sale of some part of his estate was merely a recognition of the fact that it might not be practical or desirable for his children to keep the entire estate intact and retain title to all of it. If, however, he intended it to be a limitation upon the right of alienation, or partition, we hold it to be void. *Johnson v. Gaines,* 230 N.C. 653, 55 S.E. 2d 191; *Croom v. Cornelius, supra; Barco v. Owens,* 212 N.C. 30, 192 S.E. 862; *Williams v. Sealy,* 201 N.C. 372, 160 S.E. 452; *Combs v. Paul,* 191 N.C. 789, 133 S.E. 93; *Carroll v. Herring, supra; Schwren v. Falls, supra; Wool v. Fleetwood,* 136 N.C. 460, 48 S.E. 785, 67 L.R.A. 444; *Latimer v. Waddell,* 119 N.C. 370, 26 S.E. 122, 3 L.R.A. (N.S.) 668.

Furthermore, it would make no difference in the instant case were we to hold that Leo Mangum has only a life estate with power to sell or a defeasible fee with such power (*Mabry v. Brown,* 162 N.C. 217, 78 S.E. 78), since in either event should he die leaving issue, such issue would be estopped from claiming any interest in this particular property by the warranty in his deed to these defendants. *Buffaloe v. Blalock, supra; Croom v. Cornelius, supra; Thames v. Goode,* 217 N.C. 639, 9 S.E. 2d 485; *Insurance Co. v. Sandridge,* 216 N.C. 766, 6 S.E. 2d 876; *Woody v. Cates,* 213 N.C. 792, 197 S.E. 561; *Williams v. R. R.,* 200 N.C. 771, 158 S.E. 473. Likewise, since all the Mangum bodily heirs who would hold a contingent interest in Leo Mangum's one-fifth undivided interest, in his father's estate, under such construction, are parties to this proceeding and have executed a deed to the premises involved, should Leo Mangum die without leaving issue, they, as well as those claiming under them, would be estopped by the warranty in their deed from claiming any

interest in the premises conveyed to the defendants. *Buffaloe v. Blalock, supra; Croom v. Cornelius, supra; Thames v. Goode, supra; Woody v. Cates, supra; Grace v. Johnson,* 192 N.C. 734, 135 S.E. 849; *James v. Griffin,* 192 N.C. 285, 134 S.E. 849; *Williams v. Biggs,* 176 N.C. 48, 96 S.E. 643; *Hobgood v. Hobgood,* 169 N.C. 485, 86 S.E. 189.

The judgment of the court below is

Affirmed.

IREDELL COUNTY BOARD OF EDUCATION v. ZEB V. K. DICKSON.

(Filed 9 April, 1952.)

1. Statutes § 5a—

Matters necessarily implied by the language of a statute must be given effect to the same extent as matters specifically expressed.

2. Schools § 8a—

The re-election of a teacher or principal must be performed in the same manner in which he was originally elected and therefore re-election by the school committee of a district is not effective until approved by the county superintendent of schools and the county board of education. G.S. 115-112, G.S. 115-354.

3. Same—

Dismissal of a teacher or principal by a county administrative unit is not effective until approved by the county board of education and the principal or teacher notified by registered mail of his dismissal or rejection, thus approved, prior to the close of the current school term, it being required that all acts essential to the validity of the dismissal or rejection be fully performed prior to the end of the school year. G.S. 115-359.

4. Schools § 4b—

A county board of education can exercise its powers only in a regular or special meeting attended by a quorum of its members, and cannot perform its functions through its members acting individually, informally, and separately.

5. Same—

There being no statutory provision to the contrary, a majority of the members of a board of education constitutes a quorum. G.S. 115-37.

6. Schools § 8a—

A letter written by the county superintendent of schools "after consultation with the chairman of the county board of education" advising a principal of the termination of his employment is not approval of the dismissal by the county board of education, since the board may act only in a duly constituted meeting. Resolution of the board passed after the end of the school year, "supporting" any action of the local unit in regard to electing a principal for the particular school, is not retroactive approval of the

attempted dismissal by the local unit and in no event could be effective since not passed prior to the close of the school term.

7. Same—

The administrative unit undertook to re-elect a principal for the ensuing year and later undertook to dismiss or reject him. Neither action was approved by the county board of education prior to the end of the school term. *Held:* Neither the attempted re-election nor the attempted dismissal is effective, and therefore the principal's original contract automatically continued in force for the ensuing school year.

APPEAL by plaintiff from *Sink, J.*, and a jury, at November Term, 1951, of IREDELL.

Summary proceeding in ejectment tried *de novo* in the Superior Court on the appeal of the defendant from the judgment of the justice of the peace.

The plaintiff, the Board of Education of Iredell County, presented the following evidence on the trial in the Superior Court:

1. The Central School District is located in the Iredell County Administrative Unit.

2. On 21 June, 1950, the School Committee of the Central School District, whose action was forthwith approved by the plaintiff and the county superintendent of schools, elected the defendant, Zeb V. K. Dickson, principal of the Central School for the following school year. The defendant accepted the employment, executed a written contract agreeably to it on forms furnished by the State Superintendent of Public Instruction, and actually served as principal of the Central School during the ensuing school term, which ended 18 May, 1951.

3. When the defendant began his service at the Central School, the plaintiff leased to him a nearby dwelling for a term coextensive with his employment as principal of the Central School. The defendant forthwith moved into the dwelling, and has continued in its actual physical possession ever since.

4. On 10 April, 1951, the School Committee of the Central School District met and "reelected (the defendant) as principal for the ensuing year." The committee immediately notified the defendant of its action, and the defendant straightway advised the committee that he accepted the extension of his employment. Neither the plaintiff nor the county superintendent of schools was ever informed of the re-election of the defendant by the district committee, or ever took any action in respect to it.

5. On 8 May, 1951, the School Committee of the Central School met, and passed motions "to rescind (its) action on the re-election" of the defendant and to terminate the defendant's "contract as . . . principal of Central School . . . at the end of the 1950 and 1951 school year."

6. The School Committee of the Central School gave the county superintendent of schools oral notice of its passage of the motion to terminate the defendant's contract as principal at the end of the school year. Two days prior to the close of the school term at Central School, to wit, on 16 May, 1951, the county superintendent of schools mailed a registered letter to the defendant, advising him that his contract as principal of Central School was to end "at the close of this school year." He did this "after consultation with the chairman of the county board of education."

7. On 11 June, 1951, the School Committee of the Central School District mailed the defendant a letter, notifying him to vacate the dwelling occupied by him on or before 15 July, 1951. The defendant refused to quit the premises.

8. On 23 July, 1951, the members of the county board of education met and "voted unanimously to go on record supporting the Central School Committee in whatever action they take in electing a principal for the Central School."

9. On 2 August, 1951, the plaintiff brought this summary proceeding in ejectment against the defendant to recover possession of the dwelling.

When the plaintiff rested its case, the trial judge allowed the motion of the defendant for a compulsory nonsuit and entered judgment accordingly. The plaintiff excepted and appealed, assigning the dismissal of the proceeding as error.

Scott & Collier, Z. V. Turlington, and M. L. Nash for plaintiff, appellant.

Burke & Burke and J. G. Lewis for defendant, appellee.

ERVIN, J. The defendant was elected principal of Central School for the school year beginning in 1950 and ending in 1951 in strict conformity to the statute now recompiled as G.S. 115-354. The plaintiff leased the dwelling to him for a term coextensive with his employment. Consequently the propriety of the compulsory nonsuit cannot be controverted unless the plaintiff's evidence shows that the employment of the defendant as principal of Central School came to an end prior to the institution of this proceeding in summary ejectment.

The answer to the problem presented by the appeal must be obtained from the statute cited above and the additional statute now recompiled as G.S. 115-359. No good purpose will be served by setting forth verbatim the somewhat awkward language in which these enactments are couched. Their meanings are to be found in what they necessarily imply as much as in what they specifically express. 50 Am. Jur., Statutes, section 242.

G.S. 115-354 provides, in substance, that where the school committee of a district in a county administrative unit elects a person to serve as

principal or teacher of a school of the district with the approval of both the county superintendent of schools and the county board of education and the principal or teacher so elected executes a written contract covering his employment upon official forms, the contract of employment automatically continues in force from year to year until one or the other of these alternative events occurs: (1) The principal or teacher is dismissed or rejected in the manner prescribed by G.S. 115-359; or (2) the principal or teacher is affirmatively re-elected to serve during the following school year, and fails to give notice to the county superintendent of schools of his acceptance of the renewed employment within ten days after notice of his re-election. *Davis v. Moseley,* 230 N.C. 645, 55 S.E. 2d 329; *Kirby v. Board of Education,* 230 N.C. 619, 55 S.E. 2d 322.

Although G.S. 115-354 does not undertake to specify in terms how a principal or a teacher is to be re-elected, it does imply that he is to be re-elected in the same manner in which he was originally elected. This is so for the very simple reason that one is re-elected when he is elected again or anew. G.S. 115-354 explicitly declares that the school committee of a district in a county administrative unit shall elect the principals and teachers for the schools of the district, "subject to the approval of the county superintendent of schools and the county board of education." Under this statute and G.S. 115-112, the election of a principal or teacher by the school committee of a district has no validity whatever until such election has been approved by both the county superintendent of schools and the county board of education. 56 C.J., Schools and School Districts, section 319.

When G.S. 115-359 is read aright, it provides these things by express declaration or necessary implication: The school committee of a district in a county administrative unit has power to dismiss or reject a principal or teacher of a school of the district as of the end of the current school year, but such dismissal or rejection is subject to the approval or disapproval of the county board of education and has no validity whatever until it has been approved by the county board of education. And even though the county board of education approves the action of the district school committee in dismissing or rejecting a principal or teacher as of the end of the current school year, the dismissal or rejection does not become effective unless the county superintendent of schools notifies the principal or teacher by registered mail of his dismissal or rejection prior to the close of the current school term.

Where a power is entrusted to a board, such as a county board of education, composed of different individuals, the board can exercise such power only in a regular or special meeting attended by at least a quorum of its members. It cannot perform its functions through its members acting individually, informally, and separately. *Bath v. Norman,* 226 N.C. 502,

39 S.E. 2d 363; *Bowles v. Graded Schools,* 211 N.C. 36, 188 S.E. 615; *O'Neal v. Wake County,* 196 N.C. 184, 145 S.E. 28; *London v. Comrs.,* 193 N.C. 100, 136 S.E. 356; *Turner v. Wellford Special Consol. School Dist. of Chicot County,* 192 Ark. 295, 91 S.W. 2d 285; *Landers v. Board of Education of Town of Hot Springs,* 45 N.M. 446, 116 P. 2d 690; *Ward v. Board of Education,* 80 W. Va. 541, 92 S.E. 741. Inasmuch as the statute creating county boards of education does not fix a different number, a majority of the members of a particular county board of education constitutes a quorum and can exercise its powers in meeting assembled. G.S. 115-37; *Hill v. Ponder,* 221 N.C. 58, 19 S.E. 2d 5; *S. v. Woodside,* 30 N.C. 104; *Decker v. School Dist., No. 2,* 101 Mo. App. 115, 74 S.W. 390.

The task of applying these rules to the case at bar must now be performed.

The plaintiff's evidence does not suffice to show that the defendant was dismissed or rejected in the manner prescribed by G.S. 115-359. Indeed, it indicates the contrary. To be sure, the district school committee undertook to dismiss or reject the defendant as of the end of the 1950-1951 school year. The action of the district school committee was without validity in law, however, because it was not approved by the county board of education in meeting assembled at any time before the close of the school term. For this reason, the contract employing the defendant to serve as principal of Central School was not terminated by the act of the county superintendent of schools in mailing the registered letter, even though such act may have been done after consultation with the chairman of the board of education acting individually and informally.

In reaching this conclusion, we have not overlooked the resolution passed by the county board of education in meeting assembled on 23 July, 1951, "supporting the Central School Committee in whatever action they take in electing a principal for the Central School." When it adopted this resolution, the county board of education undertook to give the district school committee *carte blanche* in the premises, and not to confer retroactive approval on the attempted dismissal or rejection of the defendant. The legal standing of the plaintiff would not be bettered a whit, however, if the construction last suggested could be justly placed upon the resolution. This is true because G.S. 115-359 contemplates that all acts essential to the validity of the dismissal or rejection of a principal or teacher as of the end of the school year must be fully performed prior to the close of the school term.

The plaintiff's evidence does not show that the defendant was affirmatively re-elected during the 1950-1951 school year to serve as principal of Central School for the following school year, and that he failed to give notice to the county superintendent of schools of his acceptance of the

renewed employment within ten days after notice of his re-election. Indeed, it discloses that the defendant was not affirmatively re-elected, and that in consequence his original contract automatically continued in force for the school year beginning in 1951 and ending in 1952. To be sure, the district school committee met on 10 April, 1951, and undertook to re-elect the defendant as principal "for the ensuing year." But neither the county superintendent of schools nor the county board of education was ever informed of the re-election of the defendant by the district school committee, or ever took any action with respect to it. Hence, his supposed re-election never acquired any validity in law.

For the reasons given, the judgment of nonsuit is

Affirmed.

EDWARD D. MOORE AND WIFE, FARA LEE MOORE, v. J. W. CLARK, SR., J. W. CLARK, JR., D. C. CLARK, AND A. L. MILLER, TRADING AS CLARK CONSTRUCTION COMPANY (ORIGINAL DEFENDANTS), AND STATE HIGHWAY AND PUBLIC WORKS COMMISSION (ADDITIONAL DEFENDANT).

(Filed 9 April, 1952.)

1. Highways § 8d—

The State Highway and Public Works Commission is an agency of the State and is subject to suit only in the manner prescribed by G.S. 136-19, and in the exercise of its governmental functions in the supervision of construction and maintenance of State and county public roads may not be restrained or sued in tort for trespass. G.S. 136-1, G.S. 136-18, G.S. 136-51.

2. Highways § 8b: Eminent Domain § 6—

The State Highway and Public Works Commission has the power to take private property for public highway purposes under the power of eminent domain. G.S. 136-19.

3. Eminent Domain §§ 14, 21½—

The State Highway and Public Works Commission may condemn property for highway purposes upon the payment of just compensation or may seize property for highway purposes, in which event the owner, in the absence of agreement as to the amount of compensation, may bring a proceeding in condemnation for compensation. G.S. 136-19.

4. Highways § 4c—

A highway contractor cannot be held liable by the owner of land for damages to the land resulting from the construction of a highway in strict compliance with his contract with the State Highway and Public Works Commission, but he may be held liable for damages to the land resulting from negligence in the manner in which he performs the contract. In neither event is the contractor entitled to have the State Highway and Public Works Commission joined as a party defendant, since if the work is done in strict compliance with the contract the owner's sole remedy is

a proceeding for compensation under G.S. 136-19, and if the damages are the result of negligence, the contractor has no right against the State Highway and Public Works Commission for contribution or indemnity.

5. Parties § 10c—

The provisions of G.S. 1-73 do not authorize the court to bring in a party who cannot be held liable by either plaintiff or defendant upon the action as constituted.

6. Same—

A cause of action must stand or fall in accordance with the theory of liability set up in the complaint, and the original defendants are not entitled to the joinder of an additional party defendant upon allegations seeking to set up an entirely new theory of liability in substitution for that alleged in the complaint.

APPEAL by original defendants, J. W. Clark, Sr., J. W. Clark, Jr., D. C. Clark, and A. L. Miller, trading as Clark Construction Company, from *Sharp, Special Judge,* at January Term, 1952, of PITT.

Civil action for tortious injury allegedly done to plaintiffs' farm by original defendants heard on demurrer of the State Highway and Public Works Commission, which was brought in by impleader as a third-party defendant at the instance of the original defendants.

These are the facts in chronological order:

1. The plaintiffs brought this action against the original defendants only.

2. The complaint makes out the case stated in this paragraph. The plaintiffs own a farm on Swift Creek in Pitt County, which was adapted to growing crops and pasturing cattle "prior to the unlawful, wrongful, and tortious acts of the (original) defendants." During 1950, the original defendants, who acted "wrongfully and unlawfully and without permission of plaintiffs and contrary to plaintiffs' express instructions," entered on the plaintiffs' farm; filled up virtually all existing ditches, which were ample to drain all surface waters flowing on the farm; dug new ditches on the farm for the avowed purpose of discharging all surface waters originating on all lands in the neighborhood into Swift Creek; and connected the new ditches with "other drainage systems on lands not belonging to the plaintiffs" and not having any natural drainage onto the plaintiffs' farm. As the inevitable result of these acts, vast quantities of surface waters, which would not have reached the premises of the plaintiffs if the natural drainage conditions had not been disturbed by the original defendants, have been diverted from their wonted course into the new ditches on the plaintiffs' farm, where they have united with the surface waters naturally flowing on the farm and have overflowed and flooded the plaintiffs' fields and pastures, inflicting upon the farm and crops specified damages totaling $4,750.00. The plaintiffs pray for a

recovery of such damages from the original defendants, and for a mandatory injunction "requiring the (original) defendants to reconstruct all of such work to the end" that the plaintiffs' farm may be spared irreparable injury in the future.

3. The original defendants answered, denying the material averments of the complaint and alleging this new matter "by way of affirmative defense": That the original defendants are road and drainage contractors; that as such they were employed by the State Highway and Public Works Commission to do the work mentioned in the complaint as a part of the improvement of certain public highways; that they performed the work in strict conformity with the plans of the State Highway and Public Works Commission and under the direction of its highway engineers; that if the work injured the plaintiffs' farm, such injury constituted in law a taking of plaintiffs' property for public use by the State Highway and Public Works Commission in the exercise of the power of eminent domain vested in it by law, and in consequence liability for the injury rests upon the State Highway and Public Works Commission and not the original defendants; and "that by reason of the matters and things herein alleged, the State Highway and Public Works Commission is a necessary and material party to this action." The original defendants prayed for general relief and an order making the State Highway and Public Works Commission a party defendant.

4. On motion of the original defendants, an order was entered in the cause making the State Highway and Public Works Commission a party defendant and providing for service of process on it.

5. When such process was served, the State Highway and Public Works Commission demurred in writing to both the complaint and the answer on the ground that this is an action to recover damages for a past tort or trespass and to prevent a future tort or trespass, and that the State Highway and Public Works Commission is an unincorporated governmental agency of the State of North Carolina not subject to being sued in such action.

6. Judge Sharp entered a judgment sustaining the demurrer, and the original defendants appealed, assigning such ruling as error.

Albion Dunn for the original defendants, appellants.

R. Brookes Peters, General Counsel for the State Highway and Public Works Commission.

ERVIN, J. These propositions are well settled:

1. The State Highway and Public Works Commission is a State agency or instrumentality, and as such exercises various governmental functions, including that of supervising the construction and maintenance of state

and county public roads. G.S. 136-1, 136-18, and 136-51. In consequence, it is not subject to suit except in the manner provided by statute. G.S. 136-19; *Schloss v. Highway Commission,* 230 N.C. 489, 53 S.E. 2d 517; *Dalton v. Highway Com.,* 223 N.C. 406, 27 S.E. 2d 1. Hence, it cannot be sued for tort (*Pickett v. R. R.,* 200 N.C. 750, 158 S.E. 398; *Carpenter v. R. R.,* 184 N.C. 400, 114 S.E. 693), or trespass, even though the trespass allegedly occurs in the building of a public highway. *McKinney v. Highway Commission,* 192 N.C. 670, 135 S.E. 772; *Davis v. Highway Commission,* 191 N.C. 146, 131 S.E. 387; *Latham v. Highway Commission,* 191 N.C. 141, 131 S.E. 385. Moreover, an action does not lie against it to enjoin the exercise of its governmental powers (*Jennings v. Highway Com.,* 183 N.C. 68, 110 S.E. 583), or to restrain the commission of an apprehended tort. *Schloss v. Highway Commission, supra.*

2. The State Highway and Public Works Commission possesses the sovereign power of eminent domain, and by reason thereof can take private property for public use for highway purposes. G.S. 136-19; *Highway Com. v. Basket,* 212 N.C. 221, 193 S.E. 16. The Commission may do this either by bringing a special proceeding against the owner for the condemnation of the property under G.S. 136-19, or by actually seizing the property and appropriating it to public use. *Jennings v. Highway Com., supra.* When the State Highway and Public Works Commission takes private property for public use for highway purposes, the owner is entitled to receive just compensation from it for the property taken. *Proctor v. Highway Commission,* 230 N.C. 687, 55 S.E. 2d 479; *Lewis v. Highway & Public Works Com.,* 228 N.C. 618, 46 S.E. 2d 705; *Yancey v. Highway Commission,* 222 N.C. 106, 22 S.E. 2d 256; *Reed v. Highway Com.,* 209 N.C. 648, 184 S.E. 513; *Milling Co. v. Highway Commission,* 190 N.C. 692, 130 S.E. 724. If the State Highway and Public Works Commission and the owner are unable to agree upon the compensation justly accruing to the latter from the taking of his property by the former, the owner must seek such compensation in the only mode appointed by law for the purpose, *i.e.,* by a special proceeding in condemnation under G.S. 136-19. *Proctor v. Highway Commission, supra; Schloss v. Highway Commission, supra; Dalton v. Highway Com., supra; McKinney v. Highway Commission, supra; Latham v. Highway Commission, supra.* The owner is at liberty to bring such proceeding against the Commission in case the latter takes his property merely by seizing it and appropriating it to public use for highway purposes. *Proctor v. Highway Commission, supra; McKinney v. Highway Commission, supra.*

3. A contractor who is employed by the State Highway and Public Works Commission to do work incidental to the construction or maintenance of a public highway and who performs such work with proper care and skill cannot be held liable to an owner for damages resulting to prop-

erty from the performance of the work. The injury to the property in such a case constitutes a taking of the property for public use for highway purposes, and the only remedy available to the owner is a special proceeding against the State Highway and Public Works Commission under G.S. 136-19 to recover compensation for the property taken or damaged. *Yearsley v. W. A. Ross Const. Co.,* 309 U.S. 18, 60 S. Ct. 413, 84 L. Ed. 554; *Burt v. Henderson,* 152 Ark. 547, 238 S.W. 626; *Marin Municipal Water Dist. v. Peninsula Paving Co.,* 34 Cal. App. 2d 647, 94 P. 2d 404; *Maezes v. City of Chicago,* 316 Ill. App. 464, 45 N.E. 2d 521; *Moraski v. T. A. Gillespie Co.,* 239 Mass. 44, 131 N.E. 441; *Garrett v. Jones,* 200 Okl. 696, 200 P. 2d 402; *Svrcek v. Hahn* (Tex. Civ. App.), 103 S.W. 2d 840; *Panhandle Const. Co. v. Shireman* (Tex. Civ. App.), 80 S.W. 2d 461. But if the contractor employed by the State Highway and Public Works Commission performs his work in a negligent manner and thereby proximately injures the property of another, he is personally liable to the owner therefor. *Broadhurst v. Blythe Brothers Co.,* 220 N.C. 464, 17 S.E. 2d 646; *Burt v. Henderson, supra; Moraski v. T. A. Gillespie Co., supra.* See, also, in this connection: 63 C.J.S., Municipal Corporations, section 1259 (d).

These things being true, the State Highway and Public Works Commission cannot be required to make recompense in any way in an ordinary civil action for an injury to property, no matter what the source of the injury may be. Consequently, the demurrer was properly sustained.

While the question is not presented by the appeal, we deem it advisable to observe, in closing, that the order making the State Highway and Public Works Commission a party defendant was inadvertently entered notwithstanding the broad provisions of G.S. 1-73 authorizing the court to bring in new parties when a complete determination of a pending action cannot be made without their presence.

If the plaintiffs are to succeed at all, they must do so on the case set up in their complaint. *Suggs v. Braxton,* 227 N.C. 50, 40 S.E. 2d 470; *Simms v. Sampson,* 221 N.C. 379, 20 S.E. 2d 554; *Whichard v. Lipe,* 221 N.C. 53, 19 S.E. 2d 14, 139 A.L.R. 1147; *Rose v. Patterson,* 220 N.C. 60, 16 S.E. 2d 458. That pleading states a cause of action against the original defendants for trespass. The answer pleads matters in justification, *i.e.,* that the defendants acted in behalf of the State Highway and Public Works Commission, which was taking the plaintiffs' property for public use in the lawful exercise of its right of eminent domain. The answer undoubtedly sets forth a valid defense to the cause of action pleaded by the plaintiffs. 63 C.J.S., Trespass, section 166. But it does not disclose any basis for obtaining any affirmative relief against the State Highway and Public Works Commission. The original defendants will not have any right of action over against the State Highway and

Public Works Commission for contribution or indemnity in case judgment is rendered against them for trespassing on the plaintiffs' farm.

The judgment sustaining the demurrer is

Affirmed.

UNIVERSAL C. I. T. CREDIT CORPORATION v. JAMES N. SAUNDERS, A. W. WHEATLEY AND FRED SHAAR, CO-PARTNERS, TRADING AS DOWNTOWN MOTORS.

(Filed 9 April, 1952.)

1. Claim and Delivery § 14½—

A mortgagee seizing a chattel under claim and delivery is required to account to the mortgagor for the value of the property as of the time of seizure. G.S. 1-475.

2. Pleadings § 25—

Ordinarily a party is bound by an allegation of fact contained in his own pleading, unless withdrawn, amended, or otherwise altered.

3. Pleadings § 28: Claim and Delivery § 14½—Defendant is bound by allegations of complaint for purpose of his motion for judgment on the pleadings.

Where the mortgagee in claim and delivery alleges in his complaint and also in his reply, filed some four months after he had obtained possession of the property, that the value of the property was in a certain sum and the debt in a less amount, defendant mortgagor is entitled to recover on the pleadings the difference between the alleged debt and the alleged value of the property, but the mortgagor's motion for judgment on the pleadings is based upon plaintiff's allegations as to the value of the property and the amount of the debt, and precludes him from asserting on his counterclaim that the value of the property was in excess of that alleged in the complaint, or that the debt should be reduced by the amount of alleged usury, G.S. 1-510.

4. Appeal and Error § 37—

Error in the refusal of defendants' motion for judgment on the pleadings invalidates all subsequent proceedings in the trial court.

5. Appeal and Error § 50: Pleadings § 23—

Where the trial court erroneously refuses defendant's motion for judgment on the pleadings, the cause will be remanded, and in the subsequent proceedings defendant may renew his motion, and plaintiff, if so advised, may move to amend, in which event defendant may withdraw his motion for judgment on the pleadings and prosecute his counterclaim.

6. Claim and Delivery § 14½—

Ordinarily the value of the property at the time it is seized in claim and delivery must be determined by the jury.

7. Same—

The amount property brings at a foreclosure sale a considerable time after its seizure in claim and delivery is not conclusive of its value at the time of seizure.

APPEAL by defendant J. N. Saunders from *Sharp, Special Judge,* September Term, 1951, of LEE.

Civil action by holder of conditional sale contract to recover alleged balance due on the purchase price of an automobile. Default having been made in the payment of the first installment due on the contract, and the plaintiff having elected to declare the entire balance immediately due and payable under the accelerating clause, the plaintiff instituted this action against the defendant Saunders on 8 February, 1951, and that day caused the automobile to be seized under writ of claim and delivery.

The defendant Saunders failed to replevy, and at the end of the three-day period the Sheriff delivered the automobile to the plaintiff. G.S. 1-478. The plaintiff advertised and sold the automobile at public outcry on 5 March, 1951, for the sum of $1,763.36.

The plaintiff alleges in the complaint that the amount of the debt due by the defendant Saunders is $1,763.36 and that "the value of the . . . automobile seized is $2,000."

The defendant Saunders filed answer setting up counterclaims against the plaintiff and also against A. W. Wheatley and Fred Shaar, copartners, trading as Downtown Motors (hereinafter referred to as Downtown Motors). The gravamen of the defense and counterclaims is that the Mercury automobile taken by the plaintiff under claim and delivery had a value substantially in excess of the amount due on the conditional sale contract. In substance, Saunders alleges: (1) that the debt of $1,763.36 recited in the contract should be stripped of the carrying charges of $238.36 on the theory of usury; and (2) that the contract should be credited with the further sum of $150 due Saunders by Downtown Motors from the sale of his old Ford which was traded in on the new automobile, thus leaving only $1,375 due by Saunders. He alleges he is entitled to recover of the plaintiff and Downtown Motors approximately $875, representing the alleged difference between the value of the seized automobile and the balance due on the conditional sale contract.

Downtown Motors, without challenging on procedural grounds the action of the Clerk in bringing them into the action, filed answer denying (as did the plaintiff by reply) the material allegations of the counterclaims.

After the jury was impaneled, the defendant Saunders moved for judgment on the plaintiff's complaint for the sum of $236.64, representing the difference between the value of the seized automobile and the debt due, as alleged in the complaint. The motion was denied and Saunders excepted.

Both sides offered evidence, at the conclusion of which the plaintiff and the defendant Downtown Motors each moved for judgment as of nonsuit on the counterclaims. The motions were allowed. The defendant Saunders excepted. Thereupon, on motion of the plaintiff, and over exception of Saunders, judgment was entered by the court, without the intervention of the jury, finding and adjudging that Saunders owed the full sum of $1,763.36 on the conditional sale contract, and that the seized automobile was sold according to law and brought the exact amount of the debt.

From judgment so entered, the defendant Saunders appealed, assigning errors.

J. G. Edwards and George M. McDermott for plaintiff, appellee.
Gavin, Jackson & Gavin for defendant J. N. Saunders, appellant.
Pittman & Staton for defendant Downtown Motors, appellee.

JOHNSON, J. Decision here turns on whether the court below erred in denying the motion of the defendant Saunders for judgment in accord with the allegations of the plaintiff's pleadings.

The automobile having been seized under claim and delivery and delivered to the plaintiff, the plaintiff is required to account to the defendant Saunders for its value as at the time of seizure. G.S. 1-475. *Crump v. Love,* 193 N.C. 464, 137 S.E. 418; *Motor Co. v. Sands,* 186 N.C. 732, 120 S.E. 459; *Randolph v. McGowans,* 174 N.C. 203, 93 S.E. 730; *Gavin v. Matthews,* 152 N.C. 195, 67 S.E. 478; *Griffith v. Richmond,* 126 N.C. 377, 35 S.E. 620.

In the complaint plaintiff alleges that the sum of $1,763.36 is due by the defendant Saunders on the conditional sale contract. It is further alleged in the complaint (and also in the affidavit in claim and delivery and in the plaintiff's replevin bond) that the automobile is of the value of $2,000. Also, the plaintiff in its reply reiterates the allegation that the automobile is of the value of $2,000. The reply was filed some four months after the plaintiff obtained possession of the automobile under claim and delivery.

Under the Code system of pleading which obtains in this jurisdiction, a case is to be tried upon the issues of fact which arise upon the pleadings. Every material fact alleged on one side and denied on the other constitutes an issue to be established by sufficient evidence; whereas every material fact alleged on one side and not controverted or admitted on the other side is taken to be true. G.S. 1-159; *Bonham v. Craig,* 80 N.C. 224; *Cook v. Guirkin,* 119 N.C. 13, 25 S.E. 715. This well-established rule dispenses with the necessity of proving matters which, in the absence of denial, the law deems admitted.

And in searching the pleadings to determine the material facts which are controverted and those which are taken as true, the rule is that each party is bound by his pleading, and unless withdrawn, amended, or otherwise altered, the allegations contained in a pleading ordinarily are conclusive as against the pleader. *Suggs v. Braxton,* 227 N.C. 50, 40 S.E. 2d 470; *Whichard v. Lipe,* 221 N.C. 53, 19 S.E. 2d 14; 71 C.J.S., Pleading, Sec. 59.

Under application of the foregoing principles, it would seem that Saunders should have been permitted to terminate the litigation with the plaintiff on the basis of the allegations set out in the complaint.

However, Saunders was not entitled, as suggested in his brief, to judgment on the plaintiff's complaint and also to assert the rest of his counterclaim against the plaintiff by invoking the provisions of G.S. 1-510. This statute may not be invoked where, as here, its application would give sanction to piecemeal recoveries which would be essentially inconsistent. On this record judgment in conformity with the plaintiff's allegations would fix the value of the automobile at $2,000. This may not be reconciled with defendant Saunders' allegation of substantially greater value. In like manner, judgment in accord with the plaintiff's allegations, as sought by Saunders, would fix the amount of his debt at the sum of $1,763.36, and this may not be harmonized with the allegations of the counterclaim which would reduce the debt to $1,525 by striking out as usurious the carrying charges of $238.36.

In any event, it does not appear on the record that the motion of Saunders was conditioned upon any such attempted reservation of right to prosecute further the counterclaim against the plaintiff. The record indicates that after the jury was impaneled the defendant Saunders "moved for judgment on the pleadings for the sum of $236.64 as the difference between the value of (the) property as alleged and the debt as alleged." It thus appears that Saunders, in so moving for judgment, was offering, in effect, to withdraw his answer and counterclaim as against the plaintiff and abide settlement of the case accordant with the allegations of the complaint.

True, the plaintiff may have made a counter motion for leave to amend the complaint in respect to the alleged value of the automobile (G.S. 1-163; *Perkins v. Langdon,* 233 N.C. 240, 63 S.E. 2d 565), and if leave to amend had been granted, then, of course, Saunders might have withdrawn his motion. However, in the absence of a motion to amend, it must be presumed that the plaintiff stood on its pleadings as originally filed.

Therefore, on the record as presented, Saunders was entitled to have the litigation terminated, as between him and the plaintiff, on the basis of the plaintiff's allegations. The trial court erred in overruling Saunders' motion. This error invalidated all subsequent proceedings in the

court below, and it is so ordered. The case seems to have been tried on a misapplication of the pertinent principles of law. It will be remanded to the trial court for another hearing. *Coley v. Dalrymple,* 225 N.C. 67, 33 S.E. 2d 477. This will afford the defendant Saunders an opportunity to renew his motion for judgment on the pleadings. Likewise, the plaintiff, if so advised, may move to amend.

Decision here reached dispenses with detailed discussion of the remaining exceptive assignments of error. However, a perusal of the record reflects fatal lack of supporting merit for the other exceptions brought forward by the defendant Saunders, except those which challenge the novel procedure of fixing the value of seized property and disposing of a claim and delivery lawsuit without the intervention of a jury. See *Crump v. Love, supra; Gavin v. Matthews, supra.* Besides, proof of the amount the seized property brought at foreclosure sale a considerable time after seizure may not be treated as conclusive on the issue of value at the time of seizure. 32 C.J.S., Evidence, Sec. 1041. Also, on the question of lifting the burden of proof and taking from the jury an issue of fact, see *McCracken v. Clark, ante,* 186, and compare *Commercial Solvents v. Johnson, ante,* 237.

New trial.

MAE WILSON, MINNIE WILSON AND RENA WILSON v. G. W. CHANDLER.

(Filed 9 April, 1952.)

1. Trespass to Try Title § 3: Adverse Possession § 18—

Where defendant, in an action for trespass, pleads adverse possession of a tract of land, but the allegations of the boundaries of such tract do not cover the land in dispute, defendant is not entitled to introduce evidence of adverse possession of the land in dispute, since such evidence is not predicated upon allegation.

2. Pleadings § 25—

The issues arise upon the pleadings, and if a material fact alleged in the complaint is not denied by the answer, such allegation, for the purpose of the action, is taken as true and no issue arises therefrom. G.S. 1-135, G.S. 1-159.

3. Pleadings § 24c—

Proof without allegation is as ineffective as allegation without proof, and evidence which is not predicated upon allegation is irrelevant.

APPEAL by defendant from *Bobbitt, J.,* and a jury, at October Term, 1951, of YANCEY.

Civil action to recover damages for alleged trespass on land and wrongful cutting and removal of timber.

These issues were submitted to the jury and answered as indicated:

"Did the defendant trespass upon the land of the plaintiffs and wrongfully cut and remove timber therefrom, as alleged in the complaint? Answer: 'Yes.'

"What damages, if any, are the plaintiffs entitled to recover of the defendant? Answer: '$150.00.' "

From judgment entered upon the verdict, the defendant appealed, assigning errors.

R. W. Wilson, Bill Atkins, and W. E. Anglin for plaintiffs, appellees.

George A. Shuford, Charles Hutchins, and Fouts & Watson for defendant, appellant.

JOHNSON, J. The trial court excluded the defendant's proffered testimony by which he sought to establish title to the *locus in quo* by adverse possession. The exclusion of this testimony forms the basis of the defendant's chief assignments of error.

The proffered testimony appears to have been excluded on the theory that the pleadings laid no foundation for its reception. The exceptions thus put to test the sufficiency of the defendant's answer.

It is alleged in paragraph 2 of the complaint: "That the plaintiffs are the owners in fee simple and in possession of" certain described land.

In paragraph 2 of the answer it is stated: "In answer to paragraph 2 this defendant does not know the exact way that the plaintiffs derain their title, but it is denied that the plaintiffs are the owners of the lands described in paragraph 2, if said lands in any way conflict with the lands of the defendant, and said paragraph is denied insofar as the same is inconsistent with the allegations hereinafter set forth in this answer."

The allegations further set forth in the answer are in part that the defendant is one of the heirs at law of L. E. Chandler, deceased, and that in an action by the heirs at law of L. E. Chandler against J. T. Wilson and others in the Superior Court of Yancey County, involving a boundary line dispute, a judgment was entered in 1923 establishing the boundary line. The answer contains these further specific averments: "That by said judgment it was decreed that J. T. Wilson and the other defendants in said action were 'declared to be the owners of that portion of the lands lying North and West of the black and red dotted line on the map hereto attached and running from 4 to 2 to 3, . . . The plaintiffs are adjudged to be the owners of all of the lands described in the complaint lying South and East of the line 4 to 2 to 3.' And reference is hereby made to Judgment Docket No. 7 at page 34 for said judgment which was rendered in 1923, and reference is likewise made to the map which was used at the time said action was tried. That, if the plaintiffs are claim-

ing any lands lying South and East of the line shown on the above referred to map and running from 4 to 2 to 3, then the matter is *res judicata* and said judgment above referred to is hereby plead as an estoppel against the plaintiffs from asserting any claim of title to any land lying South and East of the above mentioned line.

"3. That in the above entitled cause, tried in the year 1923, the line established in said action, running from 4 to 2 to 3, ran with the top of a ridge and where an old rail fence had once been constructed; and after the Judgment of 1923, J. T. Wilson constructed a new fence along the top of said ridge and located the same where the old rail fence had stood and likewise located said fence in accordance with the verdict of the jury in 1923, which fence is now standing. At no time has this defendant cut any timber North or West of the top of said ridge, but this defendant, together with the heirs at law of L. E. Chandler, has been in the open, adverse and notorious possession of said lands up to the line established by the jury in 1923, have cultivated said lands up to the line so established. And, therefore, the three-year statute of limitations, being Section 1-52, General Statutes of North Carolina, 1943, is specifically plead in bar of the action of the plaintiffs; the seven-year statute of limitations, being Section 1-38, General Statutes of North Carolina, 1943, is specifically plead in bar of the action of the plaintiffs; and the twenty-year statute of limitations, being Section 1-40, General Statutes of North Carolina, 1943, is specifically plead in bar of the action of the plaintiffs."

The plaintiffs offered in evidence the map attached to the 1923 judgment and also the court map made for use in the instant trial below. It would serve no useful purpose to incorporate either of the maps in this opinion. The following description of the line from "4 to 2 to 3" will suffice: The southern terminus of this line is at point "4." From that point the line runs (without stated courses or distances but following the crest of a ridge) in a northeasterly direction to point "2," which is located about N. 55 degrees E., approximately 900 feet from point "4." From point "2" the line continues along the ridge (without stated courses or distances) to point "3," which is located about N. 17 degrees E., approximately 300 feet from point "2."

The plaintiffs also offered evidence tending to show that the defendant in 1948 entered upon and cut timber from a two-acre tract of the land described in the complaint, this tract being identified by the evidence and shown on the maps as being located south and west of the southern terminus of the "4 to 2 to 3" line referred to in the pleadings.

It thus appears from the map referred to in the answer and also from all the admitted evidence in the case that the plaintiffs do not claim any land lying south and east from the "4 to 2 to 3" line referred to in the defendant's answer. The land claimed by the plaintiffs is located south

and west of that line. Accordingly, the answer of the defendant does not deny plaintiffs' allegation of ownership and possession of the land described in the complaint.

It is elementary that issues arise upon the pleadings, and if a material fact alleged in the complaint is not denied by the answer, such allegation, for the purpose of the action, is taken as true and no issue arises therefrom. G.S. 1-135; G.S. 1-159; *Credit Corporation v. Saunders, ante,* 369. The fact alleged stands admitted, "and the effect of the admission is as available to the plaintiff as if found by the jury." *Bonham v. Craig,* 80 N.C. 224, top p. 227; *Tucker v. Wilkins,* 105 N.C. 272, 11 S.E. 575; McIntosh, North Carolina Practice and Procedure, Sec. 460, p. 475.

Likewise, if a fact is alleged by one party and admitted by the other, no issue arises therefrom, "and evidence offered in relation thereto is irrelevant." *Lee v. Martin,* 191 N.C. 401, p. 403, 132 S.E. 14; *Little v. Rhyne,* 211 N.C. 431, 190 S.E. 725; *Geer v. Brown,* 126 N.C. 238, 35 S.E. 470; Stansbury, N. C. Evidence, Sec. 177, p. 380 *et seq.*

It necessarily follows that the court below properly excluded the defendant's proffered testimony by which he was seeking to establish title by adverse possession to the two-acre tract lying south and west of the "4 to 2 to 3" line.

It is true the defendant set up the plea of adverse possession, but in doing so he did not extend the plea to cover the area where the timber was cut,—south and west of the "4 to 2 to 3" line,—to which his proffered proofs relate. Nor does it appear on the record that the defendant either sought or obtained leave to amend. (*Perkins v. Langdon,* 233 N.C. 240, 63 S.E. 2d 565.) Therefore he is bound by the pleadings. *Credit Corporation v. Saunders, supra.* "Proof without allegation is as ineffective as allegation without proof." *McKee v. Lineberger,* 69 N.C. 217, p. 239. See also *McLaurin v. Cronly,* 90 N.C. 50; *Talley v. Harriss Granite Quarries Co.,* 174 N.C. 445, 93 S.E. 995; *Whichard v. Lipe,* 221 N.C. 53, 19 S.E. 2d 14.

We have examined the rest of the defendant's exceptive assignments of error and find them without merit. The pertinent principles of law appear to have been applied properly in a trial in which we find

No error.

C. W. LAMB v. BOARD OF EDUCATION OF RANDOLPH COUNTY; G. F. LANE, K. A. MARTIN, T. S. BOULDIN, A. B. COX AND EARL JOHNSON, INDIVIDUALLY AND AS MEMBERS OF THE BOARD OF EDUCATION OF RANDOLPH COUNTY; R. C. WHITE, INDIVIDUALLY AND SECRETARY OF THE BOARD OF EDUCATION OF RANDOLPH COUNTY; KING-HUNTER COMPANY, INC.; LOY SINK, TRADING AS EANES ELECTRIC AND SUPPLY COMPANY; GEORGE ROBB, TRADING AS ROBB PLUMBING & HEATING COMPANY; H. MASON BLANKENSHIP, TRADING AS MODEL SUPPLY COMPANY.

(Filed 9 April, 1952.)

1. Schools § 7f—

Injunction will not lie to restrain a board of education from letting a contract for the construction of a school building on the ground that the board had failed to make plans for water and sewer service for the school, G.S. 115-96, since it will be presumed that the defendants in proper time will comply with the law.

2. Same: Statutes § 2—

A statute applicable to the board of education of a single county, prohibiting the board from expending money in excess of a designated amount on any one project for the construction of a water and sewer system for a school without approval of the voters, *is held* unconstitutional as a local or special act relating to health and sanitation.

3. Schools § 10h—

Where the board of county commissioners allots to the county board of education a designated sum for the construction of a school building and another sum for garage and equipment thereat, whether the sum set aside for the garage and equipment should be used for that purpose or some other purpose in connection with the general purpose for which the money was set aside, rests in the sound discretion of the boards, and certainly injunction will not lie to restrain the board of education from letting a contract for the building upon allegation that the sum set aside for the garage and equipment might be applied to some other purpose in connection with the school.

4. Injunctions § 10—

Where a suit is solely for the purpose of obtaining a restraining order and defendants' demurrer on the ground that the complaint failed to state facts sufficient to constitute a cause of action is properly sustained and the injunctive relief sought denied, *held* dismissal of the action is proper, only questions of law being presented.

APPEAL by plaintiff from *Halstead, Special Judge,* January-February 1952 Special Term of RANDOLPH. Affirmed.

This was a suit by a resident and taxpayer of Randleman Township in Randolph County to enjoin the defendant Board of Education, its individual members, and others with whom it is alleged the Board has made building contracts, from doing any act toward the construction of a school building on the High Point Road site without making arrange-

ment for a sufficient water supply therefor, and from spending more than $2,000 for a water and sewer system without a vote of the people, and also to enjoin the Board of Education from expending in the construction of the school building the fund heretofore allocated by Board of County Commissioners for a garage building and equipment.

It was alleged in the complaint that defendant Board, pursuant to approval by the Board of County Commissioners of its budget of $145,000 for new school buildings and $21,000 for garage and equipment, and according to plans approved by the State Board of Education, had accepted bids from defendant contractors for the construction of the new school buildings for Randleman Township on the High Point Road site in the sum of $190,789, and that the defendant Board had announced the total cost, including cost of land and architect's compensation, would amount to $206,378. But it was alleged this does not include any amount for water and sewer system, and no plans have been made therefor. It was further alleged that the site selected for the school building is one-fourth of a mile from the city limits of Randleman, and it would cost approximately $20,000 to connect with the city water and sewer system; that by statute Ch. 1075, Laws 1951, applicable to Randolph County only, the defendant Board is prohibited from expending more than $2,000 for water and sewer service to any one school unless approved by a vote of the people, and that defendant Board has refused to call such an election. It was also alleged on information and belief that defendant Board has applied or will apply to the Randleman school project the $21,000 allocated by the Board of Commissioners of Randolph County for a garage building.

The defendants' demurrer *ore tenus* to the complaint was sustained, prayer for restraining order was denied, and the action dismissed.

Plaintiff excepted and appealed.

L. T. Hammond and Ottway Burton for plaintiff, appellant.

Miller & Moser for defendants, appellees.

DEVIN, C. J. In *Kistler v. Board of Education,* 233 N.C. 400, 64 S.E. 2d 403, we considered a suit against the Board of Education of Randolph County and the individual members of that Board to enjoin them from acquiring the site on High Point Road selected by the Board for building the new high school for the Randleman School District. Demurrer to the complaint was sustained, and this Court affirmed. It was held in an opinion written for the Court by *Justice Denny* that this was a matter resting in the sound discretion of the County Board of Education and could not be controlled by the Court, in the absence of a showing of some violation of the provisions of law, or manifest abuse of discretion.

The present suit, instituted by a different plaintiff, is to enjoin the construction of the school building on the site selected, for the reason that the defendant Board of Education had failed to make plans for water and sewer service for the school, and that the cost of installing same would exceed the limitation fixed by Chapter 1075, Session Laws 1951, upon expenditures for this purpose without a vote of the people.

While the statute G.S. 115-96 imposes the duty upon the County Board of Education to make provision for "a good supply of wholesome water," it appears from the complaint that at the time this suit was instituted the construction of the proposed building had progressed only to the stage where bids had been accepted. The complaint alleges in effect that at this time no plans have been made for this purpose. This is insufficient to warrant the court in restraining the defendants from doing any act toward the construction of the new school building. Presumably the defendants at the proper time will comply with the law. *Branch v. Board of Education,* 233 N.C. 623, 65 S.E. 2d 124.

The question chiefly debated here was the applicability of Chap. 1075, Session Laws 1951, which purports to prohibit the County Board of Education of Randolph County from expending "in excess of $2,000 under any one project or contract for the purpose of extending any public or private water or sewer system so that such extended system will serve any public school in Randolph County," unless approved by the voters at a special election. It was alleged that the cost of installation of water and sewer system for the service of the students at this school would exceed the limit fixed by the statute.

The court below was of opinion that this statute was invalid because in conflict with the mandatory provisions of Art. II, sec. 29, of the Constitution of North Carolina. In this ruling we concur.

This section of the Constitution limits the power of the General Assembly to enact a local or special act "relating to health, sanitation, and the abatement of nuisances." The statute in question is a local or special act. It relates only to Randolph County, and in Randolph County affects only a single agency, the County Board of Education. *S. v. Dixon,* 215 N.C. 161, 1 S.E. 2d 521; *Idol v. Street,* 233 N.C. 730, 65 S.E. 2d 313. It relates to health and sanitation, since its sole purpose is to prescribe provisions with respect to sewer and water service for local school children in Randolph County. It purports to limit the power of the County Board of Education to provide for sanitation and healthful conditions in the schools by means of a sewerage system and an adequate water supply. The decisions of this Court sustain the ruling of the trial judge. *Sanitary District v. Prudden,* 195 N.C. 722, 143 S.E. 530; *Sams v. Board of Commissioners of Madison County,* 217 N.C. 284, 7 S.E. 2d 540; *Board of Health of Nash County v. Board of Commissioners,* 220 N.C. 140, 16 S.E. 2d 677; *Idol v. Street, supra.*

The plaintiff also prays that the restraining order issue for the additional reason that according to the budget submitted by the Board of Education, and approved by the Board of County Commissioners, $21,000 was set up for a garage building and equipment, and it is alleged this fund will be applied to the construction of the school building. There was no specific allegation that any plans have been made with respect to a garage building or to this fund, as no construction had yet begun. Hence, the matter still lay in the nebulous field of conjecture. In any event, the question would rest with the Board of County Commissioners and Board of Education to determine whether this amount should be used for the particular purpose named or some other project in connection with the general purpose for which it was set aside. It is the duty of the Board of County Commissioners to provide the funds for school equipment (G.S. 115-83; *Johnson v. Marrow,* 228 N.C. 58, 44 S.E. 2d 468). Under the circumstances alleged we do not think the court would be warranted in enjoining the erection of a needed school building upon the allegation by the plaintiff, on information and belief, that this fund might be applied to other construction than the garage and equipment. *Atkins v. McAden,* 229 N.C. 752, 51 S.E. 2d 484; *Worley v. Johnston County,* 231 N.C. 592, 58 S.E. 2d 99.

The demurrer *ore tenus* was sustained, the issuance of a restraining order was denied, and the action dismissed. The appellant assigns error in the ruling of the court sustaining the demurrer and signing the judgment. The sole purpose of the suit was to obtain a restraining order. The facts alleged were admitted by the demurrer, which was interposed on the ground that the complaint did not state facts sufficient to constitute a cause of action. Only questions of law were presented. Hence, upon the ruling of the court sustaining the demurrer and denying the injunctive relief prayed for, dismissal of the action was in order. *Groves v. McDonald,* 223 N.C. 150, 25 S.E. 2d 387. The question of the timeliness of the judgment of dismissal is not presented. *Dillingham v. Kligerman, ante,* 298.

Judgment affirmed.

T. C. CROW, ADMINISTRATOR OF E. B. McCULLEN, DECEASED, v. CECIL McCULLEN AND EDNA McCULLEN McCOLMAN.

(Filed 9 April, 1952.)

1. Bankruptcy § 10—

Whether an indebtedness scheduled by a bankrupt is within the statutory exceptions of debts dischargeable must be determined by the original character of the debt rather than the particular form of the judgment by which the debt is established.

2. Bailment § 1—

Ordinarily one who receives a specific fund for safekeeping may not be classed as an agent, but rather as a bailee.

3. Bankruptcy § 10—Original debt held not based on willful misappropriation of funds or willful and malicious injury within meaning of Bankruptcy Act.

An uncle delivered to his nephew an envelope containing a sum of money with direction to the nephew to place it in a safety deposit box in the nephew's name, and if any of the money was needed by the uncle to use it for that purpose, and "if anything happened" to the uncle and any money was left, to divide it among the nephew, a niece, and the nephew's wife. Upon the death of the uncle the money was divided as directed. Thereafter the uncle's administrator recovered a judgment for the money as having been appropriated and converted by those among whom it was divided. This judgment was listed in the schedule of indebtedness in the nephew's petition in bankruptcy. *Held:* The debt evidenced by the judgment was barred by the discharge in bankruptcy, since the original character of the debt lacked the elements of fraudulent conversion or willful and malicious injury or such unconscionable conduct as would bring it within the category of a debt excepted by the Bankruptcy Act. 11 U.S.C.A. 35.

APPEAL by plaintiff from *Carr, J.*, December Term, 1951, of DUPLIN. Affirmed.

This was a suit to renew a judgment. The defendants resisted on the ground that plaintiff's action was barred by defendants' discharge in bankruptcy. The material facts relating thereto were not controverted.

On 18 April, 1939, E. B. McCullen, plaintiff's intestate, handed to defendant Cecil D. McCullen, his nephew, an envelope containing $3,500 in currency with instructions "to place the money in a safe deposit box in the name of Cecil D. McCullen, and if the money was needed by E. B. McCullen to spend it on him, and if anything happened to E. B. McCullen and any money was left, to divide it among Cecil D. McCullen, Edna McCullen McColman and Lillie O. McCullen." One week later, 25 April, 1939, E. B. McCullen died intestate. Thereafter the money was divided among those named.

In 1941 the administrator of E. B. McCullen sued defendants to recover this money on the ground that it belonged to his intestate, and that defendants had unlawfully appropriated it. These allegations were denied by the defendants. Jury trial was waived and judgment rendered for plaintiff based on the finding that E. B. McCullen had not made delivery of this money to Cecil D. McCullen with intent to transfer right of property and possession; that Cecil D. McCullen was agent of E. B. McCullen; and that after the death of E. B. McCullen the defendants "appropriated and converted" the money to their own use.

On 24 November, 1949, Cecil D. McCullen and Edna McCullen McColman filed petition in bankruptcy in accordance with the bankruptcy statutes, listing in the schedule of indebtedness plaintiff's judgment. The defendants were duly adjudicated bankrupts. Thereafter the petition of Cecil D. McCullen for discharge in bankruptcy was opposed by plaintiff on the ground that Cecil D. McCullen was the agent of his intestate E. B. McCullen, and that he appropriated and converted to his own use money which rightfully belonged to the estate of E. B. McCullen. The present action was begun 14 December, 1950. The referee in bankruptcy entered order 9 February, 1951, discharging Cecil D. McCullen from all debts and claims which were made provable against his estate by the Bankruptcy Act, except such debts as were by the Act excepted from the operation of a discharge in bankruptcy.

Upon the facts agreed judgment was rendered in favor of defendants, and plaintiff excepted and appealed.

Butler & Butler for plaintiff, appellant.

J. Faison Thomson and Rivers D. Johnson for defendants, appellees.

DEVIN, C. J. The Federal Bankruptcy Act declares that a discharge in bankruptcy shall have the effect of releasing the bankrupt from all his provable debts, with certain specific exceptions. Among these are "(2) liabilities . . . for wilful and malicious injuries to the person or property of another," and debts which "(4) were created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity." 11 U.S.C.A. 35.

The appellant relies upon these exceptions in the Act as grounds for denying release of the defendants from liability for plaintiff's debt. He calls attention to the judgment of 1941 as having been based on findings that Cecil D. McCullen was the agent of E. B. McCullen, and that he and his codefendants appropriated and converted the money to their own use, and presents the view that the appropriation and conversion under the circumstances constituted a "wilful and malicious" injury to the property of the intestate, and that the misappropriation occurred while Cecil D. McCullen was acting in the fiduciary capacity of agent. On the other hand, the defendants' position is that the original character of the transaction upon which the judgment sued on was rendered does not show a fiduciary relationship, or, if it be so construed, that the facts indicate the instructions of the donor were complied with, and negative the suggestion of willful or malicious injury, or misappropriation while acting in the capacity of agent.

Whether an indebtedness scheduled by a bankrupt is within the statutory exceptions from the operation of a discharge in bankruptcy must be

determined by the original character of the debt rather than the particular form of the judgment by which the debt was established.

This principle is supported by judicial authority. "The original character of the debt is not lost by its reduction to judgment." *Trust Co. v. Parker,* 232 N.C. 512 (514), 61 S.E. 2d 441. "The rendition of a judgment upon an obligation does not change the character of the indebtedness." *Fidelity & Casualty Co. v. Golombosky,* 133 Conn. 317, 170 A.L.R. 361. "The debt on which this judgment was rendered is the same debt that it was before." *Boynton v. Ball,* 121 U.S. 457. The nature of the transaction between the parties at the inception of the debt is determinative of whether it was one created by the fraud or misappropriation of the bankrupt while acting in a fiduciary capacity or was a debt barred by discharge in bankruptcy. As was said by *Justice Barnhill* in *Trust Co. v. Parker,* 225 N.C. 480, 35 S.E. 2d 489: "The fiduciary character of the debt does not depend upon its form but the manner of its origin and the acts by which it is incurred, *Simpson v. Simpson, supra* (80 N.C. 332), and the Court will look behind the judgment to discover the original character of the liability. *Guernsey v. Napier,* 275 Pac. 724." Ordinarily one who receives a specific fund for safekeeping may not be classed as an agent, but rather as a bailee. *S. v. Eurell,* 220 N.C. 519, 17 S.E. 2d 669; *Lewis v. Shaw,* 106 N.Y.S. 1012.

Whatever may have been the motive of E. B. McCullen, childless and in trouble in the courts over a charge of incest, the fact remains that he turned over to his nephew a sum of money with specific instructions to place it in a safety deposit box in the nephew's name "and, if the money is needed by E. B. McCullen, to spend it on him, and if anything happened to E. B. McCullen and any money was left" to divide it among the defendants who were his nephew, his niece, and his nephew's wife. No money was needed by or expended on E. B. McCullen, but something did happen to him, for, whether anticipated or not, he died one week later. Those whom in the event anything happened to him he stated he wished to have the money accordingly divided it. Two years later the nephew and niece were sued by the administrator. It was not alleged that the money was given to defendants by E. B. McCullen with intent to defraud his creditors. That was not the basis of the suit and we are not concerned with it here. The judgment was rendered on the ground that this money was not a gift but that E. B. McCullen retained dominion over it and did not make delivery of it with intent to transfer to the defendants right of property therein. In other words, the theory of the judgment was that the money was at all times the property of E. B. McCullen and under his control. However that may be, the judgment established a debt in favor of the administrator which may not now be denied.

A different question is presented under the Bankruptcy Act. Looking back of the judgment into the original transaction and the circumstances of the delivery of the money to Cecil D. McCullen, was the debt one which should be regarded as coming within the exceptions in the Bankruptcy Act, or does the discharge in bankruptcy now constitute a bar to a suit thereon?

Consideration of all the facts here presented leads us to the conclusion that the transaction of the delivery of this money whether a gift, a bailment, or a trust, and its acceptance by defendants, does not seem to involve moral turpitude on the part of Cecil D. McCullen in the sense of a willful misappropriation of funds entrusted to him, nor should it properly be held to constitute a willful and malicious injury to the property of the intestate. The defendants may not without reason have supposed the money was intended for them. The transaction is lacking in the elements of a fraudulent conversion or a willful and malicious injury, or such unconscionable conduct as would bring it within the category of a debt excepted by the Bankruptcy Act from the operation of a discharge in bankruptcy.

The judgment of the court below holding on the facts agreed that the suit on the debt evidenced by the judgment was barred by the discharge in bankruptcy is

Affirmed.

GEORGE E. WEANT v. W. F. McCANLESS.

(Filed 9 April, 1952.)

1. Pleadings § 31—

A motion to strike a further defense, cross-action and counterclaim, should not be allowed if the facts pleaded therein may be proven by competent evidence, and if so proven, would constitute a defense in whole or in part to the affirmative relief sought in the complaint.

2. Same—

A motion to strike defendant's counterclaim on the ground that the contract therein alleged as the basis of the counterclaim is unenforceable under the statute of frauds should not be allowed, since the contract is enforceable unless the statute of frauds is properly pleaded.

3. Frauds, Statute of, § 3—

The defense of the statute of frauds must be pleaded by (1) admitting the contract and pleading the statute as a bar, (2) denying the contract and pleading the statute as a bar, (3) general denial of the contract and objection to parol testimony to prove it, and the defense of the statute may not be taken advantage of by demurrer or motion to strike.

APPEAL by defendant from *Sink, J.*, November Term, 1951, of ROWAN.

The plaintiff instituted this action in the Superior Court of Rowan County, 23 November, 1948, upon a note executed under seal by the defendant to the plaintiff on 9 December, 1938, payable six months after date, in the sum of $1,374.00.

The defendant in his answer admits the execution of the note and sets up a cross-action and counterclaim in which he alleges, among other things, that in July or August, 1934, he was indebted to the plaintiff in the sum of $7,874.00 for work and materials plaintiff, as a plumber and owner of a plumbing establishment, had furnished him; that defendant offered to convey a house and lot owned by the defendant on South Main Street in Salisbury, N. C., for a credit of $1,500 on the plaintiff's bill, and the plaintiff accepted the proposal; that defendant also conveyed a brick residence on Thomas Street in Salisbury to the plaintiff and for which the plaintiff agreed to give the defendant a credit of $5,000; that it was agreed between the parties that the defendant would execute a note for the balance due of $1,374.00 when called upon to do so, that it was further agreed between the parties at the time and before the delivery of the deed to either of the above properties, or the execution of the note, the plaintiff would reconvey the Thomas Street property to the defendant upon payment by the defendant of $5,000, and the balance on his account of $1,374.00; that in the meantime the plaintiff was to apply the rents received from the Thomas Street property, after paying the taxes thereon, to the payment of interest on said indebtedness; that according to the terms of his agreement with the plaintiff he has offered and tendered the plaintiff the sum of $5,000, and payment in full of defendant's note of $1,374.00, and requested and demanded a deed from the plaintiff for the Thomas Street property but the plaintiff failed and refused to reconvey the same.

The plaintiff filed a reply and admitted that the defendant was credited with the sum of $6,500 on his account by reason of the conveyance to him of the two pieces of property described in the answer, but denied that any agreement, oral or written, was entered into for the reconveyance of the Thomas Street property, as alleged by the defendant, and pleaded the statute of frauds.

Thereafter, plaintiff made a motion to strike defendant's further defense, cross-action and counterclaim, and the motion was allowed. The defendant appeals to the Supreme Court, assigning error.

Hudson & Hudson for plaintiff, appellee.
Woodson & Woodson for defendant, appellant.

DENNY, J. A motion to strike a further defense, cross-action and counterclaim should not be allowed if the facts pleaded therein may be

proven by competent evidence, and if so proven, such facts would constitute a defense in whole or in part to the affirmative relief sought in the complaint. *Williams v. Thompson,* 227 N.C. 166, 41 S.E. 2d 359.

The test as to whether pleadings are relevant, on a motion to strike, is whether the pleader would be entitled to introduce evidence in support of the allegations sought to be stricken. *Williams v. Thompson, supra; Trust Co. v. Dunlop,* 214 N.C. 196, 198 S.E. 645; *Patterson v. R. R.,* 214 N.C. 38, 198 S.E. 364; *Pemberton v. Greensboro,* 203 N.C. 514, 166 S.E. 396.

A parol contract to sell or convey land may be enforced, unless the party to be charged takes advantage of the statute of frauds by pleading it, or by denial of the contract, as alleged, which is equivalent to a plea of the statute. G.S. 22-2; *Allison v. Steele,* 220 N.C. 318, 17 S.E. 2d 339; *Real Estate Co. v. Fowler,* 191 N.C. 616, 132 S.E. 575; *McCall v. Institute,* 189 N.C. 775, 128 S.E. 349; *Geitner v. Jones,* 176 N.C. 542, 97 S.E. 494; *Arps v. Davenport,* 183 N.C. 72, 110 S.E. 580; *Herndon v. R. R.,* 161 N.C. 650, 77 S.E. 683; *Henry v. Hilliard,* 155 N.C. 372, 71 S.E. 439; *Miller v. Monazite Co.,* 152 N.C. 608, 68 S.E. 1.

It is settled in this jurisdiction that the provisions of the statute of frauds cannot be taken advantage of by demurrer. *McCampbell v. Building & Loan Asso.,* 231 N.C. 647, 58 S.E. 2d 617; *Embler v. Embler,* 224 N.C. 811, 32 S.E. 2d 619; *Real Estate Co. v. Fowler, supra; Stephens v. Midyette,* 161 N.C. 323, 77 S.E. 243; *Hemmings v. Doss,* 125 N.C. 400, 34 S.E. 511. Neither can such defense be taken advantage of by motion to strike. Such defense can only be raised by answer or reply. The statute of frauds may be taken advantage of in any one of three ways: (1) The contract may be admitted and the statute pleaded as a bar to its enforcement. *Bonham v. Craig,* 80 N.C. 224; *Holler v. Richards,* 102 N.C. 545, 9 S.E. 460; *Browning v. Berry,* 107 N.C. 231, 12 S.E. 195, 10 L.R.A. 726; *Vann v. Newsom,* 110 N.C. 122, 14 S.E. 519; *Jordan v. Furnace Co.,* 126 N.C. 143, 35 S.E. 247; *Henry v. Hilliard, supra;* (2) the contract, as alleged, may be denied and the statute pleaded, and in such case if it "develops on the trial that the contract is in parol, it must be declared invalid." *Embler v. Embler, supra; Jamerson v. Logan,* 228 N.C. 540, 46 S.E. 2d 561, 15 A.L.R. 2d 1325; *Balentine v. Gill,* 218 N.C. 496, 11 S.E. 2d 456; *Kluttz v. Allison,* 214 N.C. 379, 199 S.E. 395; *Winders v. Hill,* 144 N.C. 614, 57 S.E. 456; *Morrison v. Baker,* 81 N.C. 76; or, (3) the party to be charged may enter a general denial without pleading the statute, and on the trial object to the admission of parol testimony to prove the contract. *Henry v. Hilliard, supra; Price v. Askins,* 212 N.C. 583, 194 S.E. 284; *Allison v. Steele, supra; Embler v. Embler, supra; Jamerson v. Logan, supra.*

For the reasons stated, the ruling of the court below must be

Reversed.

R. L. SHUFORD, JR., v. S. G. PHILLIPS AND WIFE, ROSE PHILLIPS.

(Filed 9 April, 1952.)

1. Deeds § 17—

A covenant of warranty is an agreement or assurance by the grantor that the grantee and his heirs and assigns shall enjoy the estate conveyed without interruption or eviction by a person claiming under a paramount title outstanding at the time of the conveyance.

2. Same—

In an action on covenant of warranty, allegation of legal ouster by a person claiming under an outstanding title is sufficient, allegation that such claim was under better or paramount title being necessary only when possession has been surrendered without legal ouster.

3. Same—

Complaint in an action on covenant of warranty alleging that grantee instituted action for the recovery of the premises and to establish his title against a third person asserting title to the *locus*, that notice of the action was given grantor, who actually participated in the prosecution of the action, and that judgment was entered in said cause adjudicating paramount title in such third person, *is held* sufficient as against demurrer, since, in such instance allegation of outstanding paramount title in such third person is not necessary.

4. Pleadings § 19c—

Answer to the merits cures a defective statement of a good cause of action, and a demurrer thereafter filed on this ground is properly overruled.

5. Same—

Answer alleging an essential element of plaintiff's cause of action is available to plaintiff under the doctrine of aider upon a subsequent demurrer by defendant.

6. Deeds § 17—

Right of action for breach of covenant of warranty does not arise until ouster or disturbance of the grantee's possession by virtue of superior title outstanding at the time the covenant was made, and therefore the statute of limitations does not run against the right of action on the covenant of warranty until there is an ouster under such outstanding title.

7. Appeal and Error § 6c (1)—

Questions not supported by an assignment of error will not be considered.

APPEAL by plaintiff from *Bennett, Special Judge,* January Term, 1952, CALDWELL. Reversed.

Civil action to recover damages for breach of covenant of warranty contained in a deed to real property.

On 24 May 1941 defendant conveyed to plaintiff a certain tract of land in Caldwell County by deed containing a full covenant of warranty. In 1948 one Hickman, who was asserting title to the *locus,* cut and removed

the timber therefrom. Plaintiff, after notice to defendant, his grantor, instituted an action against Hickman for the recovery of the premises and to establish his title thereto. At the May Term 1950 the cause was heard and "it was adjudged that the defendant Hickman had the better title and upon the demurrer to plaintiff's evidence, a judgment of nonsuit was entered."

Thereupon the plaintiff instituted this action to recover the amount paid defendant on the purchase price of the land, taxes paid, court costs, and attorney's fees. After answering, the defendant demurred to the complaint for that it fails to state a cause of action. The demurrer was sustained and plaintiff appealed.

W. H. Strickland for plaintiff appellant.
Claude F. Seila for defendant appellees.

BARNHILL, J. In his brief the defendant bottoms his attack on the sufficiency of the complaint to state a cause of action on two grounds: (1) "The complaint fails to allege that plaintiff went into possession, or that he was evicted, ousted, or disturbed in his possession by one having paramount title at the time of the conveyance to plaintiff;" and (2) "Plaintiff, in his pleading, admits the deed upon which J. I. Hickman bases his title is void. It is not, therefore, paramount title." The contentions thus advanced are untenable.

Plaintiff pleads (1) the deed of conveyance for the *locus* executed and delivered to him by defendant; (2) the covenant of warranty therein contained; (3) the entry upon and possession of the land by one Hickman, the sale of the timber by him, and his assertion of paramount title to the premises; (4) notice to defendant of the asserted superior title and hostile claim of Hickman; (5) the institution of an action to oust Hickman and to adjudicate plaintiff's superior title; (6) judgment in said cause adjudicating paramount title in Hickman and dismissing plaintiff's action; (7) the failure and refusal of defendant to prosecute an appeal from said judgment; (8) damages suffered by reason of defendant's breach of warranty; and (9) defendant's admission of liability. These allegations as here abbreviated are sufficient to state a cause of action for breach of a covenant of warranty.

A covenant of warranty is an agreement or assurance by the grantor of an estate that the grantee and his heirs and assigns shall enjoy it without interruption by virtue of a paramount title, and that they shall not, by force of a paramount title, be evicted from the land or deprived of its possession. *Cover v. McAden,* 183 N.C. 641, 112 S.E. 817.

Allegations of the existence of an outstanding superior title in another, without actual possession, is insufficient to state a cause of action for breach of such warranty. *Hodges v. Latham,* 98 N.C. 239.

Either ouster or a disturbance of the peaceful possession by the assertion of an adverse superior title must be alleged. *Lockhart v. Parker,* 189 N.C. 138, 126 S.E. 313; *Guy v. Bank,* 202 N.C. 803, 164 S.E. 323; 14 A.J. 535. "The purchaser need not be actually evicted by legal process. 'It is enough that he has yielded possession to the rightful owner, or the premises being vacant that the rightful owner has taken possession.'" *Hodges v. Latham, supra.*

The duty to allege and prove the existence of a better or paramount title, *with actual possession under it,* exists only in those cases where there has been no legal ouster. *Hodges v. Latham, supra; Guy v. Bank, supra.*

Measured by these rules the complaint, liberally construed, meets the test and is sufficient to repel a demurrer. It is true plaintiff in his reply asserts that the deed to Hickman was without consideration. But this falls short of an admission that it is void. In any event, plaintiff alleges and relies on legal eviction by judgment of a court of competent jurisdiction. To establish the binding effect of that judgment upon the defendant herein, he pleads notice to defendant of the adverse claim and his actual participation in the prosecution of the action. *Culbreth v. Britt Corp.,* 231 N.C. 76, 56 S.E. 2d 15; 14 A.J. 531.

Furthermore, the demurrer was entered after answer filed, and we have held that the defect in a defective statement of a good cause of action is cured by answer to the merits. *Mizzell v. Ruffin,* 118 N.C. 69; *Bowling v. Burton,* 101 N.C. 176.

Likewise, if driven to it, the plaintiff might resort to the doctrine of aider by answer. Defendant alleges in his answer that plaintiff instituted an action against Hickman to try title to the *locus* and the termination of that action by judgment adverse to plaintiff. He further alleges "that for more than thirty years the title to said property was vested in the University of North Carolina under the escheat laws of North Carolina, and that said property remained the property of the University of North Carolina until May 13, 1948"—the date on which a consent judgment that Hickman owned the property was entered in an action between the University of North Carolina and Hickman.

In the light of this latter admission, we are at a loss to perceive just what benefits defendant hopes to reap by his defense to this action. Be that as it may, plaintiff is entitled to be heard on the complaint filed.

Plaintiff's action is not barred by any pleaded statute of limitations. The mere existence of a better title without possession and without ouster or disturbance of the possession of plaintiff does not constitute a breach of warranty. The breach arises upon ouster or disturbance of possession by virtue of a superior title outstanding at the time the covenant was made. *Mizzell v. Ruffin, supra; Lockhart v. Parker, supra; Guy v. Bank, supra.*

Plaintiff in his brief undertakes to discuss a number of questions which are not supported by any assignment of error. For that reason and for the further reason they are wholly immaterial and unrelated to plaintiff's one assignment of error, we pass them without discussion.

The judgment entered is

Reversed.

JOHN L. JONES v. W. J. JONES, ADMINISTRATOR OF THE ESTATE OF J. J. JONES, DECEASED.

(Filed 9 April, 1952.)

1. Executors and Administrators § 15d—

Plaintiff was paid allowance by order of the clerk for taking care of intestate during the period plaintiff was intestate's guardian. Plaintiff instituted this action to recover the reasonable value of his services upon the written authorization of intestate, later found, stating that intestate wanted plaintiff to have a reasonable amount for taking care of him. *Held:* It appearing that the period of guardianship did not cover the entire time during which services were rendered, the payment of the allowances under the clerk's order does not bar the action, but such payments are properly credited to the judgment.

2. Appeal and Error § 7—

Where motion for nonsuit is not made at the close of plaintiff's evidence nor renewed at the close of all the evidence, the question of the sufficiency of the evidence to be submitted to the jury is not presented. G.S. 1-183.

3. Appeal and Error § 6c (1)—

A question not presented by exception duly noted will not be considered.

APPEAL by defendant administrator from *Phillips, J.*, September Term, 1951. No error.

This was a suit to recover for services rendered to defendant's intestate, James J. Jones. The defendant administrator resisted payment on two grounds: (1) that the plaintiff while guardian of James J. Jones was by order of court upon his own petition allowed compensation for personal services to his ward, whereby plaintiff had been fully paid, and that he was estopped to make an additional claim; (2) that plaintiff's claim was barred by the three years statute of limitations.

Issues were submitted to the jury and answered in favor of the plaintiff, fixing the value of plaintiff's services to decedent at $3,565.

From judgment on the verdict defendant administrator appealed.

Childs & Childs and Fred D. Caldwell for plaintiff, appellee.

Russell W. Whitener and W. J. Sherrod for defendant, appellant.

DEVIN, C. J. The defendant brings this case here for review chiefly on the ground that the court below erred in overruling his plea of estoppel, or, if his answer be held insufficient to constitute a formal plea of estoppel, that the court erred in holding that plaintiff was not bound by the allowance heretofore made him.

It appears from the record, however, that the allowance made plaintiff by the Clerk covered only the period while he was guardian of decedent and did not embrace the entire time during which services were rendered and for which he now claims, and further that his present claim is supported by the written authorization of decedent which was discovered subsequent to the making of the allowance. This note, shown to be in the handwriting of deceased, though insufficient to constitute a will, contained the expression: "I want John to have a reasonable amount for taking care of me." The defendant was given credit in the verdict and judgment for the part payment theretofore received for his services. We think the court below correctly ruled on the question thus presented.

There was no exception to the judge's charge to the jury, nor was any exception to the judge's rulings on the admission of evidence brought forward in defendant's assignments of error.

While defendant in his case on appeal assigns error in the denial of his motion for judgment of nonsuit, the record shows that no motion for nonsuit was made at the close of plaintiff's evidence, nor at the close of all the evidence. G.S. 1-183. The judge charged the jury upon all the evidence offered to answer the issue as to the statute of limitations in favor of the plaintiff. To this no exception was noted. The question is not presented for our decision.

Upon the record before us we find

No error.

JOHN ST. DENNIS AND WIFE, MIGNON M. ST. DENNIS, AND ANTHONY REDMOND, TRUSTEE, v. L. W. THOMAS AND WIFE, EDITH R. THOMAS.

(Filed 9 April, 1952.)

1. Abatement and Revival § 9—

The test of identity of actions for the purpose of a plea in abatement is whether judgment in the prior action would support a plea of *res judicata* in the second.

2. Same—

An action to recover damages for deceit in the sale of certain real property and to restrain defendants from negotiating, transferring or pledging the note executed for the balance of the purchase price, *held* not to support a plea in abatement in a subsequent action by the grantors and trustee to

recover on the note for the balance of the purchase price and foreclose the deed of trust securing it, since judgment in the prior action would not constitute *res judicata* in the second.

APPEAL by defendants from *Bennett, Special Judge,* December 1951 Term, BUNCOMBE.

Civil action to recover on a promissory note and for the foreclosure of a deed of trust.

On 9 April, 1951, L. W. Thomas and wife, Edith R. Thomas, instituted in the Superior Court of Buncombe County an action in tort for deceit against John St. Dennis and wife, Mignon M. St. Dennis, alleging that said defendants perpetrated a fraud upon them in the sale of certain real property. They seek to recover upon their allegations of fraud $22,500 actual damages, $9,000 special damages, and $25,000 punitive damages, and to restrain the defendants and the First National Bank & Trust Company from negotiating, transferring, hypothecating, pledging, or otherwise encumbering the title to the note executed for the balance of the purchase price of said real estate. The summons and complaint were served upon the said Bank on 10 April, 1951. On 23 April, 1951, the defendants appeared, petitioned the court and obtained an order allowing them through 15 May, 1951, in which to plead and answer the rule to show cause. This suit is now pending in Buncombe County.

On 17 July, 1951, John St. Dennis and wife, Mignon M. St. Dennis, and Anthony Redmond, Trustee, instituted this suit in the Superior Court of Buncombe County to recover on a promissory note and to secure a foreclosure of the deed of trust securing said note. It is stipulated that both the summons and complaint were properly served and the defendants appeared generally and answered. Plea in abatement was filed as a part of defendants' answer on the ground that the first suit is now pending in the Superior Court of Buncombe County between the same parties and involving the same subject matter and that all the rights of the plaintiffs in this action could and should be determined in the prior action.

From the overruling of the plea in abatement, the defendants appealed, assigning errors.

George A. Shuford for plaintiffs, appellees.
E. L. Loftin and George H. Ward for defendants, appellants.

VALENTINE, J. The trial judge was correct in overruling the plea in abatement. *Brown v. Polk,* 201 N.C. 375, 160 S.E. 357.

The parties in the two suits are not identical. The causes of action are different, and the results sought are dissimilar. The final judgment in the prior action instituted by L. W. Thomas and wife, Edith R. Thomas, against John St. Dennis and wife, Mignon M. St. Dennis, would not prop-

erly support a plea of *res judicata* in the present action. This is a crucial test of identity. *Hawkins v. Hughes,* 87 N.C. 115; 1 C.J. 56; *Bank v. Broadhurst,* 197 N.C. 365, 148 S.E. 452; *Thompson v. Herring,* 203 N.C. 112, 164 S.E. 619; *Oil Co. v. Fertilizer Co.,* 204 N.C. 362, 168 S.E. 411.

Nothing was said in the cases cited in appellants' brief which militates against our present position.

The judgment of the court below must be

Affirmed.

STATE v. FLOYD MORRIS.

(Filed 9 April, 1952.)

1. Criminal Law § 14—

Where warrant is issued by a justice of the peace, returnable before the recorder's court, and there is nothing in the record to show how the case came to be on the Superior Court docket, the record fails to show jurisdiction in the Superior Court, and appeal to the Supreme Court must be dismissed.

2. Criminal Law § 67—

Where the Superior Court has no jurisdiction, the Supreme Court acquires no jurisdiction by appeal.

3. Automobiles § 31b: Criminal Law § 56—

A warrant charging that defendant was involved in an automobile accident and left the scene without complying with the statute, but failing to charge damage to property or injury to or death of any person in the accident, fails to charge any offense under G.S. 20-166.

4. Criminal Law § 23—

If defendant is tried under a fatally defective warrant the solicitor may proceed to prosecute under new pleadings, if so advised.

APPEAL by defendant from *Sink, J.,* September Term, 1951, RANDOLPH.

Criminal prosecution under G.S. 20-166, commonly known as the "hit and run" statute.

On 22 April 1951, a justice of the peace of Randolph County issued a warrant against defendant under G.S. 20-166, returnable before the recorder's court of Randolph County. At the September Term 1951 defendant was put on trial in the Superior Court on the charge that he, while driving a motor vehicle, was involved in an accident and left the scene without complying with the requirements of G.S. 20-166 (c).

There is a complete hiatus in the record. The judge in his charge refers to a bill of indictment, but there is no bill in the record. The war-

rant is included but there is nothing to show how the case came to be on the Superior Court docket or that the court below ever acquired jurisdiction.

In the trial below there was a verdict of guilty. The court pronounced judgment on the verdict and defendant appealed. In this Court the defendant moves in arrest of judgment.

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

Prevette & Coltrane for defendant appellant.

BARNHILL, J. The record fails to disclose jurisdiction in the court below. *S. v. Patterson,* 222 N.C. 179, 22 S.E. 2d 267. As that court was without jurisdiction, in so far as this record discloses, we have none. *S. v. Jones,* 227 N.C. 94, 40 S.E. 2d 700. Therefore, the appeal must be dismissed on authority of *S. v. Patterson, supra.*

The Assistant Attorney-General who argued this case in behalf of the State, with commendable frankness, directed our attention to the insufficiency of the warrant. It fails to charge the commission of any criminal offense. However, it does not sufficiently appear that defendant was put on trial under the warrant rather than upon a bill of indictment as indicated by the charge of the court below. Therefore, we are without sufficient information to direct future proceedings in the court below further than to say that the court must dispose of the cause on the basis of the record there existing. If the defendant was put on trial under the warrant appearing in this record, the judgment entered must be arrested. *S. v. Morgan,* 226 N.C. 414, 38 S.E. 2d 166. On the other hand, if he was tried under a bill of indictment, he must comply with the judgment entered.

In the event it appears there was no bill of indictment, the solicitor may proceed to prosecute under new pleadings, if so advised. *S. v. Johnson,* 226 N.C. 266, 37 S.E. 2d 678; *S. v. Morgan, supra.*

Appeal dismissed.

STATE v. LAFAYETTE MILLER.

(Filed 9 April, 1952.)

Criminal Law § 80b (4)—

Where defendant files no statement of case on appeal within the time allowed and does not apply for writ of *certiorari*, the appeal will be dismissed upon motion of the Attorney-General, but where defendant has been convicted of a capital felony this will be done only after an inspection of the record fails to disclose error.

STATE *v.* MILLER.

MOTION by State to docket case, affirm judgment, and dismiss appeal.

Attorney-General McMullan for the State.
No counsel contra.

WINBORNE, J. At a regular term of the Superior Court of Beaufort County, North Carolina, held on the 14th day of January, 1952, for the trial of criminal cases exclusively, Williams, J., presiding, the defendant Lafayette Miller was tried upon a bill of indictment charging him with the crime of murder in the first degree for the killing of one Harvey C. Boyd. There was a verdict of guilty of murder in the first degree as charged in the bill of indictment, upon which judgment of death as required by law was pronounced by the court at said term of Superior Court.

From this judgment defendant gave notice of appeal to the Supreme Court of North Carolina, and an order was entered allowing defendant sixty days for making up and serving statement of case on appeal and the State allowed sixty days thereafter to serve countercase. And on 3 March, 1952, attorneys for defendant, by assignment of the court, filed in this Court a motion, dated 29th day of February, 1952, "to withdraw the appeal in this cause, being unable to assign error to any part of the record or evidence in the cause."

And it now appears from certificate of the Clerk of Superior Court of said Beaufort County, under date 28 March, 1952: "that the trial of the case of *State v. Lafayette Miller* began on Wednesday, January 16, 1952, and was completed and sentence of death imposed and the judgment signed on Friday, January 18, 1952; that the January Term of the Superior Court of Beaufort County, North Carolina, was a two (2) weeks term; that the last day of said January Term was held on Tuesday, January 22, 1952; that the minutes of said court show, as the same appear on Minute Docket 28, page 173, of the Superior Court of Beaufort County, North Carolina, that the court expired by limitation; that as of this date, March 28, 1952, no statement of or case on appeal has been filed in the office of the Clerk of the Superior Court of Beaufort County in this action entitled "State *v.* Lafayette Miller," nor has any notice of application for writ of *certiorari* been served as of this date, March 28, 1952."

Therefore, it appears that the time allowed for serving statement of case on appeal has expired; that no statement of case on appeal has been filed; and that no notice of application for writ of *certiorari* has been given, and no application therefor has been filed in this Court.

And, in the meantime, the Attorney-General of the State of North Carolina moves to docket and dismiss the case under Rule 17 of the Rules of Practice in the Supreme Court of North Carolina, 221 N.C. 544, at page 551, and for affirmance of the judgment.

In the absence of apparent error upon the face of the record the motion is allowed. See among others the case of *S. v. Garner,* 230 N.C. 66, 51 S.E. 2d 895, and cases there cited. See also *S. v. Lewis,* 230 N.C. 539, 53 S.E. 2d 528; *S. v. Medlin,* 231 N.C. 162, 56 S.E. 2d 396; *S. v. Jones,* 231 N.C. 216, 56 S.E. 2d 390; *S. v. Daniels,* 231 N.C. 509, 57 S.E. 2d 653; *S. v. Scriven,* 232 N.C. 198, 59 S.E. 2d 428; *S. v. Liles,* 232 N.C. 622, 61 S.E. 2d 603; *S. v. Hall,* 233 N.C. 310, 63 S.E. 2d 636; *S. v. Shedd,* 233 N.C. 311, 63 S.E. 2d 633.

Appeal dismissed.

Judgment affirmed.

JOSHUA BOONE AND WIFE ROSA L. BOONE v. I. J. SPARROW AND WIFE LUCILLE M. SPARROW, LYMAN P. GRANT AND WIFE LUCILLE S. GRANT.

(Filed 16 April, 1952.)

1. Taxation § 40b—Methods of foreclosing tax sale certificate.

A tax sale certificate may be foreclosed by either of two methods: (1) the purchaser may institute an action for this purpose, G.S. 105-391, in which action any other taxing unit having tax or assessment liens must be made a party defendant unless it joins as a party plaintiff, and may prosecute the action to final judgment even though the claim of the plaintiff be satisfied while the action is pending; (2) or the taxing unit may file the certificate in the office of the clerk of the Superior Court, who must docket it upon the judgment docket, in which event it has the force and effect of a judgment, and execution may issue thereon against the property of the tax debtor, G.S. 105-392. G.S. 105-393, G.S. 105-394, and G.S. 105-395 relate to both methods.

2. Taxation § 40c—

A taxing unit may foreclose its tax lien, irrespective of any tax sale certificate, by action under G.S. 105-414 in the nature of an action to foreclose a mortgage, subject to the provisions of G.S. 105-391 (f) to (v), and in such action the judgment shall provide for the payment out of the proceeds of sale of all taxes then assessed upon the property and remaining unpaid and for the payment of such sums as may be required to redeem the property, G.S. 105-408.

3. Process § 1—

The summons must be signed by the clerk, G.S. 1-89.

4. Same: Process § 3—

The failure of the clerk to sign summons may be cured by amendment provided the summons bears internal evidence that it was issued from the clerk's office for the purpose of bringing the defendant into court to answer a complaint, G.S. 1-163, but such failure cannot be cured by amendment when there is nothing on the face of the paper to give assurance that it received the sanction of the clerk before it was delivered to the sheriff to be served, since in such event it is not a defective summons but no sum-

mons at all. Voluntary appearance dispenses with the necessity of summons and cures any defect.

5. Pleadings § 10—

Where a counterclaim is not served on the party sought to be charged its allegations are deemed to be denied, and this rule applies to a cross action against a codefendant as well as one against plaintiff. G.S. 1-140.

6. Taxation § 40c—

Where, in an action by a county to foreclose a tax lien under G.S. 105-414, a municipality made a defendant elects to file a cross action against the tax debtor for taxes due it, G.S. 105-391 (j), its answer must be served on the tax debtor, since otherwise the tax debtor would have no legal notice thereof requiring him to defend.

7. Judgments § 9—

The clerk has jurisdiction to enter a default judgment only in those instances enumerated by statute, G.S. 1-209, and he may not enter such judgment if issues of fact are raised by the pleadings either by express denial or denial by implication of law arising from failure to serve a cross action upon the party sought to be charged. G.S. 1-174, G.S. 1-273, G.S. 1-171.

8. Judgments § 27b—

Where the court entering a judgment is without jurisdiction, the judgment is void and a nullity.

9. Same: Courts § 2: Judgments § 18—

Notice and an opportunity to be heard are prerequisites of jurisdiction, and jurisdiction is a prerequisite of a valid judgment.

10. Judgments § 17a—

The judgment of a court draws its life and vitality from the judgment roll.

11. Taxation § 40g—

It is the duty of the purchaser of a tax title to investigate or cause to be investigated all sources of title, and where the judgment roll in a tax foreclosure by a county discloses that the municipality from which tax title was derived failed to serve its counterclaim for taxes upon defendant tax debtor, the purchaser is charged with notice of this fatal defect of jurisdiction in the rendition of a default judgment for the municipal taxes.

APPEAL by plaintiff from *Grady, Emergency Judge,* November Term, 1951, LENOIR. Reversed.

Civil action to remove cloud from title to real property.

On 22 December 1948 plaintiffs were the owners of a tract of land in the City of Kinston, Lenoir County. On 12 February 1949, the sheriff of Lenoir County served on them an unsigned summons dated 22 December 1948, together with a complaint captioned "Lenoir County *v.* Joshua Boone and wife Rosa L. Boone" and certain other named defendants including the City of Kinston. Service was likewise had on the City of

Kinston on the same date. The complaint served on the plaintiffs herein alleged a cause of action for the foreclosure of the tax lien of the county for the year 1938. It alleged that taxes were also due for the years 1928 to 1937, both inclusive, and the years 1939 to 1947, both inclusive.

On 28 January 1949, prior to the service of summons on it and prior to the delivery of the summons to the sheriff for service, the defendant city filed an answer in which it admitted the allegations of the complaint and pleaded a cross action against the defendants Boone for the foreclosure of its tax lien for the year 1938. It further alleged that taxes on said property for the years 1926 to 1937 and from 1939 to 1947 were due and unpaid. It prayed that said taxes be adjudged a lien on said property and that a commissioner be appointed "as prayed in the complaint" to make sale of said property and apply the proceeds to the payment of said liens. This answer was not served on the defendants Boone.

The defendants Boone (plaintiffs herein) paid all taxes due the plaintiff county in said foreclosure action except the taxes for the year 1947.

On 9 April 1951 defendant city filed an affidavit for service of summons on the individual defendants other than plaintiffs herein and service on said defendants by publication was duly had.

On 25 June 1951 the clerk entered an interlocutory order, on motion of counsel for defendant city, appointing a commissioner and directing a sale of the property to satisfy the tax liens of said city. In this order the clerk found as a fact "that all matters and things in controversy on the part of the plaintiff Lenoir County have been settled, except for taxes due Lenoir County for the years 1947, 1948, 1949, 1950 and 1951." He further found "that the defendant City of Kinston is entitled to have said lands condemned for foreclosure and sale for the satisfaction of its said tax lien for the year 1938, and for the payment and satisfaction of all other taxes, with penalties . . ."

He thereupon, on motion of counsel for said city, adjudged:

(1) "That the Answer of the defendant City of Kinston herein filed and each and every allegation thereof be, and the same is hereby taken for admitted and confessed by the defendants and each of them."

(2) That defendant city have and recover judgment in the amount of the taxes alleged to be due together with interest, etc., especially for $25.54 for taxes due for the year 1938.

(3) That said taxes for the year 1938 constitute a lien upon said property and that the defendant city has a lien for all taxes listed in the certificate filed by it.

(4) That said land is condemned for the payment of said liens and the lien of Lenoir County, and

(5) That all right, title, etc., of the tax debtor and the other individual defendants are forever foreclosed.

A commissioner was appointed with directions that he sell said land for the satisfaction of said liens as therein provided.

The commissioner sold the land as therein directed. Said sale was confirmed by order entered 9 August 1951 and the commissioner executed his deed to the purchasers, the defendants herein, on the same date.

On 11 September 1951 plaintiffs instituted this action to remove the cloud cast upon their title by said commissioner's deed.

When the cause came on for trial in the court below the parties waived trial by jury and submitted the cause to the judge to find the facts and render judgment on the facts found and the judgment roll in the foreclosure action.

The court found certain facts including the finding that plaintiffs were guilty of laches in failing to defend said action and concluded:

(1) That there is no incurable defect in the summons;

(2) That the judgment roll discloses jurisdiction of the parties and the subject matter of the foreclosure action; and

(3) That defendants herein are fully protected by the judgment entered in the foreclosure action.

It thereupon adjudged that defendants are the absolute owners of the *locus* and are entitled to the immediate possession thereof together with rent at $10 per month and the cost of the action. Issuance of a writ of assistance was directed.

Jones, Reed & Griffin for plaintiff appellants.

H. Frank Owens and J. Harvey Turner for defendant appellees.

BARNHILL, J. The sheriff of a county must report delinquent taxpayers on the first Monday in April next after the year in which the tax was assessed, and he must sell the land of the delinquent taxpayers to satisfy the taxes due on the first Monday of the following May. The requirement is the same as to cities and towns except that the report is to be made on the second Monday in April and the sale had on the second Monday in May. G.S. 105-387.

Upon making sale of the land of a delinquent taxpayer, the sheriff is required to issue to the purchaser a tax sale certificate. G.S. 105-388. However, if the taxing unit becomes the purchaser, the certificate is issued only at its election.

There are two distinct alternate methods provided by statute for the foreclosure of a tax sale certificate or the lien evidenced thereby.

1. After the land has been sold by the sheriff and a certificate of sale has been issued, the purchaser may institute an action to foreclose the lien evidenced by the certificate. G.S. 105-391. This section of the Code provides the regulations and procedure respecting an action instituted

pursuant to this method. Among these are the requirements (a) that any other taxing unit having tax or assessment liens must be made party defendant unless such other taxing unit joins as a party plaintiff, and (b) if the claim of the plaintiff is satisfied while the action is pending, the defendant taxing unit may continue the action to final judgment for the satisfaction of its own lien alleged in its answer.

2. Under G.S. 105-392 the taxing unit may file in the office of the clerk of the Superior Court a sheriff's certificate of sale of land to satisfy taxes. Thereupon, the clerk must docket the certificate upon his judgment docket. It then has the full force and effect of a judgment, and execution may issue thereon against the property of the tax debtor.

These two sections of the Code are parts of General Statutes, ch. 105, art. 27; and G.S. 105-393, 394, and 395 relate to both methods.

General Statutes, ch. 105, art. 32, provides still another method or proceeding for the foreclosure of the lien created by the assessment of a tax which is not dependent upon a sale by the sheriff and is not bottomed on a tax sale certificate. This method, which is the oldest now in existence, is expressly preserved as an alternate method for the foreclosing of tax liens in G.S. 105-395, with the proviso, however, that the provisions of subsections (f) to (v) inclusive of G.S. 105-391 shall apply in any such foreclosure action brought under G.S. 105-414.

G.S. 105-414 (formerly C.S. 7990) is a part of General Statutes, ch. 105, art. 32, and provides that any taxing unit may institute an action to foreclose its tax lien. This action is founded on the original tax lien and not upon a tax certificate of sale as in the other two alternate methods. When the action is instituted under this provision of the statute, it must be conducted as in case of a foreclosure of a mortgage.

G.S. 105-408 provides that in all judicial sales had to satisfy tax liens, the judgment shall provide for the payment, out of the proceeds of sale, of all taxes then assessed upon the property and remaining unpaid and for the payment of such sums as may be required to redeem the property if it has been sold for taxes and such redemption can be had. *New Hanover County v. Whiteman,* 190 N.C. 332, 129 S.E. 808. Thus while the action is to foreclose a specific lien, the object is to assure the payment of all tax liens on the property in one action, so that the purchaser will obtain title free of any lien for taxes assessed at any time before final judgment.

The complaint in this action makes no reference to a sale by the sheriff or to a tax sale certificate. It is an action to foreclose the original lien under the provisions of G.S. 105-414, and shall be conducted as in case of a foreclosure of a mortgage, as modified by G.S. 105-395.

The plaintiffs, who were the tax debtor defendants in the foreclosure action assert that the foreclosure judgment entered in the action is void

for the reason the purported summons was not signed by the clerk of the Superior Court; did not issue out of his office; and service thereof did not subject them to the jurisdiction of the court.

The statute, G.S. 1-89, provides for the issuance of a summons in a civil action. One of its specific requirements is that the summons shall be signed by the clerk. Is his failure to do so a fatal defect which renders the service thereof ineffectual and a judgment entered in the cause void and of no effect? On this question we have two distinct lines of decisions.

In *Hooker v. Forbes,* 202 N.C. 364, 162 S.E. 903, we held that the failure of the clerk to comply with the requirement that a summons must be signed by him, G.S. 1-89, is a defect which may be waived by a general appearance and may therefore be remedied by amendment under G.S. 1-163. *Henderson v. Graham,* 84 N.C. 496; *Piercy v. Watson,* 118 N.C. 976, and *Land Bank v. Aycock,* 223 N.C. 837, 28 S.E. 2d 494, are to like effect.

On the other hand, in *Redmond v. Mullenax,* 113 N.C. 505, this Court held that the failure of the clerk to sign the summons in that case was fatal and the judgment entered in the case was void. See also Anno. 30 A.L.R. 717; 42 A.J. 12, sec. 10.

Even so, a careful consideration of these decisions discloses that there is no real conflict or inconsistency. The Court, in a well-considered opinion in the *Redmond case,* discusses the question and states the controlling rule which has been consistently followed by this Court. It may be briefly summarized as follows:

If the clerk fails to sign a summons, the defect may be cured by amendment if there is evidence upon the face of the summons itself that it emanated from the proper office and was intended to bring the defendant into court to answer a complaint of the plaintiff. That is, if the paper bears internal evidence of its official origin and of the purpose for which it was issued, it comes within the definition of original process and may be amended by permitting the clerk to sign *nunc pro tunc* as provided by G.S. 1-163. This rule is subject to the limitation that such alteration of the record must not disturb or impair any intervening rights of third parties.

If, however, there is nothing upon the face of the paper which stamps upon it unmistakably an official character, it is not a defective summons but no summons at all—"no more than one of the usual printed blanks kept by the clerks of the courts." The curative power of amendment may not be invoked when there is nothing upon the face of the paper to give assurance that it received the sanction of the clerk before it was delivered to the sheriff to be served. This rule is cited with approval in *Land Bank v. Aycock, supra,* and *Piercy v. Watson, supra.*

Thus, when the paper bears the seal of the clerk and there is evidence it actually emanated from the clerk's office, *Land Bank v. Aycock, supra; Henderson v. Graham, supra,* or the jurat of the clerk and his signature appear below the cost bond, *Hooker v. Forbes, supra,* the paper bears internal evidence of its official character and the defect may be cured by amendment. When it does not bear some such evidence, it is void and not subject to amendment. *Redmond v. Mullenax, supra.*

Incidentally, in appraising the rule, we must bear in mind that we are not here dealing with a case in which the defendant voluntarily appeared, for voluntary appearance dispenses with the necessity of summons. *Williams v. Cooper,* 222 N.C. 589, 24 S.E. 2d 484. This is the underlying philosophy of some of our decisions wherein amendment of process was allowed.

Applying the rule as approved in these decisions, we might well hold that there was no summons issued in this cause and the judge was without authority to permit the clerk to sign the paper which purports to be a summons *nunc pro tunc.* Be that as it may, we prefer to rest decision on other grounds, to wit:

(1) The clerk was without authority to sign a default judgment in favor of the defendant City of Kinston on its cross action; and

(2) Said judgment was signed and the property foreclosed without legal notice to its codefendants, the plaintiffs herein.

If a counterclaim is pleaded against a plaintiff and no copy of the answer containing such counterclaim shall be served upon the plaintiff or his attorney of record, such counterclaim shall be deemed to be denied as surely as if plaintiff had filed a reply denying the same. G.S. 1-140; *Lumber Company v. Welch,* 197 N.C. 249, 148 S.E. 250; *Miller v. Grimsley,* 220 N.C. 514, 17 S.E. 2d 642; McIntosh, P. & P. 715, sec. 637. While this statute uses the word "plaintiff," its purpose and intent is to withhold from a defendant any right to a judgment by default on any counterclaim until and unless he gives the alleged debtor legal notice of his claim. We may concede that the defendant City of Kinston had the right to plead the counterclaim against these defendants set out in its answer in the foreclosure action. G.S. 105-391 (j), 395. Even so, the philosophy underlying the statute, G.S. 1-140, requires that the rule there prescribed be applied to a cross action by one defendant against a codefendant.

Independent of the statute, simple justice would deny to such defendant the right to obtain against a codefendant a judgment by default on a cross action of which he had no legal notice. He is summoned to court to answer the complaint of the plaintiff, and he is under no legal duty to examine the answer of a codefendant to discover whether perhaps there is still another claim there asserted against him.

If the defendant taxing unit, in an action such as this, intends to prosecute its claim irrespective of the disposition of plaintiff's cause of action as authorized by G.S. 105-391 (j), it must give its codefendant tax debtor notice thereof so that he may defend if he so elects.

The clerk of the Superior Court possesses very limited jurisdiction to enter judgments in civil actions. *Cook v. Bradsher,* 219 N.C. 10, 12 S.E. 2d 690; *High v. Pearce,* 220 N.C. 266, 17 S.E. 2d 108; *Moore v. Moore,* 224 N.C. 552, 31 S.E. 2d 690. He may exercise in such cases only such jurisdiction as is provided by statute. While he is vested with authority to enter judgments by default in certain cases, G.S. 1-209, G.S. 105-391 (m), his jurisdiction is limited to the specific instances enumerated in the statute. *Johnston County v. Ellis,* 226 N.C. 268, 38 S.E. 2d 31; *Beaufort County v. Bishop,* 216 N.C. 211, 4 S.E. 2d 525; *Cook v. Bradsher, supra; High v. Pearce, supra; Moore v. Moore, supra.*

When issues of fact are raised by the pleadings, he must transfer the cause to the civil issue docket. G.S. 1-171, 174, 273. And where an answer containing a counterclaim is not served, the allegations in the answer are to be dealt with as if denied by reply or further answer of the alleged debtor. *Kassler v. Tinsley,* 198 N.C. 781, 153 S.E. 411; *Lawrence v. Heavner,* 232 N.C. 557, 61 S.E. 2d 697; *Simon v. Masters,* 192 N.C. 731, 135 S.E. 861; *Lumber Company v. Welch, supra.*

So then, a judgment entered by a clerk in a mortgage foreclosure action based in part on evidence offered, *Johnston County v. Ellis, supra,* or in any foreclosure action under G.S. 105-414, on a day other than as authorized by statute, *Beaufort County v. Bishop, supra,* or in a dower allotment proceeding affecting land outside his county, *High v. Pearce, supra,* or where he must find facts as a basis for his judgment, *Moore v. Moore, supra,* or in a case not specified by statute, *Cook v. Bradsher, supra,* his judgment is void and of no effect.

"A lack of jurisdiction or power in the court entering the judgment always avoids the judgment. This is equally true when the court has not been given jurisdiction of the subject-matter, or has failed to obtain jurisdiction on account of a lack of service of proper process." (cases cited) "A void judgment is not a judgment and may always be treated as a nullity . . . it has no force whatever; it may be quashed *ex mero motu.*" *Clark v. Homes,* 189 N.C. 703, 128 S.E. 20.

Notice and an opportunity to be heard are prerequisites of jurisdiction, and jurisdiction is a prerequisite of a valid judgment. *Comrs. of Roxboro v. Bumpass,* 233 N.C. 190, 63 S.E. 2d 144, and cases cited. The judgment roll in the foreclosure action fails to disclose compliance with these essential requirements of due process.

Counsel for defendants assert in their brief that to require title abstracters to examine the judgment roll in judicial sales and deny them

the right to rely on the recitals in the judgment of foreclosure and decree of confirmation would place an unreasonable burden on them and rob the judgment and decree of the integrity to which they are entitled. But the judgment of the court draws its life and vitality from the judgment roll, *Powell v. Turpin,* 224 N.C. 67, 29 S.E. 2d 26, and any abstracter who overlooks this fact takes a grave risk, the consequences of which he or his client must bear.

"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 no relief. *Foy v. Haughton,* 85 N.C. 169.'" *Wilmington v. Merrick,* 234 N.C. 46; *Quevedo v. Deans,* 234 N.C. 618.

The question whether these defendants are subrogated to any right of the City of Kinston to prosecute a foreclosure action for the collection of taxes paid it out of the proceeds of sale is not presented for decision on this record.

The judgment entered in the court below is

Reversed.

IN THE MATTER OF W. H. McGOWAN, DECEASED.

(Filed 16 April, 1952.)

1. Evidence §§ 17, 30a—

Where defendants introduce a photostatic copy of an instrument introduced by plaintiff and such photostatic copy is admitted by the court, not as substantive evidence, but merely for the purpose of illustrating the testimony of a witness, defendants are not estopped from attacking the authenticity or due execution of the original instrument.

2. Wills § 23a—

Where a will is attacked solely on the ground that the signature thereto was not the genuine signature of decedent, testimony of a witness of a conversation with deceased shortly before the execution of the instrument, introduced for the purpose of showing deceased's mental capacity to make a will, is incompetent as irrelevant to the issue. Further, such testimony would be incompetent on the question of mental capacity if decedent, in the conversation, in no way expressed an intention to make a will.

3. Appeal and Error § 8—

An appeal will be determined in accordance with theory of trial in the lower court.

4. Evidence § 46b—

A handwriting expert may give his opinion as to the genuineness of a signature upon an instrument, based upon comparison of such signature with the signature appearing on various checks identified by witnesses as

being genuine, without offering the checks in evidence. This rule was not altered by G.S. 8-40.

5. Wills § 25: Appeal and Error § 39f—

In an action attacking a paper writing solely on the ground that the signature thereto was not the genuine signature of deceased, it is error for the court to charge the jury as to what disposition would be made of decedent's property in the event the paper writing was not upheld, since this matter is irrelevant to the issue, but where the instruction is in response to the argument of counsel on both sides upon the matter the error is invited and will not be held prejudicial.

6. Appeal and Error § 6c (6)—

Misstatement of the contentions of a party must be brought to the trial court's attention before the case is finally given to the jury so that it may be corrected.

7. Appeal and Error § 29—

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

APPEAL by propounder from *Phillips, J.*, October Term, 1951, of CALDWELL.

Issue of *devisavit vel non* decided in favor of caveators.

W. H. McGowan, a resident of Caldwell County, North Carolina, died on 6 April, 1951, leaving no lineal descendants. Lois Sanders McGowan, widow of W. H. McGowan, presented to the Clerk of the Superior Court of Caldwell County a paper writing purporting to be the last will and testament of her late husband, which paper writing was duly admitted to probate in common form on 14 May, 1951. This paper writing purports to bequeath and devise to Lois Sanders McGowan the entire estate of W. H. McGowan, deceased.

The brothers and sisters of W. H. McGowan, deceased, filed a caveat to said purported will on 10 August, 1951, alleging that the paper writing admitted to probate in common form was not the last will and testament of the said W. H. McGowan. Two issues were submitted to the jury and answered as follows:

"1. Was the paper writing offered for probate as the last will and testament of W. H. McGowan signed by W. H. McGowan and executed according to law? Answer: No.

"2. Is the paper writing propounded by Mrs. Lois Sanders McGowan and every part thereof the last will and testament of W. H. McGowan, deceased? Answer: No."

From the judgment on the verdict the propounder appeals and assigns error.

Williams & Whisnant and W. H. Strickland for propounder, appellant.

James C. Farthing and Mull, Patton & Craven for caveators, appellees.

DENNY, J. The trial below resolved itself into an inquiry as to whether the signature appearing on the paper writing offered for probate in solemn form, as the last will and testament of W. H. McGowan, was or was not his genuine signature, there being no contention that the signature was affixed by anyone authorized by him to sign his name thereto. The evidence was conflicting on this question. Even so, there was ample evidence to support the verdict of the jury. Consequently, the verdict should be upheld unless some prejudicial error was committed in the course of the trial.

The propounder offered in evidence the original paper writing which had been probated in common form, as the last will and testament of W. H. McGowan. This instrument was admitted and marked, "Propounder's Exhibit A." Thereafter, the caveators offered evidence to the effect that they had caused a photographic copy of propounder's Exhibit A to be made in the presence of the Assistant Clerk of the Superior Court of Caldwell County, and offered such copy in evidence. The propounder objected to its admission, whereupon the court overruled the objection and instructed the jury as follows: ". . . the photographic copy of the instrument that caveators offer in evidence is not to be considered by you as substantive evidence. It is only admitted for the purpose of illustrating the testimony of the witness, and you will receive it only in its illustrative effect, and not as substantive evidence."

The handwriting expert, who was a witness for the caveators, testified that he took the photographic copy of propounder's Exhibit A to his office in Charlotte and used it in making a comparison of the signature appearing thereon with the genuine handwriting of W. H. McGowan; that he also examined propounder's Exhibit A and the signatures on various checks identified by the witnesses who testified the signatures on the checks were in the genuine handwriting of W. H. McGowan, and, in his opinion, the signature appearing on propounder's Exhibit A was not the genuine signature of W. H. McGowan.

The propounder now takes the position that since the caveators did not offer the photographic copy of propounder's Exhibit A for the purpose of attack or impeachment, they are bound by it to the same extent as if they had offered the original instrument without qualification. The propounder contends that by offering in evidence a photograpic copy of the propounder's Exhibit A, the caveators are estopped from denying the authenticity, or the due execution of the original instrument. The contention is untenable.

A photographic or photostatic copy of an instrument or document is nothing more than a photograph of it. And in this jurisdiction, photographs, when properly authenticated, are competent for use in illustrating or explaining the testimony of a witness, but may not be admitted as

substantive evidence. Hence, the photograph of propounder's Exhibit A was admissible only for the restricted use specified by the trial judge. It was not admitted as substantive evidence. *S. v. Gardner,* 228 N.C. 567, 46 S.E. 2d 824; *S. v. Mays,* 225 N.C. 486, 35 S.E. 2d 494; *S. v. Miller,* 219 N.C. 514, 14 S.E. 2d 522; *Coach Co. v. Lee,* 218 N.C. 320, 11 S.E. 2d 341; *Pearson v. Luther,* 212 N.C. 412, 193 S.E. 739; *Kelly v. Granite Co.,* 200 N.C. 326, 156 S.E. 517; *Elliott v. Power Co.,* 190 N.C. 62, 128 S.E. 730; *S. v. Jones,* 175 N.C. 709, 95 S.E. 576; *Pickett v. R. R.,* 153 N.C. 148, 69 S.E. 8; *Hampton v. R. R.,* 120 N.C. 534, 27 S.E. 96, 35 L.R.A. 808.

Assignment of error No. 49 is bottomed on the exception to the refusal of the court to admit the testimony of one of propounder's witnesses with respect to certain conversations the witness had with W. H. McGowan several months prior to his death. The testimony of the witness was taken in the absence of the jury and excluded by the court. The substance of it was to the effect that W. H. McGowan visited the office of the witness in the late summer or early fall of 1950; that he said he wanted his advice; that some of his real property was in his name alone, and some of it was in his wife's name and he wanted his wife to have all his property if she survived him. He asked him what was the best thing to do. The witness said: "I told him the best thing to do was to make a will." Two or three months later, toward the end of 1950, Mr. W. H. McGowan again raised this same question and expressed the desire for his wife to have all his property if she survived him. The witness said: "I told him in my opinion the best thing to do was to make a will." At no time, however, during these conversations, according to this witness, did Mr. McGowan express any intention to make a will.

The propounder insists that this evidence was competent on the question of Mr. McGowan's mental capacity to make a will. There are two reasons why the evidence was not admissible: (1) Mr. McGowan never expressed any intention to make a will. "A statement of a decedent which cannot be conceived as referring to an instrument propounded as his will is not admissible upon any theory that it is a demonstration which reveals his intent to make a testamentary disposition by the instrument." 57 Am. Jur., Wills, section 896, page 591. See *In re Will of Ball,* 225 N.C. 91, 33 S.E. 2d 619. (2) The mental capacity of W. H. McGowan was not challenged in the trial below.

Where the caveat to a will is duly filed and on the trial the sole question is whether the signature to the will is or is not the genuine signature of the purported testator, an exception to the exclusion of evidence on the ground that such evidence was admissible on some questions not considered or presented in the trial below, is without merit. *In re Efird's Will,* 195 N.C. 76, 141 S.E. 460. "A party is not permitted to try his case in

the Superior Court on one theory and then ask the Supreme Court to hear it on another and different theory." *Shipp v. Stage Lines,* 192 N.C. 475, 135 S.E. 339; *Warren v. Susman,* 168 N.C. 457, 84 S.E. 760; *Hendon v. R. R.,* 127 N.C. 110, 37 S.E. 155; *Allen v. R. R.,* 119 N.C. 710, 25 S.E. 787.

The propounder assigns as error the admission of opinion evidence as to the genuineness of the signature of W. H. McGowan, derived from comparison of his handwriting on the purported will with that appearing on various checks identified by witnesses as being in his genuine handwriting, without offering the checks in evidence.

Prior to the enactment of Chapter 52, Public Laws of 1913, C.S. 1784, now G.S. 8-40, a qualified witness was permitted to make a comparison of a disputed writing with one whose genuineness was admitted or not denied. But no comparison was permissible when the proposed standard was itself disputed or evidence was required to establish its genuineness. *Boyd v. Leatherwood,* 165 N.C. 614, 81 S.E. 1025; *Tunstall v. Cobb,* 109 N.C. 316, 14 S.E. 28. And in those cases, where the comparison of handwriting was permissible under the law, a paper containing the admitted genuine signature was not required to be introduced in evidence to authorize its comparison by a qualified witness with a signature the genuineness of which was in issue. *Abernethy v. Yount,* 138 N.C. 337, 50 S.E. 696. We do not construe the statute G.S. 8-40, which was enacted after the above decision was rendered, to change the rule in this respect. The statute, however, did change the rule of evidence so as to permit the comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine, and to permit such writing and the evidence of witnesses respecting the same to be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute. But we do not construe the statute to prevent a comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine, unless such genuine writing is introduced in evidence. *Abernethy v. Yount, supra;* 32 C.J.S., Evidence, Section 617 (a), page 467.

It appears from the record that the attorneys for the propounder and the caveators, in their arguments to the jury, discussed what disposition would be made of the estate of W. H. McGowan in the event the will under consideration was declared invalid. Whereupon, the court in its charge to the jury stated that since there had been arguments on both sides about what would become of the estate of W. H. McGowan, in the event the will was held to be invalid, in order for the jury to know what the law says about that, and for that purpose only, the court would instruct the jury as to what the statute provided. Thereupon the court proceeded to read to the jury section 3 of the Statute of Distribution, which is as follows: "If there is no child nor legal representative of a

deceased child, then one-half of the estate shall be allotted to the widow, and the residue be distributed equally to every of the next of kin of the intestate, who are in equal degree, and to those who legally represent them. The court then said: "And, in addition thereto, the widow would be entitled to dower in real estate."

The propounder challenges this instruction on the following grounds: (1) That the jury was not informed that the Statute of Distribution applies only to personal property; (2) that the court failed to define the meaning of the word "dower"; (3) that the charge as to the disposition of the estate, in the event the will was declared invalid, amounted to an intimation on the part of the judge that he felt the will should be set aside.

The question as to what disposition would be made of W. H. McGowan's estate, in the event his purported will was held to be invalid, was not a question for the consideration of the jury on the facts disclosed on this record, and the jury should have been so instructed. There was no unnatural disposition of the testator's property in the purported will, making such disposition a proper subject of comment. *In re Burns' Will,* 121 N.C. 336, 28 S.E. 519. However, we think the error now complained of falls under the category of invited error and will not be held as prejudicial on this record. *Johnson v. Sidbury,* 226 N.C. 345, 38 S.E. 2d 82; *Carruthers v. R. R.,* 218 N.C. 377, 11 S.E. 2d 157; *Kelly v. Traction Co.,* 132 N.C. 368, 43 S.E. 923. Moreover, the grounds upon which the propounder challenges the instruction given are without merit.

The assignments of error Nos. 67, 70, 71, 72, 73, and 74 are directed to those portions of the charge containing the contentions of the caveators.

It is well settled that if the trial judge in charging the jury fails to state the contentions correctly, it is the duty of the aggrieved party to call such failure to his attention before the case is finally given to the jury so that it may be corrected. McIntosh, N. C. Procedure and Practice, section 580, page 642; *Dickson v. Coach Co.,* 233 N.C. 167, 63 S.E. 2d 297; *Shipping Lines v. Young,* 230 N.C. 80, 52 S.E. 2d 12; *S. v. McNair,* 226 N.C. 462, 38 S.E. 2d 514; *Switzerland Co. v. Highway Com.,* 216 N.C. 450, 5 S.E. 2d 327; *Hayes v. Ferguson,* 206 N.C. 414, 174 S.E. 121; *S. v. Johnson,* 193 N.C. 701, 138 S.E. 19; *Walker v. Burt,* 182 N.C. 325, 109 S.E. 43; *Sears v. R. R.,* 178 N.C. 285, 100 S.E. 433; *Hardy v. Mitchell,* 161 N.C. 351, 77 S.E. 225.

The remaining assignments of error, fifty-eight in number, have not been brought forward and argued in the brief and will, therefore, be taken as abandoned. Rule 28, Rules of Practice in the Supreme Court, 221 N.C. 563.

Upon a consideration of the entire record, in our opinion, no error of sufficient merit to warrant a new trial has been shown

No error.

STATE v. THEODORE BIRCHFIELD, D. W. BIRCHFIELD, AND LEROY BIRCHFIELD.

(Filed 16 April, 1952.)

1. Criminal Law § 8a—

A principal in the first degree is one who actually commits the offense with his own hand.

2. Criminal Law § 8b—Definition of principal in second degree.

A principal in the second degree is one who is actually or constructively present when an offense is committed by another and who aids or abets such other in the commission of the offense, and while the mere presence of a bystander at the scene does not constitute him a principal in the second degree, even though he make no effort to prevent the crime, or silently approve its commission or secretly intend to assist the perpetrator in case his aid becomes necessary, when he shares in the criminal intent and is present to the knowledge of the actual perpetrator for the purpose of giving assistance if necessary, and his presence and purpose to do so in fact encourages the actual perpetrator to commit the offense, he is guilty as a principal in the second degree.

3. Same—

In determining whether a person is guilty as a principal in the second degree, evidence of his relationship to the actual perpetrator, of motive tempting him to assist in the crime, his presence at the scene, and his conduct before and after the crime, are circumstances to be considered.

4. Assault § 8d—

In order to sustain conviction of defendant as a principal under G.S. 14-32, the State must prove that defendant committed an assault and battery upon another with a deadly weapon, with intent to kill the victim of his violence, and did thus inflict on the person of his victim serious injury not resulting in death.

5. Assault § 13—Evidence held sufficient to be submitted to the jury in this prosecution for assault with a deadly weapon with intent to kill, inflicting serious injury.

Defendants are the father-in-law and the brothers-in-law of the prosecuting witness. The State's evidence tended to show that while a prosecution against defendants for assault on the prosecuting witness was pending, defendants in a car, driven by one of the brothers-in-law, met the car driven by the prosecuting witness in a rural section of the county, that as the cars passed, the father-in-law fired two shots into the car driven by the prosecuting witness, that the prosecuting witness stopped his car and undertook to flee, that the driver of the other car stopped it, permitting the father-in-law to alight, that the father-in-law felled the prosecuting witness with a shot through his body, and that all of the defendants left in their car without offering aid to the prosecuting witness who was lying on the ground seriously injured. *Held:* The evidence is sufficient to be submitted to the jury on the question of the father-in-law's guilt as a principal in the first degree and the brothers-in-law's guilt as principals in the second degree in a prosecution under G.S. 14-32.

6. Criminal Law § 44—

A motion for a continuance ordinarily is addressed to the discretion of the trial court, and his refusal of such motion will not be disturbed on appeal unless the record discloses abuse of discretion or that the refusal of the motion deprived defendant of his fundamental right to an adequate and fair trial.

7. Assault § 12: Criminal Law § 29b—

Evidence that some six weeks prior to the occasion in question one of defendants shot at prosecuting witness, and that the prosecuting witness had all of defendants arrested on a charge of assault, *is held* competent for the purpose of showing intent and motive on the part of the defendants in making the later assault.

8. Criminal Law § 50d—

It appeared that during lengthy testimony, the judge, in response to the witness' request, was handing him water from the only pitcher available, and so did not hear the solicitor's question but only the objection of defendant's counsel, and that thereupon the court inquired whether the objection was to his giving the witness a drink of water. *Held:* The incident was not prejudicial.

9. Same—

It appeared that the witness volunteered a statement and that the judge admonished him "to keep quiet until (counsel) ask you questions." *Held:* The court was merely requiring the witness to observe the rules of evidence, and the incident was not prejudicial.

10. Criminal Law § 81c (2)—

A new trial will not be awarded for error in the charge which is not prejudicial.

11. Criminal Law § 78e (2)—

A misstatement of the contentions of a party must be brought to the trial court's attention in time to afford opportunity for correction.

APPEAL by defendants from *Rudisill, J.*, and a jury, at September Term, 1951, of GRAHAM.

Criminal prosecution upon an indictment charging that on 28 August, 1951, the defendants assaulted and wounded Boyd Jordan with a deadly weapon, to wit, a rifle, with intent to kill him, and in that way inflicted upon him serious injury not resulting in his death. G.S. 14-32.

The State's evidence was as follows:

1. Boyd Jordan's wife is the daughter of Theodore Birchfield and the sister of D. W. Birchfield and Leroy Birchfield. Relations between Jordan and his wife became strained, and they separated sometime before July, 1951.

2. In July, 1951, Theodore Birchfield shot Jordan in the leg. Jordan had Theodore Birchfield, D. W. Birchfield, and Leroy Birchfield arrested and charged with jointly assaulting him in connection with this shooting.

The case was set for trial at a term of the Superior Court of Graham County, which was to convene 3 September, 1951.

3. Five days before that time, *i.e.,* on 28 August, 1951, an automobile driven by Jordan, and an automobile operated by D. W. Birchfield met on a highway in a rural section of Graham County. Theodore Birchfield and Leroy Birchfield were riding in the car driven by D. W. Birchfield. Theodore Birchfield was armed with a rifle.

4. Thereupon the following events occurred in the order stated. As the two automobiles approached and passed each other, Theodore Birchfield fired two shots into the car driven by Jordan. "One took effect in the windshield, and the other in the windshield strip next to the front door." Jordan stopped his automobile, dismounted, and undertook to flee. D. W. Birchfield halted his car, permitting Theodore Birchfield to alight. Theodore Birchfield fired at Jordan, who was running away. The shot struck Jordan "in the back and came out his belly," felling him. Neither D. W. Birchfield nor Leroy Birchfield said anything while these things were happening. The defendants left in D. W. Birchfield's automobile without offering any aid to Jordan, who was lying on the ground.

5. The wound occasioned Jordan much pain, and necessitated his confinement to a hospital for a week.

Each defendant asserted his innocence, and presented testimony tending to establish an alibi.

The jury found each defendant "guilty as charged in the bill of indictment," and the trial judge sentenced each defendant to imprisonment in the State's prison. The defendants excepted and appealed, assigning errors.

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

R. B. Morphew and T. M. Jenkins for the defendants, appellants.

ERVIN, J. The defendants insist initially upon reversals on the ground that the action ought to have been involuntarily nonsuited as to all of them under the statute embodied in G.S. 15-173. Inasmuch as they have been convicted of the principal charge rather than of a lesser offense included in it, our present inquiry comes to this: Does the State's evidence suffice to show that the defendants or any of them committed a felonious assault and battery with a deadly weapon with intent to kill within the purview of the statute codified as G.S. 14-32?

The State bottoms this prosecution on the theory that Theodore Birchfield is guilty as a principal in the first degree, and that D. W. Birchfield and Leroy Birchfield are guilty as principals in the second degree.

A principal in the first degree in an assault and battery is he who actually commits the assault and battery with his own hand. A principal in the second degree in an assault and battery is one who is actually or constructively present when an assault and battery is committed by another, and who aids or abets such other in its commission. *S. v. Minton,* 234 N.C. 716, 68 S.E. 2d 844; *S. v. Allison,* 200 N.C. 190, 156 S.E. 547; *S. v. Morris,* 10 N.C. 388.

To warrant the conviction of an accused of a felonious assault and battery under G.S. 14-32 on the theory that he participated in the offense as a principal in the first degree, the State must produce evidence sufficient to establish beyond a reasonable doubt that he did these four things: (1) That he committed an assault and battery upon another; (2) that he committed the assault and battery with a deadly weapon; (3) that he committed the assault and battery with intent to kill the victim of his violence; and (4) that he thus inflicted on the person of his victim serious injury not resulting in death. *S. v. Hefner,* 199 N.C. 778, 155 S.E. 879; *S. v. Gibson,* 196 N.C. 393, 145 S.E. 772; *S. v. Redditt,* 189 N.C. 176, 126 S.E. 506; *S. v. Crisp,* 188 N.C. 799, 125 S.E. 543.

This being true, the sufficiency of the State's evidence to establish the guilt of Theodore Birchfield on the principal charge is too evident to admit of dispute.

This conclusion does not put an end to our present inquiry. D. W. Birchfield and Leroy Birchfield take the position that the action should have been involuntarily nonsuited as to them for insufficiency of evidence of aiding and abetting even if the State's evidence is ample to prove that Theodore Birchfield committed a felonious assault and battery upon Jordan in their presence.

The mere presence of a person at the scene of a crime at the time of its commission does not make him a principal in the second degree; and this is so even though he makes no effort to prevent the crime, or even though he may silently approve of the crime, or even though he may secretly intend to assist the perpetrator in the commission of the crime in case his aid becomes necessary to its consummation. *S. v. Hart,* 186 N.C. 582, 120 S.E. 345; *S. v. Hildreth,* 31 N.C. 440, 51 Am. D. 369.

To constitute one a principal in the second degree, he must not only be actually or constructively present when the crime is committed, but he must aid or abet the actual perpetrator in its commission. *S. v. Epps,* 213 N.C. 709, 197 S.E. 580; *S. v. Davenport,* 156 N.C. 596, 72 S.E. 7; *S. v. Lumber Co.,* 153 N.C. 610, 69 S.E. 58. A person aids or abets in the commission of a crime within the meaning of this rule when he shares in the criminal intent of the actual perpetrator (*S. v. Oxendine,* 187 N.C. 658, 122 S.E. 568), and renders assistance or encouragement to him in the perpetration of the crime. *S. v. Hoffman,* 199 N.C. 328, 154 S.E.

314; *S. v. Baldwin,* 193 N.C. 566, 137 S.E. 590. While mere presence cannot constitute aiding and abetting in legal contemplation, a bystander does become a principal in the second degree by his presence at the time and place of a crime where he is present to the knowledge of the actual perpetrator for the purpose of assisting, if necessary, in the commission of the crime, and his presence and purpose do, in fact, encourage the actual perpetrator to commit the crime. *S. v. Williams,* 225 N.C. 182, 33 S.E. 2d 880; *S. v. Johnson,* 220 N.C. 773, 18 S.E. 2d 358; *S. v. Hoffman, supra; S. v. Cloninger,* 149 N.C. 567, 63 S.E. 154; *S. v. Jarrell,* 141 N.C. 722, 53 S.E. 127, 8 Ann. Cas. 438; *S. v. Chastain,* 104 N.C. 900, 10 S.E. 519.

Their relationship to the actual perpetrator of the crime, the motives tempting them to assist in the crime, their presence at the time and place of the crime, and their conduct before and after the crime are circumstances to be considered in determining whether D. W. Birchfield and Leroy Birchfield aided and abetted Theodore Birchfield in the perpetration of the felonious assault and battery. When these circumstances are appraised at their true probative value, they suffice to show beyond a reasonable doubt that D. W. Birchfield and Leroy Birchfield were actually present when their father shot and seriously wounded Jordan with intent to kill him; that they both shared in their father's criminal intent; that D. W. Birchfield actually aided his father in the crime by stopping the automobile and permitting his father to fire at Jordan from a stationary position; and that Leroy Birchfield actually encouraged his father to commit the crime by being present at the time and place of the crime to the knowledge of his father for the purpose of assisting, if necessary, in the consummation of the crime. Consequently the trial judge properly permitted the jury to pass upon the guilt and innocence of D. W. Birchfield and Leroy Birchfield.

The defendants assert secondarily that they are entitled to a new trial for errors committed by the trial judge in denying their motion for a continuance, in receiving and rejecting evidence, in disparaging them and their counsel in the presence of the jury, and in instructing the jury on the law of the case.

The granting or refusing of a motion for a continuance in a criminal action rests largely in the discretion of the trial judge. *S. v. Strickland,* 229 N.C. 201, 49 S.E. 2d 469; *S. v. Culberson,* 228 N.C. 615, 46 S.E. 2d 647; *S. v. Rising,* 223 N.C. 747, 28 S.E. 2d 221; *S. v. Lippard,* 223 N.C. 167, 25 S.E. 2d 594. In consequence, a ruling of a trial judge denying the motion of an accused for a continuance will not be disturbed on appeal unless the accused shows by the record that the denial of the motion amounted to an abuse of discretion or deprived him of his fundamental right to an adequate and fair trial. *S. v. Gibson,* 229 N.C. 497, 50 S.E.

2d 520; *S. v. Farrell,* 223 N.C. 321, 26 S.E. 2d 322. The defendants make no such showing in the case at bar.

The defendants assign as error the receipt of the State's testimony that six weeks prior to the felonious assault and battery alleged in the indictment one of the defendants shot the prosecutor, that the prosecutor had all of the defendants arrested and charged with jointly assaulting him in connection with the shooting, and that such charge was awaiting trial at the time specified in the indictment. This evidence had a logical tendency to show intent and motive on the part of the defendants, and consequently its admission was proper. *S. v. Church,* 231 N.C. 39, 55 S.E. 2d 792; *S. v. Oxendine,* 224 N.C. 825, 32 S.E. 2d 648; *S. v. LeFevers,* 216 N.C. 494, 5 S.E. 2d 552; *S. v. Ray,* 212 N.C. 725, 194 S.E. 482; Stansbury on North Carolina Evidence, section 92. The remaining assignments of error challenging the receipt or rejection of evidence have either been abandoned under Rule 28 or are without substantial merit.

The defendants claim that the trial judge disparaged them and their cause by an inquiry made of their counsel and a remark directed to Theodore Birchfield. When the case on appeal is read aright, these things appear either expressly or impliedly: The witness stand is near the judge's bench. During his re-direct examination, the State's witness Boyd Jordan, who had been testifying a considerable time, asked for a drink of water. The only water in the courtroom was in a pitcher on the judge's desk. The judge poured some water from the pitcher into a glass, and handed the glass to Jordan. As he did so, the solicitor propounded a question to the witness, and the defendants objected to it. Having heard the objection but not the question, the judge inquired of counsel for the defendants whether they were objecting to his "giving (the) witness a drink of water." Upon being advised as to the real basis of the objection, the judge promptly ruled thereon. While the defendant Theodore Birchfield was testifying in his own behalf, he volunteered the statement that he had documentary evidence to show he was "not well." It does not appear whether the solicitor objected to this incompetent statement. Be that as it may, the judge admonished Theodore Birchfield "to keep quiet until (counsel) ask you questions."

The judge was merely ascertaining the basis for the defendants' objection before ruling thereon, and endeavoring to require Theodore Birchfield to observe the rules of evidence. His conduct in so doing did not deprive the accused of their fundamental right "to a trial before an impartial judge and an unprejudicial jury in an atmosphere of judicial calm." *S. v. Carter,* 233 N.C. 581, 65 S.E. 2d 9.

The defendants noted thirteen exceptions to the charge, ten to instructions on the law and three to statements of contentions on the facts. All of the instructions on the law are substantially correct, except that defin-

ing the term "serious injury," which is inaccurate. Despite its inaccuracy, we are constrained to hold on the present record that this particular instruction occasioned no prejudice to the defendants. The exceptions to the statements of the contentions present nothing for review because the defendants did not call the supposed misstatements to the attention of the judge at the time they were made, and afford him an opportunity to correct them before the case was given to the jury. *S. v. Lambe,* 232 N.C. 570, 61 S.E. 2d 608.

The proceedings in the Superior Court will be upheld, for there is in law

No error.

EFFIE FLORENCE THOMPSON v. WESLEY THOMPSON AND WIFE, MRS. WESLEY THOMPSON.

(Filed 16 April, 1952.)

1. Appeal and Error § 29—

Assignments of error not brought forward and argued in the brief are deemed abandoned. Rule of Practice in the Supreme Court No. 28.

2. Appeal and Error § 6c (2)—

An assignment of error, based on a general exception to the order of confirmation, that the court confirmed the report of commissioners in partition notwithstanding that the commissioners failed to follow directions in the judgment for partition, *is held* ineffectual as a broadside exception in failing to point out in what particulars the commissioners failed to follow the judgment, and presents at most whether error of law appears on the face of the record.

3. Partition § 4d—

Judgment confirming report for actual partition in accordance with the consent judgment theretofore entered will not be held for error on the ground that the commissioners failed to take into consideration the value of a structure erected on the land by one party and allotted to the other, even though the report makes no specific reference to the structure, when the record discloses that the value of the structure was, in fact, considered by the commissioners in the division of the land.

4. Appeal and Error § 40d—

Findings of fact of the trial court are conclusive on appeal when supported by evidence.

5. Appeal and Error § 6c (2)—

An assignment of error to judgment confirming report of commissioners in partition proceedings on the ground that the delay of the commissioners in bringing in the report resulted in prejudice to the rights of appellant, *is held* ineffectual as a broadside exception in failing to point out in what particular the delay resulted in injury.

6. Partition § 4d—

The mere fact that commissioners in partition failed to file their report within sixty days after notification does not vitiate the report or preclude confirmation. G.S. 46-17.

APPEAL by defendants from *Crisp, Special Judge,* at October Term, 1951, of RANDOLPH.

Special proceeding for partition of land.

After the petition and answer were filed, consent judgment was entered by Judge Susie Sharp at the October Term, 1950, adjudging: (1) that the plaintiff and the defendant Wesley Thompson are the owners in fee simple as tenants in common of the land described in the petition; (2) that the plaintiff and the defendant Wesley Thompson each owns a one-half undivided interest in the land, and it was ordered that each be allotted his or her share in severalty. Three commissioners were named and designated to make the partition, with the usual direction respecting the assessment of owelty charges under G.S. 46-10, and with further direction that the defendant Wesley Thompson be given credit for a chicken house erected by him on the premises. As to this, the judgment provides that in the event the portion of the property allotted to the defendant Wesley Thompson "shall contain the chicken house," such portion shall be valued without reference thereto; and in the event the defendant's share does not embrace the chicken house, the share allotted to him "shall be increased by the value of the chicken house."

Two of the commissioners appointed by Judge Sharp declined to act and tendered their resignations in February, 1951. Thereafter Judge F. Donald Phillips, Judge Presiding at the March Term, 1951, entered an order appointing two substitute commissioners, with direction that they act with the third commissioner previously appointed "in dividing the lands described in the petition filed in this cause according to the terms set out in the judgment signed by Her Honor Susie Sharp . . ."

The commissioners, after partitioning the land, filed their report in the Clerk's office 31 July, 1951, signed by all of them. Tract No. 1, containing 76.20 acres, was allotted to the plaintiff, and Tract No. 2, containing 95.70 acres, was allotted to the defendant Wesley Thompson. The report makes no specific reference to the chicken house; however, the record indicates it is embraced in Tract No. 1 and this tract is charged in the report "with $535.00 to be paid to Tract No. 2."

The defendants in apt time filed exceptions to the commissioners' report, the pertinent exceptions being in substance as follows: (1) "For that the allotments, . . . notwithstanding the charge of $535.00 against Tract No. 1 . . . are not equal in value." (2) "For that the report . . . fails to show (that) the value of the chicken house erected by the defendants . . . was taken into consideration . . ." (3 and 4) That the com-

missioners failed to make their report within 60 days after notification of their appointment as required by G.S. 46-17; that during the period of delay the commissioners, as a result of outside influence, changed their first decision on the location of the divisional line between the two shares, to the prejudice and injury of the defendants.

Thereafter it was stipulated and agreed by the attorneys for the parties that Judge H. Hoyle Sink should hear the exceptions at the September Term, 1951, but as it turned out the case was not reached or heard at that term.

The cause came on for hearing on the exceptions at the October Term, 1951. Both sides offered evidence, at the conclusion of which Judge Crisp entered the order from which the defendants now appeal. The order recites that "After hearing the affidavits of both the plaintiff and defendant and the oral evidence of the defendant as to the objections and exceptions filed by the defendant, the Court finds that the report filed by said commissioners is fair and just and should be confirmed: It is, therefore, ordered, adjudged and decreed by the Court that said report be, and the same is hereby confirmed. . . . And it is further ordered that the charge against the more valuable share and in favor of the share inferior in value, as shown by said report, be entered on the judgment docket as by law provided."

To the signing of the order of confirmation, the defendants excepted and appealed to this Court, assigning errors.

Prevette & Coltrane for plaintiff, appellee.

Sam W. Miller for defendants, appellants.

JOHNSON, J. The agreed statement of case on appeal indicates that the defendants in challenging the proceedings below assigned five errors. Of these, however, only two are brought forward on brief. Therefore, the other three assignments of error, in support of which no argument is stated or authority cited, will be taken as abandoned. Rule 28, Rules of Practice in the Supreme Court, 221 N.C. 562 *et seq.* *Rose v. Bank,* 217 N.C. 600, 9 S.E. 2d 2; *Dillingham v. Kligerman, ante,* 298.

The remaining assignments, 2 and 5, will be stated and discussed in that order:

Assignment of Error No. 2.—Here the defendant assigns as error "that his Honor confirmed the report of the Commissioners notwithstanding the fact that the Commissioners failed to follow the orders contained in the consent judgment of Honorable Susie Sharp heretofore referred to, and the supplemental judgment of Honorable F. Donald Phillips when he appointed new commissioners in place of the ones who had resigned."

This assignment of error is supported by no specific exception—the only exception in the record being the general exception to the order as set out in the appeal entries. It thus appears that the assignment of error is fatally defective in failing to point out in what particular "the Commissioners failed to follow the orders" directing partition of the land. Hence, the assignment, like the exception appearing in the appeal entries, is broadside. *Vestal v. Vending Machine Exchange,* 219 N.C. 468, 14 S.E. 2d 427. It is elementary that if a litigant would invoke the right of review, he must point out specifically and distinctly the alleged error. *Weaver v. Morgan,* 232 N.C. 642, 61 S.E. 2d 916. At most, then, this assignment presents only the question whether error of law appears on the face of the record. *Weaver v. Morgan, supra; Burnsville v. Boone,* 231 N.C. 577, 58 S.E. 2d 351. See also *S. v. Williams, post,* 429. Here the defendants urge that the report of the commissioners fails to show specifically that they took into consideration the value of the chicken house erected by the defendant Wesley Thompson on the share allotted to the plaintiff as directed in the judgment of partition. Nothing else appearing, this might be treated as error appearing on the face of the record. However, it further appears on the record that at the hearing below one of the commissioners, testifying as a witness for the defendants, said "we considered the value of the chicken house, the best I can tell, at $200." The record also indicates that while the evidence was sharply conflicting on the main question of equality of partition, there was substantial evidence tending to show that the division was fair and equal. It is elementary that the findings of fact by a trial court are conclusive on appeal if there be evidence to support them. *Burnsville v. Boone, supra.* Accordingly, while decision as to this assignment of error turns on failure to observe established rules of appellate procedure, nevertheless it appears that the result would have been the same if the defendants had complied with the procedural requirements.

Assignment of Error No. 5.—Here the assignment is "that his Honor was in error in confirming the report of the Commissioners when the evidence shows that their unjustifiable delay in bringing in the report resulted in prejudice to the rights of the defendants."

This assignment of error, like Assignment No. 2, is not supported by specific exception. It is fatally defective in that it fails to point out in what particular the "delay in bringing in the report resulted in prejudice to the rights of the defendants." Therefore this assignment, also, is broadside and must be overruled. *Weaver v. Morgan, supra; Burnsville v. Boone, supra.* The mere fact that the commissioners did not file their report within the statutory period of sixty days after notification (G.S. 46-17) does not vitiate the report or preclude confirmation.

No error.

STATE v. JOHNNIE BRYANT.

(Filed 16 April, 1952.)

1. Criminal Law § 52a (1)—

Defendant's evidence favorable to the State or which explains or makes clear the State's evidence is properly considered in passing upon defendant's motion to nonsuit. G.S. 15-173.

2. Larceny § 7—

The State's evidence implicating a person in the larceny of chickens, with testimony, unobjected to, of a statement of such person to the effect that he stole the chickens in company with defendant, together with defendant's statement that he was with such person on the nights in question, except for a short time, *is held* sufficient to be submitted to the jury in a prosecution for larceny.

3. Criminal Law §§ 35, 52a (1), 78c—

Where hearsay evidence is not objected to, it may be considered by the jury and taken into account in determining the sufficiency of the evidence to be submitted to the jury.

4. Criminal Law § 34c—

Where defendant denies an accusation of guilt against him, testimony as to the accusation is incompetent.

5. Larceny § 9—

Where each of several warrants charges the larceny of chickens from different people on specified dates, a verdict of guilty "of larceny of chickens" is not too indefinite to support judgment, and cannot be held prejudicial when sentence on each count runs concurrently.

APPEAL by defendant Johnnie Bryant from *Stevens, J.*, at December Term, 1951, of SAMPSON.

Criminal prosecution upon four separate warrants each upon an affidavit charging that at and in Sampson County, on given date, Elijah Cooper and Johnnie Bryant did take, steal and carry away, and convert to their own use: In No. 1263, on 14 June, 1951, "about thirty chickens" from premises of W. C. Westbrook; in No. 1264, on 14 June, 1951, "about 14 chickens" from premises of Leon Wilson; in No. 1265, on 4 July, 1951, "18 chickens" from premises of A. B. Bizzelle; and in No. 1266, on .... June, 1951, "about 35 or 40 chickens" from premises of Craven Lee; in the first three cases of value less than $50.00, and in the fourth of value about $50.00, contrary to the form of the statute, etc.

The warrants were issued by a justice of the peace, who finding probable cause, bound the defendants, Elijah Cooper and Johnnie Bryant, over to the Recorder's Court of Sampson County for trial. And upon trial in the Recorder's Court on 10 July, 1951, defendants were each found "Guilty" in each case, and sentenced to "eighteen months in jail

and assigned to work the roads as provided by law," the sentences to run concurrently.

Defendant Johnnie Bryant appealed therefrom to Superior Court, where the cases as against him were consolidated for the purpose of trial without objection, and were so tried.

Upon the trial in Superior Court as witnesses for the State: W. C. Westbrook testified that he lost about 30 chickens, New Hampshire Reds, on night of 13 June,—missing them on morning of 14th; Mrs. Leon Wilson testified that she lost 14 chickens, Barred Rocks, about 13 June, supposing they were taken the same night as Mr. Westbrook's; A. B. Bizzelle testified that about 20 chickens were taken from him about 4 July; and Craven Lee testified that sometime in first part of June, the exact date he does not know, 35 or 40 chickens, New Hampshire Reds, were taken from his premises.

And their testimony tends to show that Elijah Cooper farmed for Mr. Bizzelle—living about three-quarters of a mile from him, and that defendant Bryant lived about a mile and a quarter from Craven Lee.

The State did not offer Elijah Cooper as a witness, and he did not testify at the trial in Superior Court.

But a deputy sheriff, as witness for the State, testified, without objection, to substantially these facts: That he was called to home of A. B. Bizzelle on 5 July,—there having been some chickens stolen there the night before; that he found in the Bizzelle chicken yard a corner post broken down, and two sets of men's shoe tracks going into the chicken house, and out of the chicken yard; that he first went to Johnnie Bryant's house in the afternoon, and found that he was in bed; that in reply to question as to where he was the night before, Johnnie said he and Elijah Cooper went to his brother's in Angier,—that they were out all night and did not get back until 10 or 11 o'clock that day; that he asked Johnnie about the chickens, and he said he knew nothing of the chickens; that, nevertheless, he, the deputy sheriff, carried Johnnie to Mr. Bizzelle,—there where the two tracks led into, and out of the yard; that he placed Johnnie's foot into two or three or four of the tracks; that it did not fit one of the tracks, but one fitted perfectly; that he then took Elijah Cooper to the Bizzelle place and put his foot into the other set of tracks and it fitted perfectly; that Elijah Cooper, in absence of Johnnie Bryant, then said he was going to tell the truth about it,—and stated that he and Johnnie Bryant not only got the chickens from Mr. Bizzelle's place on the night of 4 July, 1951, but that they went into the chicken houses of Mr. Westbrook and Mrs. Wilson on 14 June, 1951, and into the chicken house of Mr. Lee on 28 June, 1951, and took chickens, and on each occasion carried the chickens to Dunn, N. C., and sold them to a named individual; that the statement of Elijah Cooper was later reduced to writing

and read to, and in the presence of Johnnie Bryant, and he, Johnnie, "still denied it," and has "at all times denied it"; and that at the trial in the Recorder's Court, Elijah Cooper told on cross-examination that "Johnnie Bryant had nothing to do with it."

And the deputy sheriff further testified that he only took Johnnie Bryant to the Bizzelle place; that he would say that the size of Johnnie Bryant's foot "looks like about a 9 or 10," that is about the average size foot of about 65 to 70 per cent of the men in Sampson County; and that he was "not swearing that his foot made that track."

Defendant, Johnnie Bryant, reserving exception to denial of his motion for judgment as of nonsuit when the State first rested its case, testified, in detail, and offered testimony of others that he was with Elijah Cooper all through the night of 4 July, 1951, except for an hour or an hour and a half when Elijah Cooper left him and others at "the colored boys' cafe at Newton Grove," but he denied that he had anything to do with the taking of the chickens, or that he knew that Elijah Cooper had taken them; and that "he was not hooked up with Elijah Cooper on these different nights getting chickens."

Defendant Johnnie Bryant renewed his motion for judgment as of nonsuit at the close of all the evidence. The motion was denied, and he excepted.

The jury returned a verdict "that said Johnnie Bryant is guilty of larceny of chickens."

Judgment: Confinement in the common jail of Sampson County for a period of eighteen months and assigned to work the roads as provided by law.

Defendant appeals therefrom to Supreme Court and assigns error.

Attorney-General McMullan, Assistant Attorney-General Bruton, and Robert B. Broughton, Member of Staff, for the State.

David J. Turlington, Jr., for defendant, appellant.

WINBORNE, J. I. For error in the trial in Superior Court, appellant stresses in the main his exception to the overruling of his motion for judgment as of nonsuit aptly renewed at the close of all the evidence. G.S. 15-173.

Such a motion made under the provisions of G.S. 15-173, formerly C.S. 4643, serves, and was intended to serve, the same purpose in criminal prosecutions as is accomplished by G.S. 1-183, formerly C.S. 567, in civil actions. *S. v. Fulcher,* 184 N.C. 663, 113 S.E. 769. Thus in considering such motion in a criminal prosecution, as in a civil action, the defendant's evidence, unless favorable to the State, is not to be taken into consideration, except when not in conflict with the State's evidence, it may be used

to explain or make clear that which has been offered by the State. See *Rice v. Lumberton, ante,* 227, where the authorities are assembled.

Therefore, taking the evidence offered by the State and so much of defendant's evidence as is favorable to the State, or tends to explain and make clear that which has been offered by the State, in the light most favorable to the State, this Court is of opinion, and is impelled to hold that there is sufficient evidence to take the case to the jury on the question of the guilt or innocence of defendant on all, or on each of the offenses with which he stands charged.

While some of the evidence offered by the State might have been excluded as hearsay, *Bunting v. Salsbury,* 221 N.C. 34, 18 S.E. 2d 697, it was admitted without objection, and hence under the rule may be considered with the other evidence and given such evidentiary value as it properly may possess. *S. v. Fuqua,* 234 N.C. 168, 66 S.E. 2d 667; *Maley v. Furniture Co.,* 214 N.C. 589, 200 S.E. 438. Under another rule of evidence statements made in the presence and hearing of the accused implicating him in the commission of a crime, to which he makes no reply, are competent against him as implied admissions. *S. v. Suggs,* 89 N.C. 527. *S. v. Wilson,* 205 N.C. 376, 171 S.E. 338; *S. v. Hawkins,* 214 N.C. 326, 199 S.E. 284; *S. v. Gentry,* 228 N.C. 643, 46 S.E. 2d 863; *S. v. Sawyer,* 230 N.C. 713, 55 S.E. 2d 464; *S. v. Hendrick,* 232 N.C. 447, 61 S.E. 2d 349.

But when he at the time denies the truth of the statements, this rule does not apply, and the evidence upon objection would be excluded. See Stansbury N. C. Evidence, Sec. 179; also *S. v. Herring,* 200 N.C. 308, 156 S.E. 538; *Hedgecock v. Ins. Co.,* 212 N.C. 638, 194 S.E. 86; *S. v. Peterson,* 212 N.C. 758, 194 S.E. 498.

II. Appellant also assigns as error the denial of his motion to set aside the verdict, and the rendition of the judgment as set out in the record. It is urged that the verdict is too indefinite to support the judgment. Probably it would have been better if the jury had spelled out the verdict more specifically. But as the charge in each of the four cases is larceny of chickens, a verdict of guilty in any one of the cases would be guilty of larceny of chickens. And since the court has imposed only one sentence, prejudicial error is not made to appear.

No error.

CALVIN MILLS v. RAEFORD WATERS, BLANCHARD WATERS, AND NOLAN WATERS, D. B. A. CENTER SERVICE STATION.

(Filed 16 April, 1952.)

1. **Negligence § 4a—**

The heating of a filling station by an open gas heater within the room some distance from the outside gas tanks and pumps is not negligence *per se.*

2. **Negligence § 1—**

Negligence is the failure to exercise that degree of care which a reasonably prudent person would exercise under like circumstances, under conditions from which the resulting or similar injury could have been reasonably foreseen, which proximately causes the injury.

3. **Negligence § 2—**

In a sudden emergency a person is not held to the duty of selecting the wisest choice of conduct but only to such choice as a person of ordinary care and prudence, similarly situated, would have selected.

4. **Negligence § 9—**

The operator of a filling station heated by an open gas heater cannot be held to the duty of foreseeing that a customer purchasing a jug of gasoline would bring the jug into the station and that the jug would become broken accidentally so as to set the premises afire.

5. **Negligence § 4f—**

The evidence disclosed that a customer at a filling station purchased a jug of gasoline and followed the attendant into the station with the jug to receive his change, that in some accidental manner the jug became broken, that the attendant grabbed a broom and attempted to sweep the loose gasoline out the door, but that during the sweeping motion some gasoline came in contact with an open gas stove which was in the station for the purpose of heating the room, resulting in a fire in which plaintiff was injured. *Held:* The emergency was not brought about by defendants or their agents, and nonsuit was properly entered.

APPEAL by plaintiff from *Grady, Emergency Judge,* January Term, 1952, ONSLOW. Affirmed.

Civil action to recover damages for personal injury.

Defendants are the owners and operators of a service station in the town of Jacksonville, North Carolina. On the night of 8 December, 1948, plaintiff carried to defendants' service station a one-gallon glass jug and there purchased the jug full of gasoline. The jug was filled by an employee of the defendants at the pumps by the use of the same equipment employed to fill automobile gas tanks. The pumps were located in front of the filling station in the usual manner. Plaintiff, carrying the jug of gasoline, followed defendants' employee into the station to receive his change. Plaintiff set the jug of gasoline down in the station and after

receiving his change, picked up the jug and the bottom fell out and the gasoline spread over the floor of the station and onto the clothing of plaintiff. Defendants' employee immediately grabbed a broom and attempted to sweep the loose gasoline out the front door. During the sweeping motion, some of the gas came in contact with an open gas stove which was in the station for the purpose of heating the room, and the gasoline caught fire on the floor, on the shoes of defendants' employee, and on the clothes of plaintiff. Plaintiff ran out the door and was chased down by the employees of defendants, who extinguished the fire only after plaintiff had sustained serious and painful burns. The flames spread well over the filling station and considerable damage was done to the building and the stock. No effort was made to cut off the gas heater, which was sitting about six inches from the floor with nothing in front of it.

At the close of plaintiff's evidence, defendants moved for judgment as of nonsuit. The court reserved its ruling and defendants offered evidence. Upon a renewal of defendants' motion at the conclusion of all the evidence, judgment was entered dismissing the action as of nonsuit. From this judgment, plaintiff excepted and appealed.

Carl V. Venters and J. T. Gresham, Jr., for plaintiff, appellant.

Summersill & Summersill for defendants, appellees.

VALENTINE, J. It was a cold night in December and perfectly natural that the building should be heated in some manner. With the gas tanks and pumps a safe distance from the front door, the presence of an open gas heater well within the room could not be regarded as negligence *per se*. The decisions of this Court are to the effect that in order to establish actionable negligence it must appear: (1) that the defendant, either personally or through an agent, servant or employee, has failed to exercise proper care and diligence in the performance of some legal duty which he owed the plaintiff under the circumstances in which they were at the time. Proper care, of course, means that degree of care which a man of ordinary prudence should use under like circumstances when charged with like duty. And, (2) that such negligent breach of duty was the proximate cause of the injury claimed. In addition it must appear that the negligent act produced the result in continuous sequence. The proof must also show that the negligent act was such that a man of ordinary prudence could have foreseen that such or some similar injurious result was probable under all the facts as they then existed. *Ellis v. Refining Co.*, 214 N.C. 388, 199 S.E. 403.

In applying the rule of the prudent man, due consideration must be had for the circumstances prevailing at the time. An allowance must be made

for the excitement produced by the situation and the resulting nervous strain.

"One who is required to act in an 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." *Ingle v. Cassady,* 208 N.C. 497, 181 S.E. 562. Citing *Poplin v. Adickes,* 203 N.C. 726, 166 S.E. 908; *Pridgen v. Produce Co.,* 199 N.C. 560, 155 S.E. 247; *Odom v. R. R.,* 193 N.C. 442, 137 S.E. 313; *Parker v. R. R.,* 181 N.C. 95, 106 S.E. 755; *Norris v. R. R.,* 152 N.C. 505, 67 S.E. 1017. The standard of conduct required is that of an ordinarily prudent man. *Jernigan v. Jernigan,* 207 N.C. 831, 178 S.E. 587; *Small v. Utilities Co.,* 200 N.C. 719, 158 S.E. 385. " 'If the peril seemed imminent, more hasty and violent action was to be expected than would be natural at quieter moments, and such conduct is to be judged with reference to the stress of appearances at the time, and not by the cool estimate of the actual danger formed by outsiders after the event'—*Holmes, J.,* in *Gannon v. R. R.,* 173 Mass. 40." *Ingle v. Cassady, supra.*

Applying these well-established rules of actionable negligence to the proof in this case, we are unable to discover any evidence of actionable negligence sufficient to take the case to the jury and sustain a verdict. In reaching this conclusion we have given due consideration to the rule of interpretation as stated in *Powell v. Lloyd,* 234 N.C. 481, 67 S.E. 2d 664, and *Gainey v. R. R., ante,* 114, 68 S.E. 2d 780.

It was necessary that the filling station be heated in some manner for the health and comfort of the employees working there. We cannot appropriately say that the defendant should have foreseen that the plaintiff or some other customer would take a jug of gasoline into the station and there break it so that the free gas would spread over the room and set the building on fire. To so hold would charge the defendants with a degree of prevision not contemplated by the law of negligence. *Clark v. Drug Co.,* 204 N.C. 628, 169 S.E. 217; *Money v. Hotel Co.,* 174 N.C. 508, 93 S.E. 964; *Ellis v. Refining Co., supra.*

In the case at bar, the emergency was not brought about by the defendants or their agents as in *Luttrell v. Hardin,* 193 N.C. 266, 136 S.E. 726, but was brought about when the plaintiff took the jug of gasoline into the filling station and there in some manner accidentally broke it so that gasoline was spread over the floor and near the open fire. Hence, that case is not controlling here.

This Court is reluctant to raise the standard of due care to such an unreasonable length as would practically place every accident in the category of actionable negligence, or make the keeper of a store or service station the insurer of the safety of his customers. *Griggs v. Sears, Roebuck & Co.,* 218 N.C. 166, 10 S.E. 2d 623.

We cannot hold upon this record that the defendants are liable for the unfortunate injury sustained by plaintiff. Therefore, the judgment below is

Affirmed.

STATE v. JAMES L. REEVES.

(Filed 16 April, 1952.)

1. Rape § 11—

Evidence of defendant's identity as the person who had carnal knowledge of an eight-year-old girl, together with evidence of penetration, *held* sufficient to be submitted to the jury in a prosecution for rape. G.S. 14-21, G.S. 14-23.

2. Criminal Law § 52a (1)—

On motion to nonsuit, the evidence must be considered in the light most favorable to the State.

3. Criminal Law § 52a (4)—

Reconciliation of apparent discrepancies in the testimony, the weight of the evidence, and the credibility of the witnesses, are all matters for the jury and not the court.

4. Criminal Law § 53—

A party desiring more specific instructions on a subordinate phase of the case must make timely request therefor.

5. Rape § 14—

The recommendation of the jury for life imprisonment upon conviction of defendant of the crime of rape affords no ground of complaint on the part of defendant. G.S. 14-21.

APPEAL by defendant from *Bobbitt, J.*, January Term, 1952, of BUNCOMBE. No error.

The bill of indictment charged the defendant with the felony of rape. The State's evidence tended to show carnal knowledge of a girl eight years of age.

The State's witness testified that on the afternoon of 30 October, 1951, she was standing on the sidewalk in front of the Claxton School in Asheville when a man later identified as the defendant picked her up and took her down into the basement entrance of a near-by church and there committed a rape upon her person. There was other evidence in corroboration. The defendant, a man 30 years of age, denied his guilt and offered evidence tending to show he was elsewhere at the time the crime was alleged to have been committed.

The jury returned verdict of guilty of rape as charged, and recommended life imprisonment. From judgment imposing sentence in accord with the verdict the defendant appealed.

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

Styles & Styles for defendant, appellant.

DEVIN, C. J. The defendant assigns error in the ruling of the trial judge in denying his motion for judgment of nonsuit interposed at the close of the State's evidence and renewed at the conclusion of all the evidence.

No good purpose would be served by setting out in detail the evidence as deposed by the witnesses, but we deem it sufficient to say that all of the evidence shown by the record has been given careful consideration, and that we conclude that defendant's motion for judgment of nonsuit was properly denied. Evidence was offered tending to show the presence in this case of all the elements necessary to constitute the crime charged in the bill of indictment. The age of the State's witness, the identity of the defendant as the perpetrator of the offense, and carnal knowledge of the witness by the defendant are sufficiently shown to carry the case to the jury.

The defendant by his motion questions the sufficiency of the evidence of penetration, but considering all the evidence on this point, both that of the girl and the physician, we are of opinion that it was sufficient, if accepted by the jury, to make out this element of the crime of rape. G.S. 14-21; G.S. 14-23; *S. v. Monds,* 130 N.C. 697, 41 S.E. 789; *S. v. Bowman,* 232 N.C. 374, 61 S.E. 2d 107. On motion for nonsuit the State is entitled to have the evidence considered in its most favorable light. The reconciliation of any apparent discrepancy in the testimony, the weight of the evidence, and the credibility of the witnesses are all matters for the jury and not the court. *S. v. Hovis,* 233 N.C. 359, 64 S.E. 2d 564; *S. v. Robinson,* 229 N.C. 647, 50 S.E. 2d 740; *S. v. Lawrence,* 196 N.C. 562, 146 S.E. 395.

There was no specific exception to the judge's charge to the jury, nor request for special instructions on any phase of the case, but defendant assigns error in that the judge failed to instruct the jury in regard to the law relating to circumstantial evidence. As the State's case was based on the direct testimony of witnesses, we are unable to perceive ground for complaint on this score. If defendant desired more specific instructions on any subordinate phase of the case, timely request therefor should have been made. *S. v. Warren,* 228 N.C. 22, 44 S.E. 2d 207; *S. v. Brooks,*

228 N.C. 68, 44 S.E. 2d 482; *S. v. Hicks,* 229 N.C. 345, 49 S.E. 2d 639; *S. v. Glatly,* 230 N.C. 177, 52 S.E. 2d 277.

The defendant's motion to set aside the verdict and for a new trial were properly denied. The defendant denied his guilt and testified he was elsewhere at the time and place of the commission of the offense charged. He offered other evidence in support of his contention, but the jury accepted the State's evidence as true and rendered verdict that the defendant was guilty of rape as charged. The fact that the jury under proper instructions from the court, as required by G.S. 14-21, also recommended punishment of life imprisonment affords no ground of complaint on the part of the defendant. That was a matter in the discretion of the jury. *S. v. Simmons,* 234 N.C. 290, 66 S.E. 2d 897; *S. v. McMillan,* 233 N.C. 630, 65 S.E. 2d 212.

It is worthy of note that on cross-examination the defendant admitted numerous convictions for larceny, particularly of automobiles, and that he had been imprisoned in this State and in the Federal Penitentiary, and "that he had been in and out of prison since he was 13 years old."

The trial of the defendant on the charge of rape as contained in the bill of indictment was free from error, and the verdict and judgment will be upheld.

No error.

STATE v. SIMMIE WILLIAMS.

(Filed 16 April, 1952.)

1. Criminal Law § 78c—

The Supreme Court will consider only questions presented by assignments of error based upon exceptions pointing out some alleged error appearing in the record and brought forward in the statement of case on appeal.

2. Criminal Law § 80b (3)—

Failure of any proper exception or assignment of error does not work a dismissal of the appeal, since the appeal itself constitutes an exception to the judgment.

3. Criminal Law § 78c—

An appeal without any proper exception or assignment of error presents only the question of whether error appears on the face of the record, and where the record discloses that the trial court had jurisdiction, that the bill of indictment charges a criminal offense, and that the verdict is in due form and the sentence pronounced within the limit permitted by law, the record fails to disclose error.

4. Criminal Law § 54b—

Any ambiguity in a verdict will be construed in favor of defendant.

5. Larceny §§ 2, 10—

A verdict establishing that defendant stole property of the value of more than fifty dollars is a conviction of nothing more than a misdemeanor notwithstanding anything to the contrary in the charge.

APPEAL by defendant from *Carr, J.*, January Term, 1952, WAKE. No error.

Criminal prosecution under a bill of indictment charging the felony of larceny.

In the trial below the jury returned a verdict of "GUILTY OF LARCENY OF PROPERTY OF THE VALUE IN EXCESS OF $50.00." The court pronounced judgment on the verdict that defendant be confined in the common jail of Wake County for a term of eighteen months to be assigned to work the public roads under the supervision of the State Highway and Public Works Commission. Defendant appealed.

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

John R. Hood for defendant appellant.

BARNHILL, J. The record does not contain a single exception. Appellant must except to the rulings of the trial judge which he desires this Court to review. The exception must be confined to something alleged as error which appears in the record. He must likewise set out in his statement of case on appeal his exceptions thus entered. "No exceptions not thus set out, or filed and made a part of the case or record, shall be considered by this Court . . ." Rule 21, Rules of Practice in the Supreme Court, 221 N.C. 558; *S. v. Parnell,* 214 N.C. 467, 199 S.E. 601; *Bell v. Nivens,* 225 N.C. 35, 33 S.E. 2d 66.

An assignment of error alone will not suffice. Only an assignment of error bottomed on an exception duly entered in the record will serve to present a question of law for this Court to decide. *S. v. Jones,* 182 N.C. 781, 108 S.E. 376; *S. v. Parnell, supra.*

Even so, failure to have any proper exception or assignment of error does not perforce work a dismissal of the appeal, for the appeal itself constitutes an exception to the judgment. *S. v. Parnell, supra; Bell v. Nivens, supra.*

This exception presents the one question: Is there error appearing on the face of the record? On this appeal it must be answered in the negative. The court below had jurisdiction. The bill of indictment charges a criminal offense. The verdict is in due form and the sentence pronounced is within the limits permitted by law.

Any ambiguity in a verdict will be construed in favor of the defendant. A finding that defendant stole property of the value of more than $50

is not a finding that the property had a value of more than $100. G.S. 14-72. Hence, notwithstanding anything the trial judge may have said to the jury in his charge, the defendant stands convicted of nothing more than a misdemeanor. He has suffered no loss of citizenship.

The Attorney-General moves to dismiss the appeal for the reason the defendant has filed nothing more than a "pass" brief. Rule 28, Rules of Practice in the Supreme Court, 221 N.C. 562. There is merit in the motion. Even so, in view of our disposition of the appeal, we may pass the motion without ruling thereon.

As the record fails to disclose any error in the trial of which this Court may or will take notice, the judgment entered must be affirmed.

No error.

HELEN R. GAITHER AND HUSBAND, W. G. GAITHER, v. ALBEMARLE HOSPITAL, INC., AS TRUSTEE FOR PASQUOTANK COUNTY AND CITY OF ELIZABETH CITY, AND CITY OF ELIZABETH CITY AND PASQUOTANK COUNTY.

(Filed 30 April, 1952.)

1. Reference § 4—

Where defendants object to a compulsory reference ordered without first determining their plea in bar of title by adverse possession, but do not at once appeal therefrom, they may not, after reference, maintain that the plea in bar first should have been determined.

2. Reference § 14a—

Where defendants in a compulsory reference offer no evidence in support of their plea of title by adverse possession and tender no issue thereon with demand for jury trial, they waive the right to have the plea in bar tried by a jury.

3. Appeal and Error § 40d—

Findings of fact of the referee approved by the trial judge are conclusive on appeal when supported by any competent evidence.

4. Dedication § 3: Waters and Watercourses § 12—

Where the owner of lands sells same by lots with reference to a plat showing streets and roads, each grantee of a lot acquires an easement to use all of the streets and roads so shown, and this rule extends to the dedication of riparian rights along a navigable stream shown on the plat.

5. Waters and Watercourses § 12—

Navigable waters constitute a public highway which the public is entitled to use for travel either for business or pleasure, subject to the riparian owners' right of access and the right of private property in the banks of the stream.

6. Same: Dedication § 3—

The owner of lands along a navigable stream sold same with reference to a plat showing a street along the river with a strip of land never wider than six feet lying between the river and the street. *Held:* The purchasers of lots acquire the right to access to navigable water in front of the narrow strip of land, and are entitled to restrain another grantee from filling in the shallow water in front of his property so as to interfere with such right of access.

7. Waters and Watercourses § 12—

The filling in of land under shallow water along a navigable river in such a manner as to constitute a material obstruction to convenient, secure and expeditious navigation constitutes a nuisance notwithstanding that the obstruction may be a source of public benefit, and the creation of such nuisance may be restrained. G.S. 14-133.

8. Appeal and Error § 39c—

Where plaintiff is entitled to the relief sought upon his original complaint irrespective of allegations contained in his amended complaint, the order of the trial court allowing the filing of the amended complaint cannot be prejudicial even though the amendment be beyond the discretionary power of the court to allow.

BARNHILL, J., dissents on the question of dedication.

APPEAL by defendants from *Frizzelle, Judge* riding the First Judicial District Superior Court, 29 December, 1951, of PASQUOTANK.

Civil action to enjoin defendants, their agents, servants and employees, from building a break-water along, and constructing a public park out to, the deep water line of Pasquotank River in front, and to the east of plaintiffs' property fronting on Riverside Avenue in the city of Elizabeth City and Pasquotank County, North Carolina.

Plaintiffs allege in their complaint facts in respect of the deraignment of title by the respective parties, the physical situation, the announced purpose of defendants, and the effect of the proposed park on their property, substantially in accord with findings of fact made by the referee as hereinafter shown. They further allege in substance:

(1) That if defendants are permitted to carry out their purpose of constructing a park as indicated, plaintiffs will be deprived of their riparian rights, and the privilege of enjoying the use of the water of Pasquotank River adjacent to the land in question, and will suffer irreparable loss.

(2) That defendants have no title to the lands under the waters of Pasquotank River which would either justify or permit said break-water and fill, and defendants have no right to construct same, and the acts of defendants in that respect are wrongful and unlawful and constitute encroachments upon the rights and property of the plaintiffs.

(3) That the Riverside Land Company, having sold the lots now owned by plaintiff Helen R. Gaither, in reference to the plat, all those claiming under it, including defendants, are estopped from destroying or changing the said river in front of said lots, and plaintiffs expressly plead such estoppel.

Defendants, answering the complaint, admit that the street designated on the plat as "Riverside" has been opened to the general public since the map was placed of record; but they deny in material aspect other allegations.

"And for further and separate answer by way of defense," defendants aver:

"16. That, as defendants are advised, believe and therefore allege, the defendants herein and those under whom they claim have been in the open, notorious and adverse possession of the lands in controversy herein, under known and visible boundaries for more than seven years under color of title and for more than twenty-one years under color of title, for more than twenty years and for more than thirty years, and the said seven- and twenty-one-year and twenty- and thirty-year statutes of limitations are hereby pleaded in bar of plaintiffs' right to recover herein."

Plaintiffs at November Term, 1950, moved for a reference. The court finding as a fact that this action involves a complicated question of title and boundaries and that a reference is essential for a complete development of the facts and contentions of the parties, a reference was ordered, and Frank B. Aycock was appointed referee and directed to hear the evidence and contentions of the parties and to report to the court his findings of fact and conclusions of law. And this entry appears: "The defendants except to the foregoing order and reserve all rights to which they may be entitled, including the right to trial by jury if they so elect."

Pending the filing of report of referee, plaintiffs moved for permission to amend their complaint by adding at the end of section 12 the following:

"That plaintiffs are residents of Pasquotank County and are taxpayers of said County and of the City of Elizabeth City. That the construction of the proposed concrete breakwater and the construction of said park in said river will cost these plaintiffs and the other taxpayers of said County and City a large sum of money, and that such construction would in itself be a criminal act. Furthermore, if defendants are permitted to proceed with the construction of said breakwater and to fill the same in for a park, said area would immediately become public lands subject to entry which entry the defendants are, by statute, precluded from making, and the entire expenditure on the part of the defendants would be a total loss to be borne by the taxpayers of said County and City."

The referee, being of opinion that the proposed amendment to the complaint did not change substantially the claim or defense, that the same

evidence would support the amendment as would support the complaint in original form, that the same relief would apply to the original complaint and to the complaint as amended, that the testimony already taken in the case encompassed all purported facts necessary to support the allegations in the amended complaint, allowed the motion. Defendants except.

The referee made, and set out in his report, findings of fact substantially as follows:

1. That on or about 1 June, 1902, Riverside Land Company, a corporation, the then owner of certain lands situated on Pasquotank River in Pasquotank County, North Carolina, caused the lands to be surveyed and a plat made and recorded in the office of register of deeds of said county,—the land now being in the city limits of Elizabeth City.

2. That the corporation, Riverside Land Company, was dissolved in May, 1904.

3. That on this plat there was laid out a passageway designated as Riverside Avenue,—representing a street or avenue for the general use of the public, and extending from the western line of the property "eastwardly along the northern portion thereof, to a point within a few feet of the Pasquotank River and thence south 4 deg. west 475 feet and south 11 deg. east 105 feet to what is known as Hathaway property; that the street on the course south 4 deg. west was laid out as 50 feet in width and along the entire course ran within a few feet of Pasquotank River; that the plat as recorded indicates that at no point between Carolina Street and Preyer Street was there more than 6 feet between the high water mark of the river, and the eastern boundary of Riverside Avenue, and at most points there was less than 6 feet; and that Riverside Avenue between Carolina and Preyer Streets is an improved hard-surfaced road, 16 feet in width, in general use by the public.

"4. That said plat indicates numerous lots, laid off and numbered for purpose of sale to the public. That on the eastwardly course of Riverside Avenue there were numerous 50-foot lots, laid off and numbered, between said Riverside Avenue and the Pasquotank River. That some of the lots were of a depth between Riverside Avenue and Pasquotank River of as little as 9 to 18 feet. That, specifically, the lot designated as No. 161 had a depth on one side of 9 feet and on the other side of 12 feet; that Lot No. 162 had a depth on one side of 12 feet and on the other a depth of 15 feet; that Lot No. 163 had a depth on one side of 15 feet and on the other side 24 feet. That on the course of Riverside Avenue running south 4 deg. west where there was indicated a strip of land not more than six feet wide at any point no lots were laid off and numbered.

"5. That all parties to this action claim from a common source, to wit, the Riverside Land Company."

6. That Riverside Land Company, on given dates in the year 1903, conveyed lots Nos. 152, 153, 154, 155 and 156, which front on Riverside Avenue, between Carolina and Preyer Streets, and same have by successive conveyances come into the possession of plaintiffs who now own them; that between these lots and Pasquotank River there is the fifty-foot width of Riverside Avenue and "the aforementioned strip of land" between the eastern line or boundary of the avenue and the river, "not exceeding 6 feet at any point according to the plat"; "a level space reaching to a break in the river bank where the bank rapidly and irregularly falls off toward a narrow sand beach, which . . . then gently slopes to the water's edge in a comparatively regular manner"; that according to measurements made at five separate points between the east edge of these lots, Nos. 152-156, eastwardly to the break in the river bank the distances range from 33 feet to 60 feet; that according to measurements made at same time when the tide was 10 inches below high tide, and at the same points to the water's edge the distances ranged from 60 to 82 feet; that between the lots, where they abut the western line of Riverside Avenue, and the edge of the water at mean high tide, the distance is more than 50 feet; and that the tides in Pasquotank River are wind tides and are not influenced by the ocean tides.

7. That thereafter Riverside Land Company, by deed dated 9 May, 1904, and recorded in June, 1904, Book 27, page 504, conveyed to J. H. LeRoy lots numbered 161, 162, 169 and 75, as shown on the plat of 1 June, 1902, and immediately following the description of said lots, the deed contains the following:

"Also the lands under the water and right of entry for wharf purposes in front of said lots #169 and #161 and #162; and also the lands under the water and the right of entry for wharf purposes, beginning at West line of lot #162 on Pasquotank River; thence Easterly and Southerly, binding Riverside Avenue to Mrs. S. L. Hathaway's line; thence Easterly with her line projected to deep water line on Pasquotank River; thence binding the same Northerly and Westerly to opposite lot #162, thence to the beginning."

(With certain exception not now pertinent.)

And that J. H. LeRoy and wife, by paper writing dated 7 January, 1914, and registered, purported to convey to the Elizabeth City Hospital Company certain described property, substantially the same as in the above deed from Riverside Land Company to J. H. LeRoy, and "also his right, title and interest, in and to the land above described for wharf purposes as by Grant Number 76467 issued by the State of North Carolina to said J. H. LeRoy on the 13th day of February, 1905, and Grant Number 16497 issued to J. H. LeRoy by the State of North Carolina on

the 9th day of May 1905, which grants are duly recorded in the office of the Secretary of State," etc.

And that through connected chain, set out in detail, a paper writing, dated 1 October, 1938, and registered, from John Saliba, purported to convey to the Albemarle Hospital, Inc., "all that portion of said property lying south of the northern line of Carolina Avenue in said city of Elizabeth City, said line extending to deep water of Pasquotank River, said line being the division line between Carolina Avenue and said avenue extended and said hospital grounds proper, being so marked by privet hedge."

(It being found that the original conveyances by Riverside Land Company of lots Nos. 152-156 antedate the conveyance to J. H. LeRoy as set forth above.)

"8. That the Pasquotank River is a large watercourse upon which fairly large commercial vessels ply and such vessels plying said river may and do reach the ocean, various inland waters and the navigable waters of other States. That the Pasquotank River is a navigable stream. That the channel in said navigable stream is several hundred yards east of Riverside Avenue in front of lots Nos. 152-156. That immediately in front . . . between Preyer and Carolina Streets, the waters . . . are comparatively shallow . . . from the shore line to points 150 feet out in the river . . . That said shallow waters are capable of floating skiffs and small boats and small craft navigate the waters of the . . . river directly east of said lots from the shore line out.

"9. That the city of Elizabeth City and the County of Pasquotank, with the consent of the Albemarle Hospital, Inc., have expressed their intention to build a bulkhead or breakwater 150 feet from the shore line immediately to the east of Riverside Avenue and in front of lots Nos. 152-156. That the defendants have expressed their further intention to fill the space between the shore line and the bulkhead with debris and earth in order to convert the said area, now lying under the waters of Pasquotank River, into a public park. That such proposed park would be an obstruction in the waters of a navigable stream, but would not obstruct the channel of Pasquotank River.

"10. That the proposed action on the part of the defendants as set forth in the section next above will cause serious and irreparable damage to the plaintiffs in that the value of their lots Nos. 152-156 will be seriously diminished. That only a small portion of the damages that may be suffered by the plaintiffs would arise from the loss of accessibility to the waters from these lots. That such damages as may be suffered by the plaintiffs because of an impairment of the accessibility to the water would be greater in degree and different in kind from the damage suffered by the members of the general public. That the far greater portion of the

damages that may be suffered by these plaintiffs would arise from a diminution in aesthetic values now enjoyed by these plaintiffs by reason of the proximity of said lots . . . to the waters of the . . . river. That this diminution in aesthetic value and consequent damage would not arise from the threatened obstruction of navigation *per se* but would be incident to and a by-product of such obstruction of navigation.

"11. That plaintiffs will suffer serious damage if the restraining order prayed for is not issued. That the defendants will suffer no damage if such restraining order issues.

"12. That all the original conveyances by the Riverside Land Company to the parties herein and/or their predecessors in title were by lot number and reference to the aforementioned plat. That said plat shows the Pasquotank River as one of the geographical boundaries of the land of the Riverside Land Company. That all of the lots mentioned herein and all the lots shown on the entire plat are shown on the plat as abutting the near side of streets and avenues.

"13. That the plaintiffs are tax payers in the city of Elizabeth City and County of Pasquotank. That the plaintiffs have made no demand upon the governing boards of the city of Elizabeth City and County of Pasquotank that they desist from their plan as set forth in section 9, but the defendants have alleged their intention to carry out the plan unless restrained by order of court.

"14. That the construction of said bulkhead and fill for the purpose of constructing said park will cost a considerable sum of money which will be paid from monies raised by taxation in the city of Elizabeth City and the County of Pasquotank."

Upon these findings of fact, the referee concluded as matters of law:

"1. That the plaintiffs were under no legal duty to make personal protest to the governing bodies of the City of Elizabeth City and the County of Pasquotank County before bringing this action.

"2. That Lots Nos. 152-156 abut and are bounded by the western edge of Riverside Avenue. That plaintiffs are not riparian owners and have no riparian rights such as would entitle them to enter said lands for wharf purposes, or claim title to lands formed by accretion. That plaintiffs do have rights in Pasquotank River as a public thoroughfare and a public way.

"3. That the paper writing dated May 9, 1904, recorded June 11, 1904, in Book 27, page 504, did not convey the strip of land lying between Riverside Avenue and Pasquotank River other than numbered lots and specifically did not convey the strip of land between Riverside Avenue and Pasquotank River between Carolina and Preyer Streets in front of said Lots Nos. 152-156. That said paper writing purporting to convey lands under water conveyed no title to lands under water since it will be

presumed that the title to lands under navigable water is in the State in the absence of a showing of connected chain of title with a grant dated between 1835 A.D. and 1845 A.D. That at the point in question in front of Lots Nos. 152-156, J. H. LeRoy did not obtain the right to enter for wharf purposes and his successors in title, the defendants, are not riparian owners and have no riparian rights in or along the Pasquotank River immediately in front of said Lots Nos. 152-156.

"4. That by recording the plat in Book 26, at page 236, and indicating on said plat that there was only a narrow bank between Riverside Avenue and the waters of Pasquotank River, and by failing to indicate that said narrow strip of bank had been subdivided and by selling lots in said subdivision by plat and lot number, the Riverside Land Company dedicated such narrow strip or bank to the use of the public in reaching the waters of the Pasquotank River.

"5. That such defendants as are parties to this action cannot be precluded and estopped on these facts from performing a useful public service and constructing a useful public work and the defendants are not estopped from the construction of the said park.

"6. That the defendants have no legal right to enter into the lands under waters of Pasquotank River and obstruct the same. That the construction of said park would constitute a public nuisance. That if the defendants owned the aforementioned six-foot strip of land as shown by the plat, then the construction of said park would constitute a public nuisance. That if the defendants owned said strip of bank and the lands under water in front of Lots Nos. 152-156, the construction of said park would constitute a public nuisance. That the said proposed construction of the park should be enjoined as a nuisance.

"7. That if and when the proposed park is constructed the lands in said park as artificially raised above the waters of the Pasquotank River will become vacant and unappropriated lands subject to entry by any citizen of this State. That the defendants are not among the class that may make entry and obtain a grant to such lands. That such construction would necessarily result in serious loss to the plaintiffs as taxpayers and such expenditure of the funds of the defendants with consequent loss should be enjoined."

The record shows that: "The defendants except to the report of the referee and for their exceptions say": Then follows exceptions to findings of fact, a portion of No. 9, and all of numbers 10, 11 and 14 for that, in substance, each is not supported by the evidence—but no issues were tendered.

Then there follows these exceptions to conclusions of law:

"1. The defendants except to the Referee's Conclusion of Law No. 1 for the same is contrary to law, and the Referee should have concluded

that the plaintiffs were under legal duty to make protest to the governing bodies of the defendant County and the defendant City, in manner and form as required by law.

"2. Defendants except to so much of the second Conclusion of Law as reads as follows: 'The plaintiffs do have rights in Pasquotank River as a public thoroughfare and a public way,' for that such conclusion is contrary to law and the Referee should have concluded that plaintiffs have only such rights in the portion of Pasquotank River sought to be utilized as a park as is by law accorded to all other individuals, firms or corporations not owning riparian rights thereover.

"3. Defendants except to Conclusion of Law No. 3 for that such conclusion is contrary to law in its entirety, as the Referee should have concluded that the deed dated May 9, 1904, recorded in Book 27, page 504, in the Public Registry of Pasquotank County, conveyed from The Riverside Land Company to J. H. LeRoy all lands of the grantor lying to the east of Riverside Avenue between Carolina Avenue and Pryor Street, and that the Albemarle Hospital, Inc. is now the owner in fee of said lands, together with all riparian rights attendant thereto.

"4. The defendants except to Conclusion of Law No. 4 for that the same is contrary to law and is entirely unsupported by fact upon which such conclusion could properly be made.

"5. The defendants except to the 6th Conclusion of Law for that the same is contrary to law and is entirely unsupported by fact, and the Referee should have concluded that as against the plaintiffs the defendants had the right to construct the public park into the shoal waters of Pasquotank River in so far as the channel thereof was not obstructed; that said public park would not constitute a public nuisance and that if it did in fact constitute a public nuisance, that plaintiffs' remedy is not by injunction but by suit for damages.

"6. That defendants except to Conclusion of Law No. 7 for that the same is contrary to law and is entirely unsupported by fact or proper pleading.

"Exceptions to the Referee's Allowing the plaintiffs to File Additional Pleadings Following the Closing of the Testimony:

"The defendants except to the Referee's sustaining plaintiffs' motion to file additional pleadings as is set forth in the "Supplementary Transcript of Further Proceedings" for that the amendment to the complaint so allowed constituted a new and different cause of action."

On the other hand, the record shows that plaintiffs excepted to the fifth conclusion of law set forth in referee's report "for that there was no evidence or finding of fact to support same. On the contrary, the referee should have concluded on all the evidence and the findings of fact

that the defendants are estopped and precluded from construction of said purposed park, the Land Company having made the representations as shown by the plat, and the defendants claiming only such rights as they may have acquired under the LeRoy deed, all parties claiming from a common source."

When the cause came on for hearing on the exceptions filed by the respective parties, the judge entered judgment reading as follows:

"Counsel for plaintiffs and defendants having presented their contentions, and the court having carefully read and considered the pleadings, the evidence and the findings of fact and conclusions of law of the Referee, and the exceptions thereto: The court now finds the facts to be as set forth in the Referee's report and designated under 'Findings of Fact' as 'First,' 'Second,' 'Third,' 'Fourth,' 'Fifth,' 'Sixth,' 'Seventh,' 'Eighth,' 'Ninth,' 'Tenth,' 'Eleventh,' 'Twelfth' and 'Thirteenth,' and now confirms said findings by the Referee and adopts the same as the findings of this court as fully as if here copied verbatim.

"The court confirms and adopts as the conclusions of this court, the conclusions of law of the Referee as set forth under 'Conclusions of Law' and numbered 'First,' 'Second,' 'Third,' 'Fourth,' 'Sixth,' and 'Seventh,' but overrules conclusion of law number 'Fifth' and now holds as a matter of law that the defendants are estopped and precluded from construction of said proposed park.

"The exception of the plaintiffs is sustained, and the exceptions of the defendants are overruled.

"This court now confirms the 'Supplementary Transcript of Further Proceedings' of the Referee with respect to the amendment prayed for by plaintiffs, finds the facts to be as therein set forth and now confirms the Referee's Order allowing said amendment.

"It is, therefore, adjudged and decreed that the Findings of Fact by the Referee, and the Findings of Fact by this court, are amply supported by the evidence offered in this cause; that the defendants, their agents, servants and employees, be, and they are hereby enjoined and restrained from constructing said breakwater and from making the fill thereof adjacent to and immediately eastward of the street or driveway referred to as Riverside Drive and which street or driveway is immediately eastward of the lots of plaintiffs designated as lots Nos. 152 and 153 and 154 and 155 and 156 as shown on plat of Riverside Land Company, recorded in Book 26, page 236, in the office of the Register of Deeds of Pasquotank County; that the plaintiffs recover their costs to be taxed by the Clerk.

"Judgment is hereby entered accordingly.

"The Clerk will record the Referee's report with this judgment.

"By consent of plaintiffs and defendants, this judgment is signed out of term and out of the District with the same force and effect as if signed at term in Pasquotank County.

"December 29, 1951.

"J. PAUL FRIZZELLE,
Judge Riding First Judicial District."

The record shows appeal entries signed by the judge as follows: "To the judgment rendered by the undersigned judge on December 29, 1951, and received and filed by the clerk on January 2, 1952, the defendants in apt time except, and from same appeal to the Supreme Court . . ."

The record of agreed case on appeal shows, among other things, that there was evidence offered on the trial tending to support each and every finding of fact of the referee as is shown in his report.

The record of agreed case on appeal also shows that the defendants offered no evidence at the trial before the referee tending to support their plea of the statute of limitations.

The following also appears therein: "To each conclusion of law contained in said judgment and numbered below, and to each of them separately the defendants in apt time excepted as follows:" enumerating the conclusions of law and rulings as shown in the judgment—as well as to the signing and entering of the judgment.

And that from the judgment of the court below defendants appeal to Supreme Court, and they assign error.

Worth & Horner for plaintiffs, appellees.

McMullan & Aydlett and Wilson & Wilson for defendants, appellants.

WINBORNE, J. Appellants, the defendants, raise, and debate in their brief filed here on this appeal, four questions as arising upon assignments of error on which they rely. We hold, however, that on the record and case on appeal now considered, prejudicial error is not made to appear.

The first question presented is this: "Should the court have disposed of defendants' plea of adverse possession prior to entering an order of compulsory reference?" As to this, if it be conceded that the plea as made be sufficient to set up a good plea in bar to plaintiffs' cause of action, "the rule of practice in an orderly course of procedure" would be to have such defense disposed of before ordering a compulsory reference. *Comrs. v. Raleigh,* 88 N.C. 120, and numerous other cases.

Such plea raises an issue of fact which the pleaders are entitled to have tried by a jury. This right may be waived. In a consent reference this right is waived, and this issue, as well as all others raised by the pleadings, may be decided by the referee. On the other hand, in a compulsory

reference the right to have this issue tried by a jury is not waived, and this issue should be settled by a jury before an order of reference is made. (See McIntosh N. C. P. & P., Sec. 523.)

But if when a good plea in bar is pleaded the court should order a reference, a party may object, and "appeal at once, if he be so minded, or he may rely on his objection by reserving his exception, and appeal from the final judgment," *Walker, J.*, in *Pritchett v. Supply Co.*, 153 N.C. 344, 69 S.E. 249; *Baker v. Edwards*, 176 N.C. 229, 97 S.E. 16, and other cases.

Indeed, if the objectors elect to take the latter course, their right to have the issue based on the plea in bar tried by a jury, may be waived. *Booker v. Highlands*, 198 N.C. 282, 151 S.E. 635; *Brown v. Clement Co.*, 217 N.C. 47, 6 S.E. 2d 842, and cases cited.

In *Booker v. Highlands, supra, Stacy, C. J.*, states clearly and concisely the procedure which must be pursued in a compulsory reference in order to preserve the right to a trial by jury (the first two requirements being pertinent to case in hand), as follows:

"1. Object to the order of reference at the time it is made . . .

"2. On the coming in of the report of the reference, if it be adverse, file exceptions in apt time to particular findings of fact made by the referee, tender appropriate issues based on the facts pointed out in the exceptions and raised by the pleadings, and demand a jury trial on each of the issues thus tendered . . ."

And "a failure to observe any one of these requirements may constitute a waiver of the party's right to have the controverted matters submitted to a jury and authorize the judge to pass upon the exceptions without the aid of a jury." McIntosh, Sec. 525.

Applying this procedure to the case in hand, it appears that while defendants excepted to the order of reference, and filed exception to certain adverse findings of fact and conclusions of law made by the referee, yet they did not tender any issues, nor did they demand a jury trial on any issue. Hence, the right to have the issue raised by their plea in bar tried by a jury is waived. Indeed, they offered no evidence in support of such issue. And the rulings of the judge, made upon exceptions to the report of referee, while not expressly so stated, are tantamount to holding against defendants on their plea in bar.

The second question is stated by appellants in these words: "Does the recordation of the Riverside Land Company plat, showing a strip of land to the east of Riverside Avenue as undivided land, constitute a dedication of the strip for such a purpose as to give the plaintiffs a special property right therein sufficient to support their original complaint?"

In this connection, it is appropriate to note that, in this State, the findings of fact made by a referee, when there is evidence tending to

support them, if affirmed by the judge, are conclusive on appeal. See *Frey v. Lumber Co.*, 144 N.C. 759, 57 S.E. 464; *Henderson v. McLain*, 146 N.C. 329, 59 S.E. 873; *Mirror Co. v. Casualty Co.*, 153 N.C. 373, 69 S.E. 261.

And the question here posed by appellants is predicated upon assignments of error based upon exceptions to conclusions of law approved by the judge and to conclusions of law made by the judge. Hence the pivotal question is whether the findings of fact support these conclusions of law. The Court is of opinion, and holds that they do support such conclusions of law.

It is a settled principle in this State that when the owner of land, located within or without a city or town, has it subdivided and platted into lots, streets, alleys, and parks, and sells and conveys the lots or any of them with reference to the plat, nothing else appearing, he thereby dedicates the streets, alleys, and parks, and all of them, to the use of the purchasers, and those claiming under them, and of the public. See *Ins. Co. v. Carolina Beach*, 216 N.C. 778, 7 S.E. 2d 13, where pertinent decisions of this Court are assembled. Among the cases cited are: *Conrad v. Land Co.*, 126 N.C. 776, 36 S.E. 282; *Collins v. Land Co.*, 128 N.C. 563, 39 S.E. 21; *Hughes v. Clark*, 134 N.C. 457, 46 S.E. 956; *Green v. Miller*, 161 N.C. 24, 76 S.E. 505; *Sexton v. Elizabeth City*, 169 N.C. 385, 86 S.E. 344; *Wittson v. Dowling*, 179 N.C. 542, 103 S.E. 18. See also *Foster v. Atwater*, 226 N.C. 472, 38 S.E. 2d 316.

In the *Collins case, supra*, it is held "that a map or plat referred to in a deed, becomes a part of the deed as if it were written therein, and that, therefore, the plan indicated on the plat is to be regarded as a unity, and the purchaser of a lot acquires a right to have each and all of the ways and streets on the plat, or map, kept open." To support this view the Court quotes with approval the following from Elliott on Roads, Sec. 120: "It is not only those who buy lands or lots abutting on a road or street laid out on a map or plat that have a right to insist upon the opening of a road or street, but where streets and roads are marked on a plat and lots are bought and sold with reference to the map or plat, all who buy with reference to the general plan or scheme disclosed by the plat or map acquire a right to all the public ways designated thereon and may enforce the dedication. The plan or scheme indicated on the map or plat is regarded as a unity, and it is presumed, as well it may be, that all the public ways add value to all lots embraced in the general plan or scheme."

The reason for the rule, as stated in *Green v. Miller, supra*, is that "the grantor, by making such a conveyance of his property, induces the purchaser to believe that the streets and alleys, squares, courts and parks will be kept open for their use and benefit, and having acted upon the faith of his implied representations, based upon his conduct in platting the land

and selling accordingly, he is equitably estopped, as well in reference to the public as to his grantees, from denying the existence of the easement thus created."

In this connection attention is directed to Annotation appearing in 7 A.L.R. 2d 607, on the subject "Conveyance of lot by reference to map or plat as giving purchaser rights in indicated streets, alleys, and areas not abutting his lot." The annotator states that in those jurisdictions in which the question has arisen, the majority adhere to the "broad view" or "unity" rule, "that a grantee to whom a conveyance is made by reference to a map or plat acquires a private right, frequently designated as an easement to the use of all the streets and alleys delineated on such map or plat," as well as of a "park or other open area" delineated thereon. And the annotator classifies decisions of the Supreme Court of North Carolina as holding to the "broad view" or "unity" rule.

In this connection, it is noted that Pasquotank River is a navigable stream. And navigable waters constitute a public highway, which the public is entitled to use for the purposes of travel either for business or pleasure. *Cromartie v. Stone,* 194 N.C. 663, 140 S.E. 612. *S. ex rel. Lyon v. Power Co.,* 82 S.C. 181, 63 S.E. 884, 22 L.R.A. (N.S.) 435, 129 Am. St. Rep. 876, 17 Ann. Cas. 343, 56 Am. Jur. 672—Waters, Sec. 209.

However, the right of navigation gives no license to go and come through and over the riparian owner's land without "let or hindrance." Similarly, those navigating a river have no right, as incident to the right of navigation, to land upon and use the bank at a place other than a public landing without the consent of the owner, for the banks of a navigable stream are private property. 56 Am. Jur. 674—Waters, Sec. 213.

Moreover, in *Bond v. Wool,* 107 N.C. 139, 12 S.E. 281, this Court said: "In the absence of any special legislation on the subject, a littoral proprietor and a riparian owner, as is universally conceded, have a qualified property in the water frontage belonging, by nature, to their land, the chief advantage growing out of the appurtenant estate in the submerged land being the right of access over an extension of their water fronts to navigable water, and the right to construct wharves, piers, or landings, subject to such general rules and regulations as the Legislature, in the exercise of its powers, may prescribe for the public rights in rivers and navigable waters." See G.S. 146-6.

Again in the same case, at page 149, it is declared: "This qualified property, that, according to well settled principles, as interpreted in nearly all the highest courts of the United States, is necessarily incident to riparian ownership, extends to the submerged land bounded by the water front of a particular proprietor, the navigable water and two parallel lines projected from each side of his front to navigable water."

These principles were applied in *O'Neal v. Rollinson,* 212 N.C. 83, 192 S.E. 688. See also *R. R. v. Way,* 169 N.C. 1, 85 S.E. 12.

Hence, normally, the right of access to navigable waters over adjacent lands held under private ownership is vested exclusively in the owner of such lands, and can be exercised by another only by virtue of a grant or license by such owner. It is a property right, analogous, it is said, to an abutting owner's right of access to highways on land. 56 Am. Jur. 677, Waters, Sec. 216.

Applying these principles to the case in hand, the Riverside Land Company, being a riparian owner of land fronting on Pasquotank River, a navigable stream, shown on, and in accordance with, the plat by which it sold lots, had the right to grant to purchasers of such lots access over its water frontage land to the waters of the river. And the conclusions of law on the facts found appear logical.

The third and fourth questions as stated by appellants are these: (3) "Did the court err in allowing the plaintiffs to amend their complaint, and set up a taxpayer's action, after all the evidence had been taken and the case was under consideration by the referee?"

(4) "Does the construction of a park on the bluff, beach and shallow water east of Riverside Avenue constitute a public nuisance, and result in such an expenditure of funds for an unlawful purpose, the prevention of which the plaintiffs would be entitled to maintain a taxpayer's action?"

In this connection, the General Assembly has declared in G.S. 14-133 that "if any person shall erect artificial islands or lumps in any of the waters of the State east of the Atlantic Coast Line Railroad running from Wilmington to Weldon . . . to the North Carolina-Virginia state boundary, he shall be guilty of a misdemeanor." The Court will take judicial notice of the fact that the Pasquotank River is east of the above railroad as so expressly located.

Moreover, we find it stated in 56 Am. Jur. 680, Waters, 218, that, navigable waters being public highways, it follows, under elementary principles of the common law, that any unreasonable obstruction thereof, or of navigation thereon, is unlawful. In general, the rule is that all material obstructions to navigation not authorized by the proper governmental authority are public nuisances. See *Mfg. Co. v. R. R. Co.,* 117 N.C. 579, 23 S.E. 43; *Reyburn v. Sawyer,* 135 N.C. 328, 47 S.E. 761; *Pedrick v. R. & P. S. R. Co.,* 143 N.C. 485, 55 S.E. 877. Compare *Broocks v. Muirhead,* 223 N.C. 227, 25 S.E. 2d 889.

Indeed, it is stated that it is not necessary that obstructions in the way of navigation should have actually interfered with, or done it in order to render such obstructions nuisances; it is sufficient if navigation was thereby rendered less convenient, secure, and expeditious. The fact that

the obstruction may be a source of public benefit has been held not to relieve it of its character as a nuisance.

Hence, in the light of the decision here made in respect of the second question, as hereinabove stated, and of the principle last above stated, if there be error in allowing the amendment to which objection is made, it does not appear to be prejudicial to defendants, the appellants.

In conclusion, and after giving due consideration to argument advanced and authorities cited, the judgment from which appeal is taken is Affirmed.

BARNHILL, J., dissents on the question of dedication.

WACHOVIA BANK & TRUST COMPANY, TRUSTEE BY APPOINTMENT OF COURT, UNDER THE LAST WILL AND TESTAMENT OF SAMUEL F. PATTERSON, DECEASED, v. ROBERT H. SCHNEIDER, NANCY ELIZABETH SCHNEIDER, A MINOR; FRANCIS F. PATTERSON, MILDRED PATTERSON BEARD, THE UNBORN CHILDREN OF NANCY ELIZABETH SCHNEIDER, THE LINEAL DESCENDANTS OF MRS. MARY PATTERSON SCHNEIDER, NOT NOW IN BEING, AND ANY AND ALL OTHER PERSONS NOT NOW IN BEING OR UNDER ANY DISABILITY, OR WHOSE NAMES AND RESIDENCES ARE NOT KNOWN, WHO MAY, TO ANY DEGREE OR EXTENT, BECOME INTERESTED IN ANY OF THE ASSETS OF THE TRUST ESTABLISHED PURSUANT TO ITEM 3 OF THE LAST WILL OF SAMUEL F. PATTERSON.

(Filed 30 April, 1952.)

1. Wills § 31—

Where there is apparent repugnancy in the intent of the testator as expressed in one part of the will and as gathered from the entire instrument, the meaning of the language used is subject to judicial construction.

2. Same—

The intent of testator as gathered from the language of the entire instrument is the controlling objective of testamentary construction.

3. Same—

In ascertaining the intent of a will, all its provisions must be examined in the light of the circumstances surrounding testator, including the state of testator's family at the time the will was made.

4. Same—

It is not required that the intent of testator be declared in express terms, and in fact the intent as inferred from the language of the entire instrument is more to be regarded than the use of any particular words.

5. Wills § 32½—

A vested estate is transmittible, a contingent estate is not.

6. Wills § 33c—

An estate is vested when there is either an immediate right of present enjoyment or a present fixed right of future enjoyment.

7. Same—

Where there is uncertainty as to the person or persons who are to take, and the uncertainty is to be resolved in a particular way or according to conditions at a particular time in the future, the estate is contingent.

8. Wills § 34c—

When a gift is to a class, but the time of vesting is postponed beyond the date of the termination of the preceding life estate, members of the class *in esse* at the time of the termination of the life estate are possessed of the contingent right to take, subject to be opened up to admit members of the class thereafter born and to be closed so as to exclude members who die prior to the date set for the vesting of the estate.

9. Wills § 33a—

Where a bequest and devise of the income of an estate to the beneficiaries is limited to a specified period, with provision for the vesting of the *corpus* at the end of the period upon contingent limitations, so that the beneficiaries of the *corpus* need not be the same as the beneficiaries of the income, the beneficiaries of the income do not take the fee, since the will manifests an intent to pass an estate of less dignity.

10. Wills §§ 32½, 33c—Beneficiary of income held to have only contingent interest in corpus and therefore did not take transmittible estate.

Testator was survived by children of his first marriage and the widow and child of his second marriage. After making provision for the children of his first marriage, testator devised and bequeathed the remainder of his estate in trust with provision that the income therefrom should be paid his widow and the child of the second marriage and, upon the child's death, to her children for the period of the trust, with further provision that at the expiration of twenty years from the death of the child by the second marriage the *corpus* should be distributed to such child's children or grandchildren *per stirpes*, with further limitation over to the trustees for charitable purposes in the event testator's child by the second marriage died without direct descendants surviving at the time of the termination of the trust. The child by the second marriage died survived by two children, one of whom died before the expiration of the period fixed for the distribution of the *corpus*. *Held:* The children by the first marriage were excluded from taking any interest in the property in question by purchase under the will, and the deceased child of the child by the second marriage took no transmittible estate, and any interest he may have had terminated upon his death, and further the surviving child of the child of the second marriage is entitled to all the income from the estate, and there can be no distribution of the *corpus* prior to her death or the end of the twenty year period fixed by the will.

11. Wills § 39—

Courts do not enter anticipatory judgments, and therefore in an action to construe a will, an adjudication directing the distribution of the *corpus* of the estate in the event of the death of the contingent beneficiary prior

to the time fixed in the will for the distribution of the *corpus*, will be vacated.

12. Costs § 5—

Except as otherwise provided by G.S. 6-21 attorney's fees are not a part of the cost of litigation.

13. Wills § 39—

Fees of attorneys for parties who are *sui juris* and elect to employ counsel and assert their claim to a part of the estate cannot be allowed as a part of the costs in an action to construe the will, even though it was necessary for plaintiff to make them parties to the action.

APPEAL by guardian *ad litem* for the defendant Nancy Elizabeth Schneider, an infant, and certain other defendants, from *Hatch, Special Judge,* October Special Term, 1951, WAKE. Modified and affirmed.

Petition by plaintiff trustee for advice and instruction.

Samuel F. Patterson, plaintiff's trustor, a resident of Halifax County, North Carolina, died in 1924 possessed of a large estate consisting of both real and personal property. He left surviving a widow, now deceased, and their daughter, Mary B. Patterson, then nine years of age; and also a son and daughter by a former marriage, the defendants Francis F. Patterson, and Mildred Patterson Beard. The son has one child and the daughter Mildred five children now living. Said grandchildren are represented here by a duly appointed guardian *ad litem.*

Said Samuel F. Patterson died testate. In his will he made provision for his son Francis and his daughter Mildred. Title to the gift to or for the benefit of Mildred was vested in trustees who were directed to pay the income therefrom to her during her natural life and after her death to her children until the youngest one thereof should attain the age of twenty-one years, at which time payment of income should cease and the *corpus* of the devise should revert to the residuary estate of the testator. Neither this devise nor the devise to Francis is in any wise involved in this litigation.

Then he made provision for his widow and their daughter Mary in the following language:

"ITEM No. 3. I give, devise and bequeath to my wife, Nancy P. Patterson, and to my daughter, Mary B. Patterson, equally, all of the income which may arise from the remainder of all of my property of every kind, character, and description, so long as they both shall live. In the event of the death of either of them, the survivor shall receive, so long as she shall live, all of the income which may arise from the remainder of my estate not disposed of in items 1 and 2 as above set out . . . If my daughter, Mary B. Patterson, shall have any children living at the time of her death, then, and in that event, any and all income to which she would be

entitled hereunder, if she were living shall be paid equally to her children for a period of twenty years after her death. Upon the death of my wife, Nancy P. Patterson, and the death of my daughter, Mary B. Patterson, leaving no children or grandchildren, her surviving, then all of my estate shall revert to my executors hereinafter provided. In the event that my daughter, Mary B. Patterson shall die leaving children or grandchildren her surviving, then upon the expiration of the 20 year period succeeding her death as above provided, my estate shall be distributed equally among her children and the children of any one of her children who may have predeceased her, provided that her grandchildren shall receive only such portion as would have been received by their parent if living.

"ITEM No. 4. In the event of the reversion of the remainder of my estate to my Executors, on account of the death of my wife, Nancy P. Patterson and the death of my daughter, Mary B. Patterson, without leaving any children or grandchildren surviving her, then it is my desire that my executors hereinafter named and their successors, shall use the income which may be derived from my estate for charitable and educational purposes in their discretion."

Executors and trustees were named in the will, and plaintiff is the successor trustee now in charge of and actively engaged in the administration of said trust estate which presently consists of real estate and the proceeds of real estate of the value of $77,203.17 and personal property not traceable to real estate of the value of $558,743.98.

Mary B. Patterson, the surviving daughter by the last marriage and beneficiary of the trust, intermarried with defendant Robert H. Schneider and there were born to the marriage two children, defendant Nancy Elizabeth Schneider and Robert Patterson Schneider. She died a resident of Virginia, 6 February 1951. Her infant son, Robert, died a few days thereafter, that is, on 16 February 1951.

A controversy has arisen among the parties as to the proper disposition of the trust estate. The defendant Robert H. Schneider, father of Robert Patterson Schneider, deceased infant son of Mary Patterson Schneider, claims one-half of the personal estate held in trust as heir of distributee of his said child, and the other parties make conflicting claims, the exact nature of which need not be detailed here.

In view of the language used in Item 3 of the will, the trustee is not certain as to the disposition, if any, it should now make of the *corpus* of the trust estate or as to the rights of the respective parties under the several claims made by them. It therefore filed this petition for advice and instruction, particularly as to:

1. Its right to sell and convey, invest and reinvest the assets of the trust estate;

2. The meaning and dispositive effect of the language used in said Item 3; and

3. The rights and interests of the respective claimants in the *corpus* of the trust estate.

It prays specific instruction as to whether it shall now make distribution of any part of the *corpus* of the trust and, if so, what part and to whom.

The court below, after finding certain facts, adjudged that:

1. The trustee possesses full discretionary power of administration of the trust including the power to sell, invest and reinvest without order of court and without the consent of the beneficiary or beneficiaries of the trust;

2. The proceeds of real estate now held by the trustee shall be deemed real estate for the purpose of descent and distribution as directed by the court;

3. Upon the death of Mary P. Schneider, the title to the *corpus* of the trust estate immediately vested in her two surviving children, Nancy Elizabeth and Robert Patterson Schneider, with the enjoyment thereof postponed until the termination of the trust; each being entitled to one-half of the income therefrom during the period of the trust;

4. Upon the death of Robert P. Schneider, 16 February 1951, one-half of the trust estate passed immediately, free of the trust, to his heirs and distributees, his father, Robert H. Schneider, and his sister, Nancy Elizabeth Schneider; and

5. The father, Robert H. Schneider, as sole distributee of his son, is now entitled to one-half of all the personal estate held in trust by plaintiff, and the sister, Nancy Elizabeth Schneider, as sole heir at law of said infant, is now entitled to one-half of all the real estate or proceeds of real estate now in possession of the trustee, free and clear of the trust provisions.

The other adjudications are of secondary importance.

The guardian *ad litem* for Nancy Elizabeth Schneider and certain other defendants excepted and appealed.

A. L. Purrington, Jr., guardian ad litem for Nancy Elizabeth Schneider.

Manning & Joslin for Mildred Patterson Beard and Francis F. Patterson.

Samuel R. Leager, guardian ad litem for all persons in esse and in posse not otherwise represented.

Brassfield & Maupin for Robert H. Schneider.

Joseph B. Cheshire, Jr., guardian ad litem for unborn children of Nancy Elizabeth Schneider and for lineal descendants of Mary Patterson Schneider not now in being.

BARNHILL, J. Did Robert P. Schneider, upon the death of his mother, become seized and possessed of a transmittible one-half interest in the trust estate devised in Item 3 of the will of Samuel F. Patterson, subject only to the provisions of the trust postponing the time of full enjoyment thereof? This is the primary question posed by this appeal. Since the widow, Nancy P. Patterson, is now dead and her interest in the trust estate has terminated, we may discuss the question without reference to her or her rights under the will.

If Item 3 of the will is lifted out of its context and considered apart from the will as a whole, the language there used generates very plausible, if not persuasive argument in support of an affirmative answer. The will considered in its entirety tends to point in the other direction. So then, there is sufficient ambiguity as to the purpose and intent of the testator and the meaning of the language used by him to invoke judicial construction. *Cannon v. Cannon,* 225 N.C. 611, 36 S.E. 2d 17.

Judicial construction is guided and controlled by well-recognized and established canons of construction, some of which must be invoked here.

The discovery of the intent of the testator as expressed in his will is the dominant and controlling objective of testamentary construction, for the intent of the testator as so expressed is his will. *Woodard v. Clark,* 234 N.C. 215; *Trust Co. v. Waddell,* 234 N.C. 454; *Seawell v. Seawell,* 233 N.C. 735, 65 S.E. 2d 369; *Heyer v. Bulluck,* 210 N.C. 321, 186 S.E. 356.

In ascertaining the intent of the testator, all the provisions of the will must be examined in the light of the circumstances, including the state of the testator's family at the time the will was made. *Heyer v. Bulluck, supra; Scales v. Barringer,* 192 N.C. 94, 133 S.E. 410, and cases cited. The intent is to be gained from a consideration of the will in its entirety. *Richardson v. Cheek,* 212 N.C. 510, 193 S.E. 705; *Heyer v. Bulluck, supra; Brown v. Brown,* 195 N.C. 315, 142 S.E. 4; *Cannon v. Cannon, supra; Bank v. Corl,* 225 N.C. 96, 33 S.E. 2d 613; *Buffaloe v. Blalock,* 232 N.C. 105, 59 S.E. 2d 625.

The intent of the testator, as expressed in the will, "taking it by its four corners" is the "Polar star" guiding the Court in arriving at the proper construction of the language used in the will. *Trust Co. v. Miller,* 223 N.C. 1, 25 S.E. 2d 177, and cases cited.

The intention of the testator need not be declared in express terms. It is sufficient if it can be inferred from particular provisions of the will and from its general scope and import. *Trust Co. v. Miller, supra; Efird v. Efird,* 234 N.C. 607. And greater regard is to be given to the dominant purpose of the testator than to the use of any particular words. *Heyer v. Bulluck, supra; Trust Co. v. Waddell, supra.*

Likewise we must bear in mind the distinction between a vested and a contingent estate, for the one is transmittible while the other is not. " '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.*" (121 A.L.R. 1516) *McQueen v. Trust Co.,* 234 N.C. 737. Conversely, when there is uncertainty as to the person or persons who are to take, the uncertainty to be resolved in a particular way or according to conditions existing at a particular time in the future, the devise is contingent. *Scales v. Barringer, supra; Trust Co. v. Stevenson,* 196 N.C. 29, 144 S.E. 370; *Smyth v. McKissick,* 222 N.C. 644, 24 S.E. 2d 621.

"If there is uncertainty as to the person or persons who will be entitled to enjoy the remainder or if a conditional element is made a part of the description of the remainder, it is contingent." *Scales v. Barringer, supra.*

In craftsmanship the will leaves much to be desired. In some respects it is ineptly drawn and it lacks exactness of expression and attention to details that might be expected in a paper writing disposing of an estate of the size here involved. Yet an examination of the instrument with the controlling rules of construction in mind makes it manifest that the testator intended to (1) keep his devise well within the rule against perpetuities, (2) limit the property which, in any event that might arise, should go to the two children by his former marriage to that specifically devised in the will, and (3) restrict the trust property devised in Item 3 to his lineal descendants of the blood of his surviving widow, upon the failure of which it is to be used for charitable purposes as provided in Item 4 of the will.

The devise in trust is purposely and cautiously restricted to those of his own blood and the blood of his wife Nancy who may be able to answer the roll call. And it is evident he intended that the devise should take effect according to the state of his family with reference to the second set of children at the time the division is to be made. The representatives of any deceased child who predeceased the life tenant take one share *per stirpes.* They take, however, if at all, as purchasers under the will and not by inheritance, as representatives of their deceased parent.

There is no gift of the trust estate to the children and grandchildren of his daughter Mary apart from the direction that the trust shall terminate and the property shall be divided at the end of the twenty-year period. *Carter v. Kempton,* 233 N.C. 1, 62 S.E. 2d 713.

At the time the will was executed, the state of testator's family was such that there was a distinct possibility that those who are to share in the income after the death of his daughter Mary and those who may share in the final division are not identical. Only children of Mary are to

receive the income pending the termination of the trust. Grandchildren are excluded by necessary implication. Yet grandchildren of the blood of the testator and his last wife are to share in the distribution, provided their ancestor predeceased Mary.

"In the event that my daughter, Mary B. Patterson shall die leaving children or grandchildren her surviving, then upon the expiration of the 20 year period succeeding her death as above provided, my estate shall be distributed equally among her children and the children of any one of her children who may have predeceased her, provided that her grandchildren shall receive only such portion as would have been received by their parent if living."

Those who are to take the *corpus* are designated by class rather than by name. When the gift is to a class but the time of vesting is postponed beyond the date of the termination of the preceding life estate, members of the class *in esse* at the time of the termination of the preceding estate are possessed of the contingent right to take. However, the class opens up to admit members of the class thereafter born, and closes ranks so as to exclude members who die, prior to the date set for the vesting of the estate granted. *Neill v. Bach,* 231 N.C. 391, 57 S.E. 2d 385; *Smyth v. McKissick, supra.*

If testator's daughter Mary should die without leaving a direct descendant capable of answering the roll call as provided in the will, the trust property is not to pass by inheritance to representatives of his first set of children but is to revert to the trustees as a part of the testator's residuary estate and be devoted to charitable purposes as provided in Item 4 of the will.

While it is true the income from the trust is to be paid first to Mary and then, after her death, to such of her children as may survive, the gift is not a gift of the income generally. It is carefully limited to the twenty-year period next after the death of Mary. Hence, the line of cases represented by *Coddington v. Stone,* 217 N.C. 714, 9 S.E. 2d 420, and *Jackson v. Langley,* 234 N.C. 243, is not controlling here. The will manifests an intent to pass an estate of less dignity. *Mangum v. Wilson, ante,* 353.

The intent of the testator as thus disclosed by the language used in the will under consideration compels these conclusions: (1) Robert Schneider never became seized of a vested interest in the trust estate which upon his death passed by inheritance to his heirs and distributees; (2) upon the death of his mother, he became entitled to one-half of the income from the trust estate; (3) upon his death, prior to the expiration of the twenty-year period during which the trust was to continue and prior to the date set for the final distribution of the *corpus* of the estate, any interest he may have had in the trust estate terminated; (4) the defendant Nancy Elizabeth Schneider is now entitled to all the income from the estate and

is the only person who may be able to answer the roll call at the expiration of the trust, if she is then living; and (5) there can be no distribution of the *corpus* of the estate at this time.

Let it be understood, however, that we do not at this time decide (1) any right of the children of the first marriage or their representatives to take by inheritance from their half sister, Nancy Elizabeth, in the event she dies without issue, either before or after the termination of the trust, or (2) the validity or invalidity of the contingent gift over for charitable purposes contained in Item 4 of the will. These questions are not now properly before the Court. The provisions of Item 4 are now considered only as they serve to point to the intent of the testator. Specifically, paragraph 10 of the judgment, in so far as it undertakes to direct the distribution of the *corpus* of the trust in the event Nancy Elizabeth Schneider shall die prior to the expiration of the twenty-year period, is vacated. The courts do not enter anticipatory judgments. That question will be decided when and if it arises.

The court below entered an order awarding counsel fees to the attorneys for the defendant Robert Schneider and the defendants Francis F. Patterson and Mildred Patterson Beard, to be paid out of the assets of the estate as a part of the cost of the litigation. Exceptions to this order must be sustained.

Except as otherwise provided by statute, G.S. 6-21, attorneys' fees are not now regarded as a part of the court costs in this jurisdiction. *Turner v. Boger,* 126 N.C. 300; *Ragan v. Ragan,* 186 N.C. 461, 119 S.E. 882; *Parker v. Realty Co.,* 195 N.C. 644, 143 S.E. 254; *Finance Co. v. Hendry,* 189 N.C. 549, 127 S.E. 629.

Prior to 1868 counsel fees for the successful litigant were fixed by statute and allowed as a part of the cost or expense of litigation. The Code of Civil Procedure, adopted in 1868, abolished the tax fees of attorneys and made provision for the recovery by the successful party of certain amounts which were supposed to reimburse him for his expense. C.C.P., Title XII, sec. 275, 279; *Hyman v. Devereux,* 65 N.C. 588. This was changed in 1870-71 and certain fixed fees for attorneys were allowed as under the former law. Bat. Rev., Ch. 105, sec. 29; *Patterson v. Miller,* 72 N.C. 516; *Midgett v. Vann,* 158 N.C. 128, 73 S.E. 801. In 1879 this was repealed, leaving no statutory provision for attorneys' fees as costs. Laws 1879, Ch. 41; *Parker v. Realty Co., supra; Patrick v. Trust Co.,* 216 N.C. 525.

Thus the nonallowance of counsel fees as a part of the costs of litigation was deliberately adopted as the policy in this State as early as 1879. That policy, as modified by the provisions of G.S. 6-21, has prevailed in this State since that date.

The allowances may not be sustained upon the theory that they are in payment for services rendered the trust estate.

While it was necessary for the plaintiff to make Robert H. Schneider a party defendant, whether he should appear and defend was for him to decide. When he elected to employ counsel and appear and assert his claim to a part of the estate, his counsel represented him and advocated his cause. They were serving the individual and not the estate. Of course, what is here said as to Robert H. Schneider applies with equal force to the allowance made counsel for defendants Francis F. Patterson and Mildred Patterson Beard.

The judgment entered in the court below must be modified in accord with this opinion. As so modified it is affirmed.

Modified and affirmed.

HENRY MURPHY, OLIVER MURPHY, McKINELY MURPHY, VINEY LANGSTON, NOAH ATKINSON AND THOMAS ATKINSON, PETITIONERS, v. W. M. SMITH AND WIFE, NOVELLA SMITH, RESPONDENTS.

(Filed 30 April, 1952.)

1. Reference §§ 9, 12—

Where the referee fails to find a material fact, the remedy is by motion to recommit and not by exception to the failure of the referee to find the fact.

2. Appeal and Error § 40d—

Findings of fact by the referee approved by the trial judge are conclusive on appeal if supported by any evidence.

3. Death § 1—

Testimony to the effect that a missing person was last heard from some time during a particular year supports a finding that such person was not dead in February of the seventh year thereafter, there being no evidence that the full seven years had elapsed as of that date.

4. Reference § 14a—

A party to a compulsory reference waives his right to trial by jury, notwithstanding his objection to the order of reference and exception to the referee's finding of fact, when the issues tendered by him relate only to evidentiary matters and not to those issues arising upon the pleadings.

5. Partition § 1a—

Tenancy in common in land is the basis for a petition for partition. G.S. 46-1, G.S. 46-3.

6. Partition § 5a—

A plea of sole seizin in a proceeding for partition converts the proceeding, in legal effect, into an action in ejectment, with the burden upon petitioners to prove their title. G.S. 1-399.

7. Death § 1—

The rebuttable presumption of death from seven years absence does not embrace any additional presumption that the missing person died without lineal descendants.

8. Partition § 5d: Ejectment § 17—

Where, upon the plea of sole seizin in a proceeding for partition, petitioners' title is made to depend upon the death of a missing person without surviving heirs, and petitioners' only evidence in reference to this matter raises at most only a presumption of the death of such missing person, *held* petitioners have failed to make good their allegation of tenancy in common and nonsuit was properly entered.

9. Ejectment § 11—

Where plaintiffs claim as collateral heirs of a particular person and fail to show that the only child of such person died without surviving heirs, they fail to connect their claim of title with such person, and may not contend that such person was a common source of title.

APPEAL by petitioners from *Bone, J.*, at November Term, 1951, of CRAVEN.

Special proceeding for partition of land, transferred to the civil issue docket of Superior Court for trial upon issues joined. Summons issued 24 February, 1939, for W. M. Smith and was served on him 28 February, 1939.

Petitioners allege in their petition: 1. That they are tenants in common, and are seized in fee, and are in possession of two specifically described tracts of land situate in Craven County, North Carolina, (1) containing 83 acres, more or less, except such part thereof as was conveyed by Richard Jenkins and Jane, his wife, to John and Oliver Simpson, by deed dated 23 December, 1926, and registered in the office of the Register of Deeds of said county in Book 274, page 282; and (2) containing 75 acres, more or less, except such part thereof as was conveyed by Richard Jenkins and Jane, his wife, to Lula Nobles, by deed dated 22 January, 1927, and registered in said office in Book 278, page 12.

2. That the interests of the petitioners in said lands are as follows: Henry Murphy, Oliver Murphy, and McKinley Murphy, each an undivided one-ninth part of the whole, and Viney Langston, Noah Atkinson and Thomas Atkinson, each an undivided one-fifteenth part of the whole; that defendant W. M. Smith has an undivided interest in such part of said lands as is described as Lots Nos. 3 and 4, as shown on a plat of said lands made by F. A. Fulcher, Surveyor, 20 September, 1935, specifically

described as set forth, containing in the two lots 21.7 acres, more or less, and that petitioners are advised, informed and believe that Martha Atkinson and Lula Atkinson now in the State Hospital at Goldsboro also own an undivided interest in said lands.

3. That petitioners desire to hold their shares in said land in severalty.

Respondent, answering, denies in material aspect all matters alleged in the petition, except he admits that he has an interest in part of the land described therein, to wit: Lots 3 and 4, containing 21.7 acres, etc., by virtue of a deed from J. B. Hellen and wife Mamie Hellen, to W. M. Smith and Novella Smith, his wife, executed 15 November, 1938, and recorded in Book 338, page 310, Records of Craven County, and that he, the defendant, and his wife thereby became the sole owners of said lots 3 and 4.

And as further answer to the petition the respondent avers: 1, 2 and 3: That on 20 September, 1935, F. A. Fulcher, Surveyor, surveyed said lands for the purpose of dividing the property of Jane Jenkins, deceased, among her heirs, as a result of which the two tracts of land were divided into seven tracts; that lots 1 in each tract were allotted to Noah Atkinson; lots 2 in each tract to Viney Atkinson; and lots 3 and 4 in each tract to Arie Frizzelle and Martha Dunn, and on 7 October, 1935, deeds of partition were executed by and between these parties and duly recorded in the office of the Register of Deeds of Craven County.

4. That subsequent to said partition John Frizzelle and Arie Frizzelle, his wife, conveyed to J. B. Hellen one-half undivided interest in said lots numbers 3 and 4, specifically described, containing in the two lots 21.7 acres, more or less; and on 2 February, 1938, Rev. J. F. Dunn and Julia M. Dunn, his wife, and Thomas Dunn and Hattie Dunn, his wife, as devisees of Martha Dunn, conveyed to J. B. Hellen one-half undivided interest in said lots 3 and 4.

5. That on 4 April, 1938, J. B. Hellen instituted an action of ejectment against Viney Langston, James Galloway, Joe Bullock and Tom Atkinson, and a consent judgment was rendered therein on 15 August, 1938, by the Clerk of Superior Court,—declaring J. B. Hellen to be the owner and entitled to possession of said lots 3 and 4.

6. That on 15 November, 1938, J. B. Hellen and wife conveyed by deed these lots to W. M. Smith and Novella Smith.

7. That petitioners Viney Langston and Noah Atkinson, by participating in the partition of the property of Jane Jenkins, and by taking their proportionate part, and thereby benefitting thereunder, are now estopped to set up any claim to an undivided interest in the whole tract.

8. That petitioners Viney Langston and Thomas Atkinson are estopped to attack the title or set up any claim to the property of W. M. Smith, by reason of the consent judgment above referred to, etc.

Wherefore, defendant W. M. Smith prays that as to him the action be dismissed, etc.

At the May Term, 1940, the presiding judge entered an order of compulsory reference to which plaintiffs and defendants excepted. On hearing before referee, on 30 December, 1940, petitioners offered records of deeds tending to show that the two tracts of land described in the petition were conveyed to Jane Jenkins. And petitioners offered testimony tending to show that Jane Jenkins and her husband, Richard Jenkins, had one child, a son, John Jenkins; that Jane died, and then Richard died.

And petitioners offered further testimony upon which they contend that John Jenkins, son of Jane and Richard, left Craven County, and had been gone for sufficient length of time and under circumstances for presumption of death to arise.

And petitioners offered further testimony tending to show collateral kinsfolk of Jane Jenkins who, including petitioners, would inherit her real estate in the event her son John were presumed to be dead.

And on the hearing "Both petitioners and respondents admit that if John Jenkins is alive he owns the property to the exclusion of both petitioners and respondents."

When petitioners rested their case, respondents moved for judgment as of nonsuit, particularly as to tracts 3 and 4, that is, the 21.7 acres claimed by respondents.

The hearing before the referee was resumed on 4 January, 1950. In the meantime, on 29 June, 1949, the death of Oliver Murphy, one of the petitioners, was suggested, and his widow and his children, all minors, and their mother, as their duly appointed next friend, were made parties to the proceeding. And Mrs. Novella Smith was made a party defendant.

Respondents offered evidence, and petitioners offered further evidence.

At the close of all the evidence respondents renewed the motion for nonsuit.

The referee, reporting to May Civil Term, 1951, after reciting record data substantially as hereinabove set forth, made findings of fact, the first fifteen of which relate to title records, and tending to show basically that Jane Jenkins at her death was seized of the lands in question. Then follows these findings of fact pertinent to question presented on this appeal:

"16. The petitioners claim as heirs at law of Jane Jenkins, the wife of Richard Jenkins and the mother of John Jenkins, and claim that said Jane Jenkins died intestate. Plaintiffs also claim through Abraham and Dinah Murphy, the parents of Jane Jenkins. Jane Murphy married Richard Jenkins, and they had one child, John Jenkins. Jane and Richard are both dead, and John Jenkins is still alive on February 24th, 1939. (See testimony of Viney Langston.) John Jenkins was last heard from in 1932."

"18. . . . Jane Jenkins died prior to her husband, and Richard Jenkins afterward married Charity Jones, and at the time of her death Jane had a son living, John Jenkins, who was living in 1932. Richard Jenkins predeceased his son.

"19. John Jenkins got into some trouble and left this section but continued to write as late as 1932. The month and day in 1932 was not given by the witnesses, but he was last heard from in 1932.

"20. This action was instituted by issuance of summons on the 24th day of February, 1939. There is no evidence as to John Jenkins' having been married and no evidence as to whether or not he left descendants."

And the referee, upon these findings of fact, submitted his conclusions of law in pertinent part as follows:

"1. That the burden of proof as to the presumption of death of John Jenkins, the son of Jane Jenkins, deceased, and Richard Jenkins, deceased, is on the petitioners, plaintiffs, and in the opinion of the Referee they have failed to carry the burden, and he so finds. Plaintiff's testimony, Viney Langston, Page 3: 'Aunt Jane married Richard Jenkins. She had one child, John Jenkins. Jane and Richard are dead. John was living the last time I heard. I knew John. He left home. Been a long time.' There is no presumption raised on the evidence that John Jenkins died without lineal descendants, and there is no competent evidence to establish this fact.

"2. The plaintiffs should be nonsuited. . . .

"5. And upon the foregoing findings of fact and conclusions of law, the Referee reports to the court his decision as follows:

"That the plaintiffs be nonsuited, that the action be dismissed, and that the defendants have and recover of the plaintiffs the cost of the action to be taxed by the Clerk."

The petitioners filed exceptions to the report of the Referee, submitted issues, and demanded a jury trial,—all substantially as follows: The first seven exceptions, respectively, are directed to "the failure of the referee to find as a fact" evidentiary matters, the first six as to genealogy in relation to Jane Jenkins and her collateral kinsfolk, and the seventh to "failure . . . to find . . . in what year Richard Jenkins died."

And the eighth exception is "for that the referee found as a fact in Finding of Fact 16 that John Jenkins was still alive on February 24, 1939, and as basis for such referred to testimony of Viney Langston . . ., when as a matter of fact there is no evidence on either of said pages to such effect. 'Record of evidence' (pages cited) . . . shows that Richard Jenkins, father of John Jenkins, died in 1931, and all the evidence in the record shows that the last person who heard from John Jenkins was his father, Richard Jenkins, and upon such the referee should have found at least that John Jenkins was presumed to be dead."

Then follows exceptions to conclusions of law: The first (9) is to the failure of the referee to conclude as a matter of law the relationship of Viney Langston, and others named, to Jane Jenkins and John Jenkins.

"10. For that the referee erred in concluding as a matter of law that the petition of the plaintiffs be nonsuited on account of the failure of the plaintiffs and petitioners to establish that John Jenkins died without lineal descendants, or for that matter was dead at all,—and petitioners say that this conclusion of law was in error for that": (Then follows matters of argument).

The next two exceptions, Nos. 11 and 12, pertain to matters of law not pertinent to point on which decision rests.

Then this follows: "Upon the exceptions, the findings of fact, and conclusions of law of the referee as filed in this cause, the petitioners say that the following issues arise and accordingly herewith submit such issues as seems to them to be appropriate and necessary, and on each of such issues demand a jury trial and request that they be submitted to the jury in term for answer as follows." Then eight issues are set out,—all relating to evidentiary matters, and none to issues raised by the pleadings.

When the cause came on for hearing at November Term, 1951, the presiding judge overruled the exceptions filed to the report of the referee, approved the findings of fact and concluded thereon as a matter of law that petitioners are not entitled to a partition of the lands described in the petition; and, in accordance therewith, ordered, adjudged and decreed that the proceeding be dismissed, and that petitioners are taxed with the cost.

And the record shows that "petitioners excepted to the overruling of each of said exceptions, and these exceptions constitute petitioners' exceptions," Nos. 1 to 12, both inclusive.

And petitioners excepted to the court's refusal to submit each of the issues tendered or any issue, and these exceptions constitute petitioners' exceptions, 13 to 20, both inclusive.

Petitioners excepted to the judgment signed, and this constitutes petitioners' exception 21.

Petitioners appeal to Supreme Court and assign error.

Sam O. Worthington and R. A. Nunn for petitioners, appellants.

H. P. Whitehurst, W. B. R. Guion, and G. B. Riddle, Jr., for respondents, appellees.

WINBORNE, J. After careful consideration of the several assignments of error presented by appellants, the petitioners, on this appeal, error is not made to appear.

The first seven assignments of error are based upon exceptions to the failure of the referee to find certain facts. Such failure is not ground for

exception. Hence they are untenable. The failure to find certain facts might be ground for a motion to recommit the report with instructions to find them, if it appeared that they were material. *Tilley v. Bivens,* 110 N.C. 343, 14 S.E. 920; *Blalock v. Mfg. Co.,* 110 N.C. 99, 14 S.E. 501; *Scroggs v. Stevenson,* 100 N.C. 354, 6 S.E. 111; *Williams v. Whiting,* 92 N.C. 683.

The assignment of error, based upon exception No. 8, to finding of fact number 16 made by the referee is likewise untenable, for that:

It is a rule of procedure, long established in this State, that findings of fact made by a referee, and affirmed by the judge, are conclusive on appeal if there be evidence tending to support them. See, among other cases, *Frey v. Lumber Co.,* 144 N.C. 759, 57 S.E. 464; *Henderson v. McLain,* 146 N.C. 329, 59 S.E. 873; *Mirror Co. v. Casualty Co.,* 153 N.C. 373, 69 S.E. 261; *McGeorge v. Nicola,* 173 N.C. 707, 91 S.E. 708; *Gaither v. Hospital, ante,* 431.

Applying this rule to this finding of fact, the testimony of petitioner Viney Langston tends to support the finding. She testified, "John Jenkins was living the last time I heard of him . . . John was in Lexington, Ky. the last I heard of him in 1932." The action was brought on 24 February, 1939, and there is no evidence that seven years absence from which presumption of death would arise expired before that date.

But petitioners say they have right to a jury trial.

In this connection, the procedure which must be pursued in a compulsory reference in order to preserve the right to a trial by jury is clearly and concisely stated in *Booker v. Highlands,* 198 N.C. 282, 151 S.E. 635, in opinion by *Stacy, C. J.,* the first two requirements being pertinent to case in hand, as follows:

"1. Object to the order of reference at the time it is made . . .

"2. On the coming in of the report of the referee, if it be adverse, file exceptions in apt time to particular findings of fact made by the referee, tender appropriate issues based on the facts pointed out in the exceptions and raised by the pleadings, and demand a jury trial on each of the issues thus tendered . . ."

And "a failure to observe any one of these requirements may constitute a waiver of the party's right to have the controverted matters submitted to a jury, and authorize the judge to pass upon the exceptions without the aid of a jury." McIntosh, Sec. 525. See also *Gaither v. Hospital, ante,* 431.

In *Brown v. Clement Co.,* 217 N.C. 47, 6 S.E. 2d 842, opinion by *Barnhill, J.,* it is said, "Notwithstanding an order of reference, a determination of the issues of fact raised by the pleadings and evidence in the cause remains as the primary purpose. A jury trial does not extend to every finding of fact made by a referee and excepted to by the parties, but only to

issues of fact raised by the pleadings and passed upon by the referee. McIntosh, Sec. 525. Questions of fact may not be substituted for issues merely because there is a controversy, as disclosed by the exceptions, as to what the facts are. McIntosh 525 (4)." See also *Simmons v. Lee,* 230 N.C. 216, 53 S.E. 2d 79.

In the light of these decisions, it appears that petitioners excepted to the order of compulsory reference, and upon the coming in of the report of the referee, adverse to them, filed exception to the 16th finding of fact made by the referee, and tendered issues,—and demanded a jury trial. But the issues tendered are not those arising on the pleadings. Hence there is a waiver of the petitioners' right to have the controverted matters submitted to a jury. Therefore the judge was authorized to pass upon the exception without the aid of a jury, and the finding of fact, supported by evidence, and approved by the judge is binding on this Court.

The assignments of error based upon exception to the conclusion of law that motion for nonsuit should be allowed, and upon the exception to the judgment of nonsuit are not tenable for that:

Tenancy in common in land is necessary basis for maintenance of special proceeding for partition by petition to the Superior Court. G.S. 46-1, G.S. 46-3, formerly C.S. 3213, 3215, *Gregory v. Pinnix,* 158 N.C. 147, 73 S.E. 814. And when tenancy in common is denied, and there is a plea of sole seizin, the proceeding in legal effect is converted into an action in ejectment and should be transferred to the civil issue docket for trial at term on issue of title,—the burden being upon the petitioners to prove their title as in ejectment. G.S. 1-399, formerly C.S. 758. *Gibbs v. Higgins,* 215 N.C. 201, 1 S.E. 2d 554; *Keen v. Parker,* 217 N.C. 378, 8 S.E. 2d 209; *Bailey v. Hayman,* 222 N.C. 58, 22 S.E. 2d 6; *Jernigan v. Jernigan,* 226 N.C. 204, 37 S.E. 2d 493.

And in an action to recover land the general rule is that plaintiff must rely upon the strength of his own title, and not upon the weakness of that of defendant. *Love v. Gates,* 20 N.C. 498; *Newlin v. Osborne,* 47 N.C. 163; *Spivey v. Jones,* 82 N.C. 179; *Keen v. Parker, supra; Stewart v. Cary,* 220 N.C. 214, 17 S.E. 2d 29.

In the present action petitioners base their claim to tenancy in common upon contention that Jane Jenkins died intestate and seized of the land in question, that John Jenkins was her only child, that he is dead without lineal descendants, and that they, the petitioners, are his collateral heirs. And it was admitted on the hearing before the referee that if John Jenkins is alive he owns the lands to the exclusion of both petitioners and respondents.

In this connection, there is a rule of evidence that "the absence of a person from his domicile, without being heard from by those who would

be expected to hear from him, if living, raises a presumption of his death, that is, that he is dead at the end of seven years," *Beard v. Sovereign Lodge,* 184 N.C. 154, 113 S.E. 661; *University v. Harrison,* 90 N.C. 385; *Steele v. Ins. Co.,* 196 N.C. 408, 145 S.E. 787; *Deal v. Trust Co.,* 218 N.C. 483, 11 S.E. 2d 464; *Carter v. Lilley,* 227 N.C. 435, 42 S.E. 2d 610; *Trust Co. v. Deal,* 227 N.C. 691, 44 S.E. 2d 73.

Such presumption, arising from seven years absence under the rule, is a presumption of fact which may be rebutted. *Chamblee v. Bank,* 211 N.C. 48, 188 S.E. 632, and cases cited. See also *Deal v. Trust Co., supra; Trust Co. v. Deal, supra.*

However, the proof of facts on which such presumption arises raises no presumption that the missing person died without lineal descendants. *University v. Harrison, supra; Warner v. R. R.,* 94 N.C. 250; *Deal v. Trust Co., supra; Trust Co. v. Deal, supra.*

Applying these principles to the findings of fact, supported by evidence, and approved by the judge, we hold that the conclusion that the petitioners have failed to make good their allegations of tenancy in common is correct. Hence the judgment of nonsuit was proper.

This record fails to present a case of who has the better title under a common source to which *Stewart v. Cary, supra,* cited by appellants, relates. Failing to connect their claim with Jane Jenkins, there is no common source.

Other assignments of error have been given due consideration and are found to be without merit.

The judgment below is

Affirmed.

IN RE: HOUSING AUTHORITY OF THE CITY OF SALISBURY, NORTH CAROLINA, PROJECT NC-16-2

(Filed 30 April, 1952.)

1. Municipal Corporations § 8d—

The power of eminent domain has been delegated to commissioners of housing authorities. G.S. 157-11, G.S. 157-50, G.S. 40-37.

2. Same: Eminent Domain § 4½—

The selection of a site for public housing rests in the broad discretion of a housing authority and its action in this regard may be challenged only by a charge of abuse of discretion, but allegations of arbitrary or capricious conduct are sufficient, it not being necessary to allege malice, fraud or bad faith.

3. Municipal Corporations § 8d: Trial § 20—

Even though the question of whether a housing authority acted arbitrarily or capriciously in the selection of a site may be a question of fact reviewable by the judge on appeal from the clerk, nevertheless the judge has the discretionary power to submit the question to a jury.

4. Appeal and Error § 8—

Where, in the trial, the contentions and exceptions of the parties relate solely to the form of the issue to be submitted to the jury, appellant may not contend on appeal that the matter involved a question of fact determinable by the judge alone and that the submission of any issue to the jury was error, since the appeal must follow the theory of trial in the lower court.

5. Trial § 36—

Where the issue submitted adequately presents the issuable question raised by the pleadings, an exception to the issue is without merit.

6. Municipal Corporations § 8d: Eminent Domain § 4½—Evidence held sufficient to raise issue of whether housing authority acted arbitrarily and capriciously in selecting site for housing project.

Evidence tending to show that a housing authority selected as a site for a public housing project a part of the campus of a college maintained by a religious organization with the aid of donations from individuals and charitable foundations, that the college was expanding, and that the site selected was within three hundred feet of a building already erected and constituted that part of the campus essentially necessary to care for ordinary expansion and development of the college in accordance with its general plan, *is held* sufficient to overcome the motion of the housing authority for a directed verdict and sustain the finding of the jury that the commissioners had acted arbitrarily and capriciously in selecting the site. "Arbitrary" and "capricious" defined.

7. Same—

Evidence of the availability of other suitable sites is relevant and competent upon the issue of whether a housing authority acted arbitrarily or capriciously in selecting the particular site objected to.

8. Appeal and Error § 39e—

The admission of evidence over objection is rendered harmless when similar testimony is admitted without objection.

9. Municipal Corporations § 8d: Evidence § 7a—

Ordinarily in civil matters the burden of proof is by the preponderance of the evidence or its greater weight, and the question of whether a housing authority acted arbitrarily or capriciously in selecting a site does not come within any of the exceptions to the general rule, and respondents have the burden of showing abuse of discretion by the greater weight of the evidence and not by clear, strong and convincing proof.

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

ERVIN, J., concurring in the result.

IN RE HOUSING AUTHORITY.

APPEAL by petitioner, Housing Authority of the City of Salisbury, from *Sink, J.*, and a jury, November Term, 1951, of ROWAN.

Special proceeding to condemn a portion of the campus of Livingstone College as a site for the erection of a low-rent public housing project, heard below on the question whether the Commissioners of the Housing Authority acted arbitrarily or capriciously in selecting the campus site.

The proceeding was instituted under (1) the Public Works Eminent Domain Law, Chapter 470, Public Laws of 1935, as amended, now codified as Chapter 40, Article 3, of the General Statutes of North Carolina (G.S. 40-30 through 40-53); and (2) the Housing Authorities Law, Chapter 456, Public Laws of 1935, as amended, now codified as Chapter 157 of the General Statutes of North Carolina (G.S. 157-1 through 157-60).

The record stipulates compliance with all necessary jurisdictional requirements.

The petition filed by the Housing Authority with the Clerk of the Superior Court of Rowan County alleges it is necessary to condemn a specifically designated 7.25-acre portion of the Livingstone College campus within the corporate limits of the City of Salisbury as a site for the erection of a 72-unit low-rent public housing project.

The respondent, Livingstone College, by answer denies that the property sought to be condemned is necessary for a public housing project, and by further answer alleges that the College owns a large tract of farm land located some 300 yards west of the campus which would be suitable and convenient for the location of the proposed housing project, the whole or any part of which the College offers to sell at a reasonable price.

And by amendment to the answer the respondent further alleges that the action of the Housing Authority "in selecting and seeking to condemn a part of the campus of Livingstone College . . . is arbitrary, capricious and unreasonable in that it attempts to select a part of the campus of Livingstone College for a housing project, without consideration or regard for Livingstone College or for the further expansion program of Livingstone College as an educational institution, . . . and that the propriety of locating the . . . project on the campus of Livingstone College is unreasonable, unlawful, capricious and arbitrary, as the Housing Authority has other suitable sites available, not only within 300 yards of Livingstone College, but elsewhere in the City of Salisbury."

When the questions of fact raised by the pleadings came on for hearing before the Clerk of the Superior Court, he entered judgment finding that the campus site described in the petition is necessary for the housing project, and that the action of the Housing Authority in selecting the site was not arbitrary, capricious, or unreasonable, and thereupon decreed

that the Housing Authority "has the right to condemn the property described in the petition."

To the judgment of the Clerk so entered, the College excepted and appealed to the Superior Court.

A pre-trial conference was held the day before the trial in Superior Court, at which the presiding Judge ruled that the burden of proof was on the respondent College to establish its allegations that the Commissioners of the Housing Authority acted arbitrarily or capriciously in selecting the proposed site.

Upon the call of the case, the respondent College offered the testimony of various witnesses tending to show that the proposed site was vitally needed for the use and expansion of the College and that its appropriation for the purposes sought would be detrimental to the interests and objectives of the College. The College also offered evidence tending to show that there were other suitable sites available where the project could be built.

The Housing Authority offered evidence in refutation tending to show that the campus site was selected after careful survey of several other suggested sites; that it was settled upon as the only feasible site for the project on advice of the city engineer, the Housing Authority architect, its planning consultant, and other engineers.

The presiding Judge formulated and submitted to the jury the following issue, which was answered as indicated:

"Were the Commissioners of the Housing Authority of the City of Salisbury arbitrary or capricious in their selection of the Livingstone College site for Project NC-16-2, as alleged in the respondent's answer? Answer: 'Yes.'"

Judgment was entered on the verdict decreeing that the Housing Authority "is not entitled to condemn the 7.25 acres of land described in said petition and owned by the respondent, Trustees of Livingstone College."

From judgment so entered, the Housing Authority appealed, assigning errors.

Max Busby for petitioner, Housing Authority of the City of Salisbury, appellant.

Clement & Clement and Woodson & Woodson for respondent, Trustees of Livingstone College, appellee.

JOHNSON, J. In determining what property is necessary for a public housing site, a broad discretion is vested by statute in housing authority commissioners, to whom the power of eminent domain is delegated. G.S. 157-11; G.S. 157-50; G.S. 40-37.

Indeed, so extensive is this discretionary power of housing commissioners that ordinarily the selection of a project site may become an issuable question, determinable by the court, on nothing short of allegations charging arbitrary or capricious conduct amounting to abuse of discretion. See *Power Co. v. Wissler,* 160 N.C. 269, 76 S.E. 267; *Pue v. Hood, Comr. of Banks,* 222 N.C. 310, p. 315, 22 S.E. 2d 896. However, allegations charging malice, fraud, or bad faith in the selection of a housing project site are not essential to confer the right of judicial review. It suffices to allege and show abuse of discretion. The distinction here drawn is not at variance with the decision reached in *In re Housing Authority of the City of Charlotte,* 233 N.C. 649 (headnote 2), 65 S.E. 2d 761 (headnote 4).

The constitutionality of these public housing statutes has been upheld. *In re Housing Authority of the City of Charlotte, supra; Wells v. Housing Authority,* 213 N.C. 744, 197 S.E. 693; *Cox v. Kinston,* 217 N.C. 391, 8 S.E. 2d 252; 172 A.L.R. 966, Annotation.

The allegations set out in the amendment to the answer filed by the respondent, Livingstone College, though couched in language of commendable moderation, are sufficient to put to test, for determination by the court, the question whether the action of the Housing Commissioners in selecting the campus site was arbitrary or capricious amounting to a manifest abuse of discretion.

The Housing Authority stressfully contends that the question whether its Commissioners acted arbitrarily or capriciously in the selection of the campus site was a question of fact not triable by jury, but reviewable only by the presiding Judge on appeal from the Clerk. It is urged that the court below committed prejudicial error in submitting this question to the jury.

Conceding, as we may, that the issuable question thus presented was a question of fact reviewable by the presiding Judge (*Railway Co. v. Gahagan,* 161 N.C. 190, 76 S.E. 696; McIntosh, North Carolina Practice and Procedure, pp. 542, 543), nevertheless it was within the discretionary power of the Judge to submit the question to the jury for determination. *Selma v. Nobles,* 183 N.C. 322, 111 S.E. 543; *Carter v. Carter,* 232 N.C. 614, p. 617, 61 S.E. 2d 711; *Barker v. Humphrey,* 218 N.C. 389, 11 S.E. 2d 280. See also G.S. 1-172.

Besides, the record reflects no exception to the action of the trial Judge in calling to his aid the jury. Indeed, the pre-trial statement of the Judge indicates that counsel for both sides assumed the question at issue would be submitted to the jury, and issues were tendered by each side. It is true the Housing Authority excepted to the issue as submitted, but an examination of the record indicates that the exceptions here relied on relate (1) to the refusal of the court to submit the issue tendered by

counsel for the Housing Authority and (2) to the form of the issue as formulated and submitted by the court. There is no exception to the action of the court in respect to the basic question of jury trial. (R. pp. 15, 48, 49). Therefore, the instant challenge, being unsupported by an exception, may not be asserted successfully for the first time on appeal. *Thompson v. Thompson, ante,* 416. An appeal *ex necessitate* follows the theory of the trial. *Wilson v. Hood,* 208 N.C. 200, 179 S.E. 660. It has been said that "the law does not permit parties to swap horses between courts in order to get a better mount in the Supreme Court." *Weil v. Herring,* 207 N.C. 6, p. 10, 175 S.E. 836.

The issue formulated and submitted by the presiding Judge adequately presented the issuable question raised by the pleadings. Therefore, the petitioner's exception to the issue is without merit.

Next, the Housing Authority insists that the trial court erred in denying its motion, and refusing to give its prayer for special instruction, for a directed verdict. These exceptive assignments test the sufficiency of the evidence to support the verdict and require an examination of what in law amounts to "arbitrary" or "caparicious" conduct on the part of the Housing Commissioners.

"Arbitrary" means fixed or done capriciously or at pleasure. An act is arbitrary when it is done without adequate determining principle; not done according to reason or judgment, but depending upon the will alone, —absolute in power, tyrannical, despotic, nonrational,—implying either a lack of understanding of or a disregard for the fundamental nature of things. See Funk & Wagnall's New Standard Dictionary; 3 Words and Phrases, Permanent Edition, pp. 874 and 875; 6 C.J.S. p. 145.

"Capricious" means freakish, fickle, or arbitrary. An act is capricious when it is done without reason, in a whimsical manner, implying either a lack of understanding of or a disregard for the surrounding facts and settled controlling principles. See Funk & Wagnall's New Standard Dictionary; 6 Words and Phrases, Permanent Edition, p. 124; 12 C.J.S. p. 1137.

"Arbitrary" and "capricious" in many respects are synonymous terms. When applied to discretionary acts, they ordinarily denote abuse of discretion, though they do not signify nor necessarily imply bad faith.

Since the exception to the refusal of the court to direct a verdict tests only the sufficiency of the evidence to carry the case to the jury as an open question, it would serve no useful purpose to recapitulate all the evidence, *pro* and *con,* bearing on the issue. Suffice it to say, the respondent College offered evidence tending to show these controlling factors:

(1) That Livingstone College has been located in Salisbury, North Carolina, since about 1885. For many years the College has been maintained by the A.M.E. Zion Church and private donations from individ-

uals and charitable foundations throughout the United States. Its campus, containing about 40 acres, is located in the West Ward of the City of Salisbury, bounded on the east by Craig Street, on the south by the Old Plank Road (now West Marsh Street), on the west by McCoy Street, and on the north by West Monroe Street.

(2) Representatives of the Housing Authority contacted officials of the College with a view of acquiring a housing site on the western side of the campus. The College Board of Trustees, after considering the proposal, reached the conclusion and so notified the Housing Authority that they could not consent for any part of the campus to be put to use as a public housing site, but suggested that the project might be located on the college farm property of 269 acres located some 1,450 feet west of the campus, accessible by two or more roads. The Housing Authority, however, settled upon a 7.25-acre parcel in the southwest corner of the campus fronting on Marsh and McCoy Streets and instituted this proceeding for its condemnation.

(3) The College has accommodations for, and an enrollment of, approximately 400 students. It has "to turn down from 100 to 150 applications each year." It has a four-year curriculum and an "A" rating.

(4) Within the past six years the College has expended "a little over $600,000" in the erection of buildings on the campus, and has "$657,000 earmarked and allotted to the College for future expenditures in the erection of additional buildings" and the development of its athletic field.

(5) No buildings are on the proposed site. However, it is only 57 feet from the athletic field and approximately 300 feet from the recently erected Ballard Hall, which is the westernmost building on the campus.

(6) Most of the present buildings are located on the eastern side of the campus. The proposed plan of expansion calls for the location of new buildings on the western side of the campus in close proximity to the athletic field and the proposed housing site, and this site is essentially necessary to care for the orderly expansion and development of the plant facilities of the College.

It thus appears that substantial evidence was offered tending to show that the Housing Commissioners either failed to understand or disregarded the ill effects and harm likely to come to Livingstone College as a result of locating on its campus a public housing project. The testimony tends to support the inference that they failed to consider the contributions this college is making toward curing the very social and economic ills which public housing is designed to minimize.

The evidence offered in the trial below, when considered in its light most favorable to the respondent, as is the rule on motion for a directed verdict, was sufficient to overcome the motion and sustain the jury-finding that the Commissioners of the Housing Authority acted arbi-

trarily and capriciously in selecting the campus site for the location of the housing project. See *Ferrell v. Insurance Co.*, 207 N.C. 51, 175 S.E. 692; *Perry v. Trust Co.*, 226 N.C. 667, 40 S.E. 2d 116.

Another group of exceptions challenge the action of the trial court in admitting in evidence testimony tending to show that other sites were available and suitable for the housing project. This evidence was relevant and admissible as bearing directly on the main question at issue: whether the Housing Commissioners acted arbitrarily or capriciously in attempting to appropriate the college campus site, and none other. The authorities relied on by the appellant are distinguishable. In any event, the reception in evidence of the challenged testimony would seem to be harmless in view of the admission without objection of other similar testimony. *Price v. Whisnant*, 232 N.C. 653, 62 S.E. 2d 56; *Sprinkle v. Reidsville, ante*, 140; *S. v. Murphy, post*, 503.

Appellant also urges that the court should have charged the jury that the burden of the issue was on the respondent College to satisfy the jury, not by the mere preponderance of the evidence, but by proofs "clear, strong, and convincing" that the Housing Commissioners acted arbitrarily or capriciously in selecting the campus site. The contention is without merit. Ordinarily in civil matters the burden of proof is required to be carried by a preponderance of the evidence, or by its greater weight. It is only in respect to a few cases, "as where, for example, it is proposed to correct a mistake in a deed or other writing, to restore a lost deed, to convert a deed absolute on its face into a mortgage, to engraft a parol trust upon a legal estate, to impeach the probate of a married woman's deed, to establish a special or local custom, and generally to obtain relief against the apparent force and effect of a written instrument upon the ground of mutual mistake, or other similar cause, the evidence must be clear, strong and convincing." *Waste Co. v. Henderson Brothers*, 220 N.C. 438, 17 S.E. 2d 519; *Henley v. Holt*, 221 N.C. 274, 20 S.E. 2d 62. The instant case does not come within the exception to the general rule. See also Stansbury, N. C. Evidence, Sec. 213, p. 457.

Our examination of the remaining exceptions brought forward by the appellant discloses no prejudicial error. A perusal of the record leaves the impression that the appellant's cause was fairly tried, and no reason to disturb the result has been made to appear.

No error.

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

ERVIN, J., concurring: I concur in the result. If I had my way, I would reach the same result more directly by striking down as unconstitutional the statute giving housing authorities the power of eminent domain.

Under this statute, a housing authority condemns the property of one person to provide dwellings for others. No amount of sophistry can erase the plain fact that this is taking the private property of one person without his consent, and devoting it to the private uses of others. This being true, the statute conferring the power of eminent domain upon housing authorities cannot be reconciled with the declarations of the State Constitution that all men are endowed by their Creator with an unalienable right to "the enjoyment of the fruits of their own labor," and that "no person ought to be . . . deprived of his . . . property, but by the law of the land." N. C. Const., Art. I, Section 1, 17. Courts should not sustain legislative acts which sacrifice the constitutional rights of the individual to what is called social progress.

M. H. HONEYCUTT, EMPLOYEE, v. CAROLINA ASBESTOS COMPANY AND/OR UNION ASBESTOS & RUBBER COMPANY, EMPLOYER; AND AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, CARRIER.

(Filed 30 April, 1952.)

1. Master and Servant § 40f—

In making occupational diseases compensable under the Workmen's Compensation Act, the General Assembly, in recognition of the difference between the manner in which disability is brought about by an occupational disease and by an ordinary accident, has set up different tests of disability which the courts must observe.

2. Same—

In cases of asbestosis and silicosis the legislative test of disability is the incapacity of an employee to perform normal labor in the last occupation in which remuneratively employed, G.S. 97-54, G.S. 97-55, while in all other cases the test is the incapacity of the employee to earn the wages he was receiving in the same or any other employment. G.S. 97-2 (i).

3. Same—

Where an employee in an asbestos plant becomes disabled by reason of asbestosis from performing normal labor in his occupation, as distinguished from being merely affected by asbestosis and subject to rehabilitation, G.S. 97-61, such employee has suffered disablement as defined by G.S. 97-54, and this result is not affected by the fact that the employee thereafter actually earns more money in another employment than he was earning at the time the existence of his disability was determined.

4. Master and Servant § 53b (1)—

Claimant was employed by one company as foreman in its asbestos plant for thirty-seven weeks during the fifty-two weeks immediately preceding the date he became disabled from asbestosis. The plant was bought by

another company and claimant was employed by the new owner at much smaller wages for the last ten weeks of his employment. *Held:* The Industrial Commission properly took into consideration defendant's wages during the entire fifty-two weeks in determining the amount of compensation. G.S. 92-2 (e).

APPEAL by defendants, Carolina Asbestos Company and American Mutual Liability Insurance Company, from *Patton, Special Judge,* October Term, 1951, of MECKLENBURG.

This is a proceeding brought by M. H. Honeycutt, employee, for compensation under the provisions of the North Carolina Workmen's Compensation Act, for disability due to asbestosis.

The first hearing in this proceeding was before Commissioner Robert L. Scott at Charlotte, North Carolina, on 24 April, 1951, upon the testimony of the plaintiff and Dr. Otto J. Swisher, Director of Industrial Hygiene of the State of North Carolina, an admitted medical expert, together with certain documentary evidence, and the testimony of the defendants' witness, Dr. T. Preston White, admitted to be a medical expert, specializing in internal medicine including diseases of the lung.

At the hearing, counsel for the respective parties entered the following stipulations: (1) The plaintiff, M. H. Honeycutt, was employed by Carolina Asbestos Company from 21 May, 1950, through 27 July, 1950; that during this time the plaintiff worked between 50 and 55 days. (2) That all parties are subject to and bound by the Workmen's Compensation Act; that American Mutual Liability Insurance Company was the insurance carrier for Carolina Asbestos Company during the above period and was also the carrier for Union Asbestos & Rubber Company for more than a year prior to 17 April, 1950. (3) That the average weekly wage of the plaintiff for the period of employment by Union Asbestos & Rubber Company was $53.52, and for the period of employment by Carolina Asbestos Company was $36.80. (4) That the plaintiff was exposed to asbestos dust in North Carolina for two years within the past ten years in the course of his employment; that the plaintiff was exposed to asbestos dust for as much as thirty working days or parts thereof within seven consecutive calendar months while employed by Union Asbestos & Rubber Company and also while employed by Carolina Asbestos Company. (5) That the plaintiff was first advised by competent medical authority that he had asbestosis on 5 August, 1950; that the plaintiff has asbestosis and filed claim for compensation against both Union Asbestos & Rubber Company and Carolina Asbestos Company on 14 November, 1950. (6) That the plant where the plaintiff worked was owned and operated by Union Asbestos & Rubber Company prior to 16 April, 1950, and was owned and operated by Carolina Asbestos Company thereafter.

It appears from the evidence that the plaintiff worked in the asbestos plant now owned by the Carolina Asbestos Company, for approximately seventeen years, and during that period was exposed to the hazards of asbestos dust; that he was first examined by the Division of Industrial Hygiene of the North Carolina State Board of Health, on 20 December, 1935. This examination revealed him to have a chest expansion of 3 inches and all other findings were essentially negative. He was re-examined on 18 April, 1939, and was found to have a chest expansion of 3½ inches and all other findings were essentially negative. An examination on 13 May, 1941, revealed a chest expansion of 3 inches and other findings essentially negative. On 9 September, 1943, examination revealed him to have a chest expansion of 2½ inches and some scarring in his lungs. Although issuance of his work card was delayed, it was finally issued after a short period of time and he was advised by letter as follows: "We find that you have some scarring in your lungs. However, we feel that the amount of scarring found is about what one might expect over that period of time."

Plaintiff was again examined on 7 July, 1947, which revealed a chest expansion of 2 inches and X-ray film revealed asbestosis late in the first stage. It does not appear that any further notice was given the plaintiff at this time and he was issued the usual work card.

On 17 April, 1950, and again on 29 June, 1950, the plaintiff was re-examined. The X-ray diagnosis was again that of asbestosis in the first stage with slight progression since the previous film, accompanied by admitted physical symptoms, including shortness of breath for one year or more, strength and energy weak, appetite poor, loss of weight, and vomiting with coughing. Chest expansion of 1 inch was found accompanied by bowing of the nails.

Based upon these two latter examinations, the plaintiff was advised on 5 August, 1950, by letter dated 28 July, 1950, from the Division of Industrial Hygiene that he had asbestosis and that the Advisory Medical Committee had recommended that he discontinue further employment in any place where exposed to a dust hazard. This letter also contained the following statement: "Therefore, we are unable to issue you the usual work card for any future employment in said dust hazards."

After receiving this letter, the plaintiff obtained a job with the Town of Davidson as a policeman beginning in August, 1950. He is on duty 7 days a week, 12 hours a day, working the 7:00 p.m. to 7:00 a.m. shift one month and the 7:00 a.m. to 7:00 p.m. shift the next in alternating months, and earns $114.00 for 15 days' work. The plaintiff testified that he now feels worse than he did a year ago, that he is still short of breath; that he still coughs until he vomits; that he has to sit up nights to prevent coughing; that he does not feel like working but he has to work in order

to live; that he has had to miss some days because he was too sick to work; that he now weighs about 150 pounds and has gained a few pounds since he left the asbestos plant. If he does a good job as policeman he is required to walk two or three hours a day.

Dr. Swisher testified that based upon his examinations of 17 April and 29 June, 1950, he was of the opinion that at that time the plaintiff was actually incapacitated by reason of asbestosis from performing normal labor in the asbestos plant operated by the defendant. "This man is either late in the first stage or on the threshold of the second stage of asbestosis. It could be a borderline case, the second stage." In 1950, chest expansion was 1 inch with bowed nails. There has been a steady increase in blood pressure from 118/80 on the first examination recorded on 20 December, 1935, to 170/90 at the time of his last examination in 1950.

Dr. T. Preston White, witness for the defendants, testified that he examined the plaintiff on 12 February, 1951, and diagnosed his condition as that of moderately advanced asbestosis; that in his opinion the plaintiff should not work in an employment exposing him to asbestos dust. He further testified that any work done by the plaintiff should be light work requiring very little physical activity and, in his opinion, the plaintiff probably should not be doing the work which he was doing as a policeman. "That's a long stretch of work, twelve hour duty, with moderately advanced asbestosis, in a man 50 years of age." He also testified that plaintiff's examination disclosed a blood pressure of 158/110.

Plaintiff is 50 years old and his wife and 16 year old son are dependent upon him for their support. He owns no property and has only a seventh grade education. He has had no training in any occupation outside of the asbestos industry except the experience he has gained as a policeman since August, 1950.

The Commission found as a fact that there is no reasonable basis upon which to conclude that the plaintiff possesses the actual or potential capacity of body or mind to work with substantial regularity during the foreseeable future in any gainful occupation free from the hazards of asbestos without injury and detriment to his physical condition.

Upon the stipulations entered and the facts found, the Commissioner dismissed the action against the defendant, Union Asbestos & Rubber Company, and awarded the plaintiff compensation against the appellants at the rate of $24.00 per week during 400 weeks, beginning 27 July, 1950, provided, however, that the total compensation shall not exceed $6,000.

Defendants appealed to the Full Commission, which affirmed the award of the hearing Commissioner. On appeal to the Superior Court, his Honor affirmed the award of the Commission. The defendants appealed to the Supreme Court, assigning error.

Helms & Mulliss and James B. McMillan for defendants, appellants.
Shannonhouse, Bell & Horn for plaintiff, appellee.

DENNY, J. The principal question involved in this appeal is whether an employee who is disabled and incapacitated as the result of asbestosis from performing normal labor in the last occupation in which remuneratively employed is entitled to compensation for total disability under the provisions of our Workmen's Compensation Act.

The appellants take the position that the plaintiff is not totally disabled within the meaning of the Workmen's Compensation Act, since he is earning more wages as a policeman than he earned as an asbestos worker. They are relying on the case of *Branham v. Panel Company*, 223 N.C. 233, 25 S.E. 2d 865, and similar decisions, in support of their position. In the *Branham case*, the plaintiff was found to have 33⅓ per cent or more general partial disability under G.S. 97-30, and had been tendered and had accepted employment suitable to his capacity as provided for in G.S. 97-32. His employer did not reduce his wages. The Industrial Commission awarded the claimant compensation at the rate of 60 per cent of the difference between the wages he was earning before the accident and the wages he was able to earn after the accident "any time it is shown that the claimant is earning less due to his injury by accident within 300 weeks from the date of the accident." Branham appealed from this award contending he was unable to earn his wages. *Barnhill, J.*, in speaking for this Court, said: ". . . the capacity to earn wages, is the test of earning capacity, or, to state it differently, the diminution of the power or capacity to earn is the measure of compensability. It follows that, as the claimant is now earning wages in an amount equal to those received by him prior to his injury, he has failed to show any compensable injury or incapacity. However urgently he may insist that he is 'not able to earn' his wages, the fact remains that he is receiving now the same wages he earned before his injury. That fact cannot be overcome by any amount of argument. It stands as an unassailable answer to any suggestion that he has suffered any loss of wages within the meaning of the Act."

It must be kept in mind that the above case involved a claim based on disability as defined in G.S. 97-2 (i). This section defines "disability" to mean "incapacity because of injury *to earn the wages which the employee was receiving at the time of injury in the same or any other employment.*"

The general provisions of our Workmen's Compensation Act were originally enacted for the purpose of providing compensation for industrial accidents only. The provisions with respect to occupational diseases were enacted later. And while occupational diseases, as well as

ordinary industrial accidents, are now recognized as a proper expense of industry, the manner in which disability is brought about by an occupational disease is so inherently different from an ordinary accident, it is sometimes difficult to administer the law with respect to such disease under machinery adopted for the purpose of administering claims growing out of ordinary accidents. *Wisconsin Granite Co. v. Industrial Com.*, 208 Wis. 270, 242 N.W. 191. In such circumstances it becomes the duty of the courts to give effect to obvious legislative intent. *Duncan v. Carpenter*, 233 N.C. 422, 64 S.E. 2d 410.

It is clear that "disability" resulting from asbestosis and silicosis, as defined in G.S. 97-54, is not synonymous with its meaning as defined in G.S. 97-2 (i). "The term 'disablement' as used in this article as applied to cases of asbestosis and silicosis means *the event of becoming actually incapacitated, because of such occupational disease, from performing normal labor in the last occupation in which remuneratively employed; but in all other cases of occupational disease shall be equivalent to 'disability' as defined in section 97-2 paragraph (i).*" G.S. 97-54. "*The term 'disability' as used in this article means the state of being incapacitated as the term is used in defining 'disablement' in section 97-54.*" G.S. 97-55.

In the enactment of the above definitions, we construe the legislative intent to be simply this: In all cases involving industrial accidents and occupational diseases, *except asbestosis and silicosis*, "disability" means the *incapacity to earn wages which the employee was receiving at the time of his injury in the same or any other employment.* But "disability" *resulting from asbestosis or silicosis means the event of becoming actually incapacitated from performing normal labor in the last occupation in which remuneratively employed.*

The appellants concede the evidence in this case supports the finding of "disablement" within the meaning of G.S. 97-54. However, they contend that such "disablement," when found, is subject to the same test with respect to earning capacity as that laid down in *Dail v. Kellex Corp.*, 233 N.C. 446, 64 S.E. 2d 438; *Branham v. Panel Company, supra;* and *Smith v. Swift & Co.*, 212 N.C. 608, 194 S.E. 106. In this we do not concur. We think that when an employee becomes incapacitated to work as the result of having developed asbestosis or silicosis, as defined in G.S. 97-54, it was the legislative intent that he should be compensated as for total disability in accord with the provisions of our Workmen's Compensation Act. Otherwise, the provisions of G.S. 97-54 are meaningless.

We think the distinction made by the Legislature between asbestosis and silicosis, and other occupational diseases, is significant. An employee does not contract or develop asbestosis or silicosis in a few weeks or months. These diseases develop as the result of exposure for many years

to asbestos dust or dust of silica. Both diseases, according to the textbook writers, are incurable and usually result in total permanent disability. The average exposure to asbestos dust before the appearance of the disease is 13.5 years. Attorneys' Textbook on Medicine (3rd Ed.) by Gray, page 1418.

Therefore, it would seem that the victims of these incurable occupational diseases constitute a legitimate burden on the industries in which they were exposed to the hazards that produced their disablement. In our opinion, such was the intent of the Legislature. No provision was made for their rehabilitation. Rehabilitation is available only to an employee found by the Industrial Commission to be affected by asbestosis or silicosis but not actually disabled thereby. G.S. 97-61. However, if in the process of rehabilitation, or thereafter, an employee becomes disabled from asbestosis or silicosis as defined in G.S. 97-54, within two years of his last exposure to the hazards of asbestosis or silicosis, he would be entitled to ordinary compensation under the general provisions of our Workmen's Compensation Act. G.S. 97-61; *Young v. Whitehall Co.*, 229 N.C. 360, 49 S.E. 2d 797.

The plaintiff should not be penalized because during the time the defendants contest his claim, he has chosen to make his "heart and nerve and sinew serve their turn long after they are gone," rather than apply for public relief as so many are doing these days.

The appellants also except to the finding of the Commission with respect to the "Average Weekly Wage" of the plaintiff. They take the position that the only wage earned by the plaintiff while employed by the defendant, Carolina Asbestos Company, was $36.80 a week as a twister hand. They contend that the Industrial Commission had no right, under the provisions of G.S. 97-2 (e), to take into consideration the $53.52 a week the plaintiff earned as a foreman in the plant for 37 weeks during the 52 weeks immediately preceding the date of his determined disability, and while in the employment of Union Asbestos & Rubber Company.

An examination of the record discloses that the Commission determined the average weekly wage of the plaintiff in the exact manner provided by statute, if the change in the ownership of the plant be disregarded. In our opinion, the formula used by the Commission for arriving at the average weekly wage of the plaintiff was not only permissible under the statute, but a proper one in this case. To have limited the average weekly wage of the plaintiff to that earned during the last ten weeks of his employment, would have been unfair to the plaintiff under the facts and circumstances disclosed by the record in this case. And this is true whether the reduction in wages was the result of the plaintiff's impaired physical ability or resulted from the change in ownership of the plant.

The judgment of the court below is, in all respects, Affirmed.

FELIX WILLIAMS (SINCE DECEASED), W. T. ALSTON AND RALPH ALSTON, ADMINISTRATOR OF FELIX WILLIAMS, v. ANGIE H. ROBERTSON, A. J. ELLINGTON AND WIFE UNDINE D. ELLINGTON.

(Filed 30 April, 1952.)

1. **Trial § 22b—**

Upon motion to nonsuit, defendant's evidence which is favorable to plaintiff or which tends to explain or make clear that which has been offered by plaintiff, is properly considered.

2. **Trespass to Try Title § 3—**

Evidence offered by plaintiff and so much of defendant's evidence as is favorable to plaintiff or tends to explain or make clear plaintiff's evidence, considered in the light most favorable to plaintiff, *is held* sufficient to be submitted to the jury on the issue of plaintiff's acquisition of title by adverse possession through the possession by one of the tenants in common under a parol partition for more than twenty years, either by the tenant in common or his lessees.

3. **Same—**

In an action in trespass to try title plaintiff has the burden of proving both title good in himself and trespass by defendant.

4. **Same—**

In action involving title to real property, title is conclusively presumed to be out of the State unless it be a party to the action. G.S. 1-36.

5. **Adverse Possession § 7—**

Several successive possessions may be tacked for the purpose of showing a continuous adverse possession where there is privity of estate or connection of title between the several occupants.

6. **Adverse Possession § 4a—**

A parol partition comes within the statute of frauds, G.S. 22-2, and in order to acquire title thereunder a tenant in common must show adverse possession thereunder for twenty years.

7. **Same—**

The possession of one tenant in common is in law the possession of all his cotenants unless there has been an actual ouster or a sole adverse possession for twenty years, and adverse possession by a tenant in common, even under color of title, cannot ripen title in a shorter period as against the cotenants.

8. **Adverse Possession § 9c—**

A party claiming under color of title must fit the description in the deed under which he claims to the land in controversy in some manner sanctioned by law.

9. Adverse Possession § 4d—

The possession of the tenant is deemed the possession of the landlord until twenty years after the termination of the tenancy.

10. Appeal and Error § 29—

Exceptions and assignments of error not discussed in the brief and in support of which no argument or reason is stated are deemed abandoned. Rule of Practice in the Supreme Court No. 28.

APPEAL by plaintiff W. T. Alston from *Godwin, Special Judge,* at October Civil Term, 1951, of WARREN.

Civil action begun 7 January, 1946, by Felix Williams against defendants for recovery of land and for removal of cloud upon title.

Plaintiff Felix Williams alleged in his complaint substantially the following:

(1) That he is the owner and entitled to the immediate possession of a certain tract or parcel of land in Warrenton Township, Warren County, North Carolina, bounded as follows: "On the north by lands of A. J. Ellington, on the east by lands of A. J. Ellington, on the south by lands of David Alston, and on the west by the hard-surfaced highway from Warrenton to Arcola, and known as the Mary Jane Williams place."

(2) That defendant Angie H. Robertson, claiming the right to possession of said land under a contract of sale executed to her by defendants A. J. Ellington and wife Undine D. Ellington, and recorded in office of the Register of Deeds for Warren County, North Carolina, in Book 155, at page 636, under claim of ownership, has been in wrongful possession of said land since month of January, 1945,—having ousted plaintiff and his tenant W. T. Alston from possession thereof.

(3) That A. J. Ellington and wife Undine D. Ellington have no right, title or interest in or to said land, and their claim thereto is a cloud on plaintiff's title to said land, and

(4) That rental value of said land to date is $25.00.

Defendants, in answer filed in February, 1946, deny the material allegations of the complaint of plaintiff, and, for further answer and defense, and by way of counterclaim, aver that on the day of the commencement of this action they were the owners in fee simple, and were in possession of the parcel of land described in the complaint, since March, 1919, and pleaded G.S. 1-39 and G.S. 1-40 in bar of plaintiff's "pretended cause of action."

Thereafter W. T. Alston, on 27 May, 1946, claiming to be lessee of the lands in question under plaintiff Felix Williams, was made a party plaintiff.

Thereafter, on 24 September, 1946, plaintiff was permitted to amend the original complaint, by substituting a more specific description for the land as therein described.

Thereafter upon motion duly made, after notice, the Clerk of Superior Court entered an order permitting W. T. Alston, additional party plaintiff, to amend the complaint so as to show that since the complaint was filed plaintiff Felix Williams has died, and his heirs at law have conveyed their interests therein to W. T. Alston, the additional party plaintiff, by deeds of record in office of Register of Deeds of Warren County. Defendant appealed therefrom to judge of Superior Court.

Upon hearing at May Term, 1950, of Superior Court, the presiding judge entered an order approving the order of the Clerk of Superior Court, and allowed the amendment to be filed,—allowing defendants time to file answer. And the court, finding that Felix Williams, original plaintiff, had died within the past two years, and, hence, an administrator should be qualified and made a party hereto, also made an order to this effect.

Pursuant thereto, the original complaint was amended to allege that W. T. Alston, additional party plaintiff, is the owner and entitled to the possession of the land as described in the amendment of 24 September, 1946, as above set forth.

Defendants, by answer filed 30 June, 1950, deny this allegation of the complaint, and "for further answer and defense and by way of counterclaim," specifically and expressly reiterate the matters set up as "further answer and defense and by way of counterclaim" in their original answer to the original complaint as hereinabove set forth.

Thereafter on 29 July, 1950, Ralph Alston, having been appointed administrator of Felix Williams, made himself a party plaintiff to this action, and for his complaint adopted "each and every allegation of the complaint, as amended, theretofore filed by Felix Williams and W. T. Alston, and all amendments thereto," etc.

At September Civil Term, 1950, of Superior Court, defendants, by leave of court, amended their further answer by adding a plea of adverse possession of the lands, the subject of this action, for seven years under color of title, and pursuant thereto pleaded G.S. 1-38 in bar of plaintiff's "pretended cause of action."

An order for compulsory reference thereafter made was vacated upon appeal to this Court, and the cause remanded for further proceedings in accord with the rights of the respective parties. 233 N.C. 309, 63 S.E. 2d 632.

Upon the trial in Superior Court plaintiff offered evidence tending to show among other things that by deed dated 17 July, 1878, recorded 4 October, 1878, in certain book and page of Warren County Register, John White and others conveyed to Frank Hagwood 30 acres of land, adjoining the lands of Wm. Red Perry; that prior to his death Frank Hagwood made a verbal division of his land among his ten children,—

having Dr. Matthew Williams measure off with a plow line three acres apiece to them; that the portions allotted to his daughters Mary Jane and Harriet comprise the land in controversy; that Mary Jane, as Mary Jane Williams, and her husband Andrew Williams, were in possession of this land, in the opinion of William Thomas Alston, 70 years of age, when he "first knew anything and remained so until they died"; that Mary Jane Williams died about 30 years ago, and since her death her children Jennie and Oscar have been in possession of the land,—Oscar staying in possession until he died on 26 February, 1941,—prior to which he "got foolish and went to the County Home" in 1939, and stayed there until his death; that in the years 1930, 1931 and 1932 W. T. Alston rented the land from Jennie; that then Oscar Williams let defendant Alfred Ellington tend the land for five years for burying his, Oscar's, wife; that Oscar Williams got possession of it again in 1938, and rented a steer and tried to make a crop one year, and the next started building himself a house; that all the neighbors helped; that after Oscar Williams died, his brother Felix rented the land to W. T. Alston; and that after Felix started this action, he died, and W. T. Alston obtained deeds from the remaining Mary Jane Williams heirs for the land involved in the action.

Motion of defendants for judgment as of nonsuit at close of plaintiff's evidence was overruled. Thereupon defendants, reserving exception thereto, offered evidence tending to show that he obtained various deeds by *mesne* conveyance, and from various heirs at law of Frank Hagwood for various tracts of the Frank Hagwood 30-acre tract, and that he has been in adverse possession thereof under said deeds for various periods of time. And while the evidence offered by plaintiff fails to show the date of the death of Frank Hagwood, defendants offered in evidence a sheriff's deed, dated 25 July, 1894, under which they claim title, purporting to convey "three acres the entire land listed in the name of Lewis Hagwood," a son of Frank Hagwood—from which it may be inferred that the division was prior thereto.

And motion of defendants for judgment as of nonsuit, renewed at the close of all the evidence, was allowed and, in accordance therewith, judgment was signed.

Plaintiff William Thomas Alston appeals therefrom to Supreme Court, and assigns error.

Kerr & Kerr and James D. Gilliland for plaintiff, appellant.

Banzet & Banzet for defendants, appellees.

WINBORNE, J. The sole assignment of error brought forward, and debated in brief of plaintiff appellant, is based upon exception to the

judgment as of nonsuit entered, upon renewal of motion, at close of all the evidence. G.S. 1-183.

In considering such motion, "the defendant's evidence, unless favorable to the plaintiff, is not to be taken into consideration, except when not in conflict with plaintiff's evidence, it may be used to explain or make clear that which has been offered by plaintiff," *Stacy, C. J.*, in *Harrison v. R. R.*, 194 N.C. 656, 140 S.E. 598. See also *Rice v. City of Lumberton, ante,* 227, where the authorities are assembled.

Therefore, taking the evidence offered by the plaintiff, and so much of defendant's evidence as is favorable to the plaintiff, or tends to explain and make clear that which has been offered by the plaintiff, in the light most favorable to plaintiff, this Court is of opinion, and holds that there is sufficient evidence to take the case to the jury on the issue of title asserted by plaintiff. Indeed, the record is not clear as to the theory on which the nonsuit was granted.

When in an action for the recovery of land and for trespass thereon, defendant denies plaintiff's title and defendant's trespass, nothing else appearing, issues of fact arise both as to the title of plaintiff and as to trespass by defendant,—the burden as to each being on plaintiff. *Mortgage Co. v. Barco,* 218 N.C. 154, 10 S.E. 2d 642; *Smith v. Benson,* 227 N.C. 56, 40 S.E. 2d 451; *Locklear v. Oxendine,* 233 N.C. 710, 65 S.E. 2d 673.

In such action, plaintiff must rely upon the strength of his own title. This requirement may be met by various methods which are specifically set forth in *Mobley v. Griffin,* 104 N.C. 112, 10 S.E. 142; see also *Prevatt v. Harrelson,* 132 N.C. 250, 43 S.E. 800; *Moore v. Miller,* 179 N.C. 396, 102 S.E. 627; *Smith v. Benson, supra,* and many others, including *Locklear v. Oxendine, supra.*

Moreover, in all actions involving title to real property, title is conclusively presumed to be out of the State unless it be a party to the action, G.S. 1-36, but "there is no presumption in favor of one party or the other, nor is a litigant seeking to recover land otherwise relieved of the burden of showing title in himself." *Moore v. Miller, supra; Smith v. Benson, supra; Locklear v. Oxendine, supra.*

In the light of this presumption, apparently, plaintiff in the present action assuming the burden of proof, has elected to show title in himself by adverse possession by those under whom he claims title, under known and visible lines and boundaries for twenty years, without color of title, which is one of the methods by which title may be shown. See *Locklear v. Oxendine, supra.*

And, the principle prevails in this State that several successive possessions may be tacked for the purpose of showing a continuous adverse possession where there is privity of estate or connection of title between

several occupants. *Ramsey v. Ramsey,* 224 N.C. 110, 29 S.E. 2d 340; *Locklear v. Oxendine, supra.*

In this connection, it may be noted that a parol partition of land is a contract within the purview of the statute of frauds, G.S. 22-2, and is not binding. And "in order for tenants in common to perfect title to the respective shares of land allotted to them by parol, it is necessary for them to go into possession of their respecive shares in accordance with the agreement and to hold possession thereof under known and visible boundaries, consisting of lines plainly marked on the ground at the time of the partition, and to continue in possession openly, notoriously and adversely for twenty years," as stated by *Denny, J.,* in *Duckett v. Harrison, ante,* 145.

Moreover, as this Court declared in *Winstead v. Woolard,* 223 N.C. 814, 28 S.E. 2d 507, it is a well settled and long established principle of law in this State that the possession of one tenant in common is in law the possession of all his cotenants unless and until there has been an actual ouster or a sole adverse possession of twenty years, receiving the rents and profits and claiming the land as his own from which actual ouster may be presumed. See also *Duckett v. Harrison, supra.*

Indeed, adverse possession, even under color of title, will not ripen title as against a tenant in common short of twenty years. *Duckett v. Harrison, supra,* and cases cited.

And, in pursuing the method of proving title by adverse possession, under color of title, a deed offered as color of title is such only for the land designated and described in it. *Davidson v. Arledge,* 88 N.C. 326; *Smith v. Fite,* 92 N.C. 319; *Barker v. R. R.,* 125 N.C. 596, 34 S.E. 701; *Johnston v. Case,* 131 N.C. 491, 42 S.E. 957; *Smith v. Benson, supra.*

In *Smith v. Fite, supra,* this headnote epitomized the opinion of the Court, written by *Smith, C. J.*: "Where a party introduces a deed in evidence, which he intends to be used as color of title, he must prove that its boundaries cover the land in dispute, to give legal efficacy to his possession." In other words, the party must not only offer the deed upon which he relies, he must by proof fit the description in the deed to the land it covers,—in accordance with appropriate law relating to course and distance, and natural objects called for as the case may be. *Locklear v. Oxendine, supra.*

Furthermore, "when the relation of landlord and tenant has existed, the possession of the tenant is deemed the possession of the landlord, until the expiration of twenty years from the termination of the tenancy . . ." See G.S. 1-43; also *Lofton v. Barber,* 226 N.C. 481, 39 S.E. 2d 263.

Finally, it is noted that while there are numerous assignments of error based upon exceptions by plaintiff relating to matters of evidence, no reason or argument is stated, or authority cited in support of them.

Hence for purposes of this appeal, they are deemed abandoned. Rule 28 of Rules of Practice in the Supreme Court, 221 N.C. 544, at pages 562-3. Therefore, no decision is made in respect to any of the questions thereby raised.

We refrain, also, from a discussion of the evidence, as there must be another trial. And the judgment of nonsuit entered below is

Reversed.

E. I. BALLARD, J. J. SHUMAN, J. SAM HINSON, J. L. McCREADY, AND G. W. DOOLEY, TRUSTEES OF CALVARY METHODIST CHURCH OF CHARLOTTE, N. C., AND S. W. SCRUGGS, JR., AND WIFE, KATHLEEN H. SCRUGGS, v. CITY OF CHARLOTTE, A MUNICIPAL CORPORATION.

(Filed 30 April, 1952.)

1. Administrative Law § 5: Municipal Corporation § 33—

The failure to follow statutory procedure to contest the levy of assessments for public improvements does not preclude the landowner from maintaining an independent action to vacate the assessments or to enjoin their enforcement if such assessments are void.

2. Statutes § 5a—

A statute will be construed to effectuate the intent of the Legislature as therein expressed, and the courts will adopt a construction which will not defeat or impair its objective if possible by any reasonable construction of the language used.

3. Statutes § 5e: Public Offices § 7a—

Where a statute confers certain powers on persons as members of a board, the statute grants a joint authority requiring them to act after consultation together in a meeting, but such board may nevertheless act through a majority of its members, G.S. 12-3 (2), and its authority is not terminated by the death of any of its members so long as a majority of them survive and act as a board.

4. Municipal Corporations § 33—

Under Chap. 1033, Session Laws of 1947, the death of a member of the Board of Appraisers after a first appraisal has been made does not preclude the survivors, acting as a board, from making the second appraisal required by the statute after the improvements have been completed, since notwithstanding that the statute confers a joint authority, the functions of the board may be exercised by a majority of them.

APPEAL by plaintiffs from *Moore, J.*, at February Term, 1952, of MECKLENBURG.

Civil action to enjoin enforcement of assessments on land abutting on a public improvement.

This cause was heard in the Superior Court on a case agreed, which revealed these facts:

1. The plaintiffs challenge the validity of paving assessments on their lots abutting on the portion of West Boulevard, a public street of the City of Charlotte, between Cliffwood Place and Wilmore Drive. All of the lots formerly belonged to the plaintiffs, S. W. Scruggs, Jr., and his wife, Kathleen H. Scruggs, who conveyed some of them to the Trustees of Calvary Methodist Church during the Spring of 1948.

2. During 1947, a majority of the entire municipal council of the City of Charlotte adopted a resolution at two regular meetings of the council, finding as a fact that it was necessary and in the public interest to pave West Boulevard from Cliffwood Place to Wilmore Drive without a petition by the abutting property owners, and ordering the city to make such improvement and to pay all the cost incident to it except the part legally assessable against abutting property under Section 52 of the Charter of the City of Charlotte, *i.e.*, Chapter 366 of the Public-Local Laws of North Carolina for 1939, as amended by Chapter 1033 of the 1947 Session Laws of North Carolina.

3. The second of these meetings was held 1 October, 1947. Within not less than five days before that time, the Charlotte City Council published a notice in a newspaper of general circulation in the City of Charlotte, notifying abutting property owners of the time and place of the second meeting and of its intention to take this action at the same: (1) To order the paving of West Boulevard between Cliffwood Place and Wilmore Drive without a petition by the abutting property owners as authorized by the statute cited above; and (2) to name appraisers for the area to be improved in obedience to the provisions of such statute requiring the mayor to nominate and city council to appoint "a board of appraisers, consisting of five competent persons, . . . whose duty it shall be to appraise the property bordering upon . . . (the) . . . area (a) before the same is . . . improved, and (b) after the improvements are completed, and to make written report of such appraisals to the city clerk." Although the plaintiffs, S. W. Scruggs, Jr., and his wife, Kathleen H. Scruggs, the then owners of all the lots, had actual notice of the second meeting, they did not attend it or protest the making of the proposed improvement.

4. At the meeting on 1 October, 1947, five competent persons, namely, J. E. Barrentine, J. H. Carson, E. B. Dudley, John F. Durham, and Frank E. Harlan, were nominated by the mayor and appointed by the city council to serve as a board of appraisers for the area to be improved. They qualified as appraisers, met on the premises before the paving was begun, and made a contemporary appraisal of the property bordering on the area to be paved. One of them, to wit, E. B. Dudley, died while

the work was in progress. After it was finished, the four surviving appraisers, namely, J. E. Barrentine, J. H. Carson, John F. Durham, and Frank E. Harlan jointly appraised the property bordering upon the area, and filed with the city clerk a written report, showing the appraisals of each lot bordering upon the area both before the improvement was begun and after it was completed. The report showed that the appraised benefits conferred by the improvement upon all the lots owned by the Trustees of Calvary Methodist Church totaled $2,033.50, and that the appraised benefits conferred by the improvement upon all the lots retained by the plaintiffs, S. W. Scruggs, Jr., and wife, Kathleen H. Scruggs, totaled $4,708.27.

5. Within fifteen days after the report of the four surviving appraisers was filed with the city clerk, to wit, on 27 October, 1948, the Charlotte City Council held a hearing with respect to the benefits conferred upon the property within the improvement area, determined that the appraised benefit to each lot of the plaintiffs was less than one-half the cost of the improvement of such lot as measured by the statutory rule for calculating such cost, and made special assessments against the various lots of the plaintiffs for the appraised benefits set forth in the written report.

6. Within ten days thereafter, the Charlotte City Council published a notice in a newspaper of general circulation in the City of Charlotte, stating in detail the specific assessments for appraised benefits made by it against the various lots of the respective plaintiffs, and notifying the plaintiffs that the assessment against each particular lot would be final and binding unless the owner or owners of such lot gave written notice to the city council within fifteen days after the publication that such owner or owners took an appeal to the next term of the Superior Court of Mecklenburg County and within five days thereafter served upon the city manager a written statement of the facts upon which such owner or owners based the appeal.

7. The Trustees of Calvary Methodist Church had actual knowledge that the portion of West Boulevard between Cliffwood Place and Wilmore Drive was being paved by the City of Charlotte when they acquired their lots abutting thereon. None of the plaintiffs ever appeared before the Charlotte City Council to object to the making of any of the assessments, or ever appealed to the Superior Court of Mecklenburg County from any of the assessments.

8. On 2 August, 1951, the plaintiffs brought this direct action against the defendant, the City of Charlotte, in the Superior Court of Mecklenburg County, praying a decree declaring the special assessments on their lots to be absolutely void and enjoining their enforcement. When the cause was heard upon the case agreed, the presiding judge concluded as a matter of law that the plaintiffs are not entitled to the relief sought by

them and entered judgment accordingly. The plaintiff excepted and appealed, assigning the conclusion and judgment as error.

W. C. Davis for plaintiffs, appellants.
John D. Shaw for defendant, appellee.

ERVIN, J. The Charlotte City Council undertook to make the assessments in controversy under the statute resulting from the amendment of Section 52 of the Charter of the City of Charlotte, *i.e.*, Chapter 366 of the Public-Local Laws of North Carolina for 1939, by Chapter 1033 of the 1947 Session Laws of North Carolina. Instead of setting forth this lengthy statute verbatim, we shall refer to such of its provisions as are relevant to the instant case. The plaintiffs failed to appeal to the Superior Court from the assessments as authorized by this statute. Despite their neglect in this respect, the plaintiffs are entitled to vacate the assessments or to enjoin their enforcement if they are void. *Winston-Salem v. Smith*, 216 N.C. 1, 3 S.E. 2d 328; *Charlotte v. Brown*, 165 N.C. 435, 81 S.E. 611.

The plaintiffs insist that the assessments are void for this solitary reason: That the statutory authority of the board of appraisers came to an end with the death of E. B. Dudley, one of its members.

It thus appears that the question arising on the appeal hinges on the meaning of the statute under consideration. As a consequence, we must ascertain the intention of the Legislature and carry such intention into effect to the fullest degree. *Norman v. Ausbon*, 193 N.C. 791, 138 S.E. 162; *Hunt v. Eure*, 188 N.C. 716, 125 S.E. 484. In performing this judicial task, we must avoid a construction which will operate to defeat or impair the object of the statute, if we can reasonably do so without violence to the legislative language. *Manly v. Abernathy*, 167 N.C. 220, 83 S.E. 343.

When it is read and interpreted as a whole, the statute evinces a paramount purpose on the part of the Legislature to empower the Charlotte City Council to improve the public streets of the municipality without petitions by abutting property owners, and to assess against each abutting property the benefits conferred upon it by the improvement, or one-half the cost of its improvement, whichever is the lesser. The provisions of the statute imposing upon boards of appraisers the duty to make appraisals of benefits are subsidiary in character. They are merely designed to aid in the consummation of the paramount legislative purpose.

These statutory provisions specify, in substance, that before work is begun the mayor is to nominate and the city council is to appoint "a board of appraisers, consisting of five competent persons," for each area to be improved under the provisions of the statute, and that the board so

nominated and appointed is to do these several public acts in respect to its area: (1) To appraise the property bordering upon the area before it is improved; (2) to appraise the property bordering upon the area after the improvement is completed; and (3) to make written report of such appraisals to the city clerk.

Manifestly the first and second appraisals must be made by the board of appraisers at different times. When it enacted the statute, the Legislature knew that "death tracketh everything living and catcheth it in the end" and that in consequence death might well overtake a member of the board of appraisers between the two appraisals. Notwithstanding its knowledge of this tragic truth, the Legislature made no provision whatever to fill a vacancy occasioned by death in the membership of the board.

The plaintiffs argue that these statutory provisions confer a joint authority upon "a board of appraisers consisting of five . . . persons," to appraise the abutting property on both occasions, and make the exercise of such joint authority by all five appraisers a jurisdictional prerequisite to any valid assessment; that the joint authority necessarily terminates with the death of any one of the appraisers prior to the second appraisal; and that consequently any assessment based in whole or in part upon the subsequent action of the surviving appraisers is void.

This construction of these statutory provisions nullifies or thwarts in a large measure the paramount purpose of the statute, and cannot be accepted if the legislative language reasonably admits of a different interpretation.

The statutory provisions under scrutiny undoubtedly grant to the members of the board of appraisers a joint authority, and require them to exercise it as a board, *i.e.*, by meeting and consulting together. But they do not compel the conclusion that the Legislature intended the authority of the board to perish with the death of one of its members. Indeed, they justify the contrary view.

Where a statute confers a joint authority on several persons to do a public act and makes no provision for filling a vacancy occurring among them, the authority is not terminated by the death of one or more of them, if there are enough of them left legally to perform such act. *Quayle v. Missouri, K. & T. Ry. Co.*, 63 Mo. 465; *Bublitz v. Borough of Hillsdale*, 8 N. J. Misc. 334, 150 A. 229; *People v. Syracuse*, 63 N.Y. 291; *Welch v. Getzen*, 85 S.C. 156, 67 S.E. 294; 29 C.J.S., Eminent Domain, section 297; 67 C.J.S., Officers, section 109 (b). The rule of statutory construction embodied in G.S. 12-3 (2) provides that "all words purporting to give a joint authority to three or more public officers or other persons shall be construed as giving such authority to a majority of such officers or other persons, unless it shall be otherwise expressly declared in the law giving the authority." *Austin v. Helms*, 65 N.C. 560.

For these reasons, we conclude that the authority granted by the statute to the board of five appraisers is not terminated by the death of any of its members as long as three of them remain, and that in such case the surviving appraisers can make a valid appraisal if all of them attend and take part in the transaction. This conclusion necessitates an affirmance of the judgment.

Affirmed.

IN RE WILL OF MINNIE I. S. BARTLETT.

(Filed 30 April, 1952.)

1. Wills § 24—

Issues of fact raised by a caveat must be tried by a jury. G.S. 31-33.

2. Trial § 18—

It is the duty of the court alone to decide legal questions presented at the trial and to instruct the jury as to the law arising on the evidence in the case; and it is the function of the jury alone to determine the facts of the case from the evidence, it being prohibited that the court should give an opinion in any manner as to whether a fact is fully or sufficiently proven. G.S. 1-180.

3. Trial § 6—

The trial judge is forbidden to convey to the petit jury in any manner at any stage of the trial his opinion on the facts in evidence. G.S. 1-180.

4. Same—

Propounders sought to prove the genuineness of the handwriting of the script by testimony of a witness who had received Christmas cards each year from deceased but who had never seen deceased write. *Held:* Interrogation of the witness by the judge which amounted to an expression of opinion by the court to the effect that the testimony of the witness proved the cards to be in the handwriting of decedent is error and was prejudicial under the facts of this case.

5. Same—

While the trial court has the power to interrogate a witness for the purpose of clarifying matters material to the issues, he must exercise such power with caution so as not to reveal to the jury his opinion on the facts in evidence.

APPEAL by caveators from *Bennett, Special Judge,* and a jury, at August Term, 1951, of WAYNE.

Caveat to script propounded for probate as holographic will.

These are the essential facts:

1. On 25 February, 1920, Minnie I. S. Bartlett, whose maiden name was Minnie I. Sasser, married W. H. Bartlett, the widowed father of four small daughters, who then ranged downward in ages from eleven to four

years. These daughters are now known as Ruby B. Waters, Clara Bartlett, Welda B. Best, and Virginia B. Sasser.

2. W. H. Bartlett and his second wife, Minnie I. S. Bartlett, lived together in the marital state upon the latter's farm in Wayne County from the day of their marriage until 2 January, 1949, when the latter died without issue. Minnie I. S. Bartlett acted as foster-mother to her four stepdaughters throughout her married life.

3. On 18 January, 1949, W. H. Bartlett and his four daughters, as propounders, presented the script in controversy to the Clerk of the Superior Court of Wayne County, asserted that it was executed by Minnie I. S. Bartlett as her holographic will, and asked that it be legally established as such. The clerk thereupon admitted the paper to probate in common form as the last will of Minnie I. S. Bartlett. The document is couched in this language:

This is my will at my death to my husband W. H. Bartlett all my property all his life. At his death want all property valued and divided in four equal shares. One to Ruby B. Waters one to Clara Bartlett one to Welda B. Best and one to Virginia B. Sasser. And to Clara Bartlett my dimond ring. At my husband death I want my neice Sadie Collins to have 2 chair one table mirrow in hall. and all my family pictures. All so land enough for building lot on high way where she desires.

May 1946 MINNIE I. S. BARTLETT.

4. On 24 October, 1950, Sadie Collins and N. C. Howell appeared before the Clerk of the Superior Court of Wayne County and entered a caveat to the probate of the script, alleging "that the paper writing . . . is not the last will and testament of Minnie I. S. Bartlett for that it was not executed . . . as required by law." The Clerk forthwith transferred the caveat proceeding to the trial docket of the Superior Court for trial by jury at term upon the issue of *devisavit vel non*. Bettie Holder Delay, Junia Holder Gunter, Daniel T. Holder, Henry S. Holder, John F. Holder, Nancy Jane Holder, Walter A. Howell, and Frank Sasser afterwards entered general appearances in the proceeding and aligned themselves with the original caveators. The persons named in this paragraph claim that they would inherit the property of Minnie I. S. Bartlett in case the script is rejected.

5. When the proceeding was tried on its merits, the propounders offered evidence tending to show that the script was written and subscribed in its entirety by the hand of Minnie I. S. Bartlett and was found after her death among her valuable papers and effects. The caveators presented testimony indicating that portions of the paper writing, including the name subscribed thereto, were not in the handwriting of the decedent. The trial judge submitted these issues to the jury: (1) Was the paper

writing purporting to be the last will and testament of Mrs. Minnie I. S. Bartlett found among her valuable papers and effects after her death, as alleged by the propounders? (2) Is said paper writing and every part thereof in the handwriting of the deceased, Mrs. Minnie I. S. Bartlett, and her name subscribed thereto, as alleged by the propounders? The jury answered both of these issues in the affirmative, and the trial judge entered judgment establishing the script as the will of the decedent. The caveators excepted and appealed, assigning errors.

Dees & Dees and Roy M. Sasser for the propounders, appellees.

J. Faison Thomson and John S. Peacock for the caveators, appellants.

ERVIN, J. When a caveat to the probate of a paper writing propounded as the last will and testament of a deceased person is filed with the clerk of the Superior Court having jurisdiction in conformity with the provisions of the statute now codified as G.S. 31-32, and the resultant proceeding is transferred by such clerk to the trial docket of the Superior Court for trial of the issues of fact raised by the caveat at term in conformity to the requirements of the statute now embodied in G.S. 31-33, the issues of fact must be tried by a jury. *Brissie v. Craig,* 232 N.C. 701, 62 S.E. 2d 330; *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; *In re Will of Rowland,* 202 N.C. 373, 162 S.E. 897; *In re Will of Brown,* 194 N.C. 583, 140 S.E. 192; *In re Will of Chisman,* 175 N.C. 420, 95 S.E. 769.

The founders of our legal system intended that the right of trial by jury, whether constitutional or statutory in origin, should be a vital force rather than an empty form in the administration of justice. They realized that this could not be if the petit jury should become a mere unthinking echo of the judge's will. To forestall such eventuality, they clearly demarcated the respective functions of the judge and the jury in both civil and criminal trials in a familiar statute, which was enacted in 1796 and which originally bore this caption: "An act to secure the impartiality of trial by jury, and to direct the conduct of judges in charges to the petit jury." Potter's Revisal, Vol. 1, ch. 452. This statute, which now appears as G.S. 1-180, establishes these fundamental propositions: (1) That it is the duty of the judge alone to decide legal questions presented at the trial, and to instruct the jury as to the law arising on the evidence given in the case; (2) that it is the task of the jury alone to determine the facts of the case from the evidence adduced; and (3) that "no judge, in giving a charge to the petit jury, shall give an opinion whether a fact is fully or sufficiently proven, that being the true office and province of the jury." This statute is designed to make effectual the right of every litigant "to have his cause considered with the 'cold neu-

trality of the impartial judge' and the equally unbiased mind of a properly instructed jury." *Withers v. Lane,* 144 N.C. 184, 56 S.E. 855.

Although the statute refers in terms to the charge, it has always been construed to forbid the judge to convey to the petit jury in any manner at any stage of the trial his opinion on the facts in evidence. *Bailey v. Hayman,* 220 N.C. 402, 17 S.E. 2d 520; *Thompson v. Angel,* 214 N.C. 3, 197 S.E. 618; *S. v. Oakley,* 210 N.C. 206, 186 S.E. 244; *S. v. Bryant,* 189 N.C. 112, 126 S.E. 107; *Bank v. McArthur,* 168 N.C. 48, 84 S.E. 39, Ann. Cas. 1917 B, 1054; *S. v. Cook,* 162 N.C. 586, 77 S.E. 759; *Park v. Exum,* 156 N.C. 228, 72 S.E. 309; *Marcom v. Adams,* 122 N.C. 222, 29 S.E. 333. As a consequence, the judge violates the statute and commits reversible error in so doing if he puts to a witness questions which convey to the jury his opinion as to what has, or has not, been proved by the testimony of such witness. *S. v. Perry,* 231 N.C. 467, 57 S.E. 2d 774; *S. v. Cantrell,* 230 N.C. 46, 51 S.E. 2d 887; *S. v. Bean,* 211 N.C. 59, 188 S.E. 610; *S. v. Winckler,* 210 N.C. 556, 187 S.E. 792; *Morris v. Kramer,* 182 N.C. 87, 108 S.E. 381; 70 C.J., Witnesses, section 721.

The legal battle between the propounders and the caveators in the Superior Court revolved in the main around the crucial question whether the paper writing propounded for probate was wholly written and subscribed by the hand of Minnie I. S. Bartlett, whose will it purports to be. G.S. 31-3. Nobody testified that he saw the script being written. The propounders and the caveators undertook to sustain their respective positions as to the genuineness or falsity of the paper writing by the testimony of numerous witnesses divided into these categories: (1) Expert witnesses, who compared the disputed document with allegedly genuine specimens of the decedent's handwriting (G.S. 8-40, *S. v. Cofer,* 205 N.C. 653, 172 S.E. 176); and (2) nonexpert witnesses, who claimed to be acquainted with the decedent's handwriting either because they had seen her write other papers, or because they had acquired competent knowledge of her handwriting in some other approved manner. *Owens v. Lumber Co.,* 212 N.C. 133, 193 S.E. 219; *Oil Co. v. Burney,* 174 N.C. 382, 93 S.E. 912; *Morgan v. Fraternal Association,* 170 N.C. 75, 86 S.E. 975; *Nicholson v. Lumber Co.,* 156 N.C. 59, 72 S.E. 86, 36 L.R.A. (N.S.) 162; *Tuttle v. Rainey,* 98 N.C. 513, 4 S.E. 475; *McKonkey v. Gaylord,* 46 N.C. 94; *S. v. Candler,* 10 N.C. 393; Wigmore on Evidence (2d Ed.), section 693.

One of the nonexpert witnesses called to the stand by the propounders was Mrs. C. G. Rose, who testified, in substance, that she received by mail each Christmas for some years next preceding the decedent's death a Christmas card purporting to bear the decedent's signature; that she obtained a knowledge of the decedent's handwriting by seeing the Christmas cards thus received by her; and that in her opinion every word of the

paper writing propounded for probate was in the genuine handwriting of the decedent. This witness identified the propounders' Exhibit J as the Christmas card she "got . . . out of the mail box in 1944," and that exhibit was thereupon admitted in evidence.

This testimony and exhibit was received by the trial judge over the objections of the caveators, who drew from Mrs. Rose on cross-examination the admissions that she had never seen the decedent write, and that she merely "thought" the name appearing on each of the Christmas cards was the decedent's signature.

The presiding judge thereupon put the following questions to Mrs. Rose and elicited the following answers from her:

Question: "Over what period of time did you receive Christmas cards from Mrs. Bartlett?"

Answer: "I received cards from her every year after I got acquainted with her until she died."

Question: "You exchanged Christmas cards every year?"

Answer: "Yes, Sir."

Question: "As far as you know she did write them?"

Answer: "Yes, Sir, as far as I know she wrote them."

The caveators noted exceptions to these questions and answers. We are compelled to adjudge such exceptions to be well taken.

A trial judge has undoubted power to interrogate a witness for the purpose of clarifying matters material to the issues. *S. v. Horne,* 171 N.C. 787, 88 S.E. 433; *Eekhout v. Cole,* 135 N.C. 583, 47 S.E. 655. He should exercise such power with caution, however, lest his questions, or his manner of asking them, reveal to the jury his opinion on the facts in evidence and thus throw the weight of his high office to the one side or the other. The questions put to Mrs. Rose by the judge in the instant case were improper. They conveyed to the jury the opinion of the judge that the testimony of the witness proved the Christmas cards to be the genuine products of the hand of the decedent. Their prejudicial effect upon the cause of the caveators was much augmented at later stages of the trial by the repeated use of Exhibit J by witnesses for the propounders as a supposedly genuine specimen or standard of the decedent's handwriting for comparison with the disputed document.

An observation made by a great jurist, the late *Justice Walker,* in *Withers v. Lane, supra,* seems germane: "The learned and able judge who presided at the trial, inspired, no doubt, by a laudable motive and a profound sense of justice, was perhaps too zealous that what he conceived to be the right should prevail, but just here the law, conscious of the frailty of human nature at its best, both on the bench and in the jury-box, intervenes and imposes its restraint upon the judge, enjoining strictly

that he shall not in any manner sway the jury by imparting to them the slightest knowledge of his own opinion of the case."

We omit discussion of the questions raised by the other assignments of error. They are not likely to arise when the cause is tried anew.

For the reasons given, the caveators are granted a

New trial.

CITIZENS NATIONAL BANK, ADMINISTRATOR, C. T. A. OF THE ESTATE OF ALLIE LEGG, v. GERTRUDE SHAW PHILLIPS; BLONDIE S. WALSH; DEWEY S. SHAW; C. V. SHAW; HARRY M. SHAW; ROBERT L. SHAW; SARAH BELLE OVERTON; PAULINE JESSUP; MAUDE POE; CHARLIE BARNES; HESTER BARNES BROWN; DALE ECKERT; ZENDA ELY; J. MONROE WARBURTON; LEO WARBURTON; ELMA WARBURTON McNAIR; BEVERLY ECKERT BURKS; EDNA TAYLOR; LOIS PARRISH; CECIL JONES; LEON JONES; TALMADGE JONES; GLADYS ANDREWS COUCH; JOHN ANDREWS; AND W. E. McNAIR AND C. R. McNAIR AND F. L. PICKETT, TRUSTEES OF THE FIRST PRESBYTERIAN CHURCH OF ROCKINGHAM, NORTH CAROLINA, AND ALL OTHER UNKNOWN LEGATEES OF THE SAID ALLIE LEGG, DECEASED.

(Filed 30 April, 1952.)

1. Wills § 31—

Where a will is ambiguous, the courts must construe it to discover and effectuate testatrix' intention as gathered from the language of the instrument.

2. Wills § 38—

A clause disposing of the remainder of the estate after debts are paid and specified legacies satisfied is the residuary clause, notwithstanding that it is not at the end of the other dispositive clauses.

3. Wills § 31—

The words of a will are to be interpreted according to their ordinary meaning, unless it clearly appears that they were used in some other sense.

4. Wills § 34b—

A residuary devise to testatrix' "first cousins" includes only those who are testatrix' first cousins in the common sense, and excludes first cousins once removed, even though they be children of deceased first cousins.

5. Same: Wills § 34c—

A residuary devise "Then Edna Taylor is to come in for her equal part of my estate. The rest going to my first cousins . . ." *is held* to bequeath one-half the residuary estate to the beneficiary named and the other one-half of the residuary estate to be equally divided among testatrix' first cousins.

APPEAL by defendants Gertrude Shaw Phillips, Blondie S. Walsh, Dewey S. Shaw, C. V. Shaw, Harry M. Shaw, Robert L. Shaw, Maude

Poe, Charlie Barnes, Hester Barnes Brown, J. Monroe Warburton, Leo Warburton, Elma Warburton McNair, Edna Taylor, Cecil Jones, Leon Jones, Talmadge Jones, Gladys Andrews Couch and John Andrews from *Sink, J.*, at October Term, 1951, of CABARRUS.

Civil action for a declaratory judgment construing a will. G.S. 1-254.

These are the essential facts:

1. Allie Legg, an unmarried woman residing in Cabarrus County, North Carolina, died testate 25 August, 1950. Her will is as follows: "In case of my death I wish the contents of my home to go to Edna Taylor all the money in my deposit box also to go to her some of hers is in there also marked on envelope the sum of $500.00 of my estate is to go to Lois Parish. My car to Mrs. L. L. McNair also my fur neck piece. The sum of 3000.00 is to go to Beverly Eckert of Coltne Oregon. Then Edna Taylor is to come in for her equal part of my estate. The rest going to my first cousins after all debts are paid. I also wish $500.00 to go to the Presbyterian Church of Rockingham. . . . My sterling silver goes to Beverly Eckert."

2. The defendants Gertrude Shaw Phillips, Blondie S. Walsh, Dewey S. Shaw, C. V. Shaw, Harry M. Shaw, Robert L. Shaw, Sarah Belle Overton, Pauline Jessup, Maude Poe, Charlie Barnes, Hester Barnes Brown, Dale Eckert, Zenda Ely, J. Monroe Warburton, Leo Warburton, and Elma Warburton McNair are the only first cousins of the testatrix. All of them were living at the time of the execution of the will. Elma Warburton McNair is called "Mrs. L. L. McNair," in that instrument.

3. The defendants Cecil Jones, Leon Jones, and Talmadge Jones are the only children of Lena B. Jones, and the defendants Gladys Andrews Couch and John Andrews are the only children of Ennie Barnes Andrews. Lena B. Jones and Ennie B. Andrews were first cousins of the testatrix, who died before the execution of the will.

4. The sixteen defendants named in paragraph 2 and the five defendants mentioned in paragraph 3 would constitute the next of kin of the testatrix under the statute of distribution had she died intestate. Beverly Eckert Burks, who is designated as Beverly Eckert in the will, is the daughter of Dale Eckert. Neither Edna Taylor nor Lois Parrish were related to the testatrix by blood or marriage. But they were employed by her during the twenty years next preceding her death. The testatrix visited at times in the homes of the children of Lena B. Jones and Ennie B. Andrews, and entertained a high regard for them as well as for her sixteen living first cousins.

5. The plaintiff, Citizens National Bank, as administrator with the will annexed of the estate of the testatrix, has substantial personal property in its custody for disposition in accordance with the terms of the will.

6. An actual controversy arose among the defendants respecting the proper disposition of the personal property of the testatrix. As a consequence, the plaintiff brought this action against all possible claimants, praying a decree construing the will and determining the rights of the parties under it.

7. When the cause came on to be heard, the parties waived trial by jury. Judge Sink, who presided, thereupon heard the evidence, found facts conforming to those herein stated, made conclusions of law thereon, and entered a judgment construing all the clauses of the will, and declaring the rights of the parties in the personal property passing thereunder. No good purpose will be served by analyzing the judgment in its entirety. All parties admit the correctness of all its provisions except those relating to this clause: "Then Edna Taylor is to come in for her equal part of my estate. The rest going to my first cousins after all debts are paid."

8. Judge Sink concluded and adjudged that the language quoted in the preceding paragraph constituted the residuary clause of the will; that the only residuary legatees were Edna Taylor and the sixteen first cousins of the testatrix designated in paragraph 2 of this statement of facts; and that such residuary legatees were entitled to share the residue of the personal estate in equal proportions, each of them taking one-seventeenth thereof.

9. The twelve living first cousins of the testatrix represented by Messrs. Steele and Carroll excepted and appealed on the ground that the provision of the residuary clause relating to Edna Taylor is "too vague . . . to be given any effect, and that only those persons within the . . . class of first cousins should be permitted to participate as residuary legatees." Edna Taylor excepted and appealed on the ground "that the testatrix intended that she receive one-half of the residuary." The children of the two deceased first cousins of the testatrix excepted and appealed on the ground that the testatrix used the words "first cousins" in the residuary clause to denote those who would have been her next of kin under the statute of distribution had she died intestate, and that in consequence the judge erred in wholly excluding them from any share in the residue.

E. Johnston Irvin for plaintiff, appellee.

George S. Steele and Harvey C. Carroll for defendants Gertrude Shaw Phillips, Blondie S. Walsh, Dewey S. Shaw, C. V. Shaw, Harry M. Shaw, Robert L. Shaw, Maude Poe, Charlie Barnes, Hester Barnes Brown, J. Monroe Warburton, Leo Warburton, and Elma Warburton McNair, appellants.

Pollock & Fullenwider for defendants Sarah Belle Overton and Pauline Jessup, appellees.

Hartsell & Hartsell for defendants Beverly Eckert Burks and Dale Eckert, appellees.

John Hugh Williams for defendant Edna Taylor, appellant.

E. C. Brooks, Jr., for defendants Cecil Jones, Leon Jones, Talmadge Jones, Gladys Andrews Couch, and John Andrews, appellants.

ERVIN, J. While the testatrix was among the living, she was highly proficient in the millinery art, but sadly deficient in legal draftsmanship. Despite her inadequacy in the last field of endeavor, she chose to write her last will in words of her own selection without regard for legal precedents. As an inevitable consequence, she produced a testamentary document which illustrates anew the accuracy of the epigram of Sir William Jones that "no will has a brother." 57 Am. Jur., Wills, section 1123. This action calls on the court to ascertain and carry into effect the intention of the testatrix as to the disposition of her property. In the very nature of things, the court must seek and discover such intention in the awkward phrases which the hand of the testatrix put on the paper probated as her last will. *Elmore v. Austin,* 232 N.C. 13, 59 S.E. 2d 205.

This judicial task has been made less burdensome by the frank admission of the appellants that all of the provisions of the judgment are correct except those interpreting this language of the testatrix: "Then Edna Taylor is to come in for her equal part of my estate. The rest going to my first cousins after all debts are paid."

This portion of the will constitutes a residuary clause. It disposes of all of the estate of the testatrix that is left after debts are paid and specified gifts are satisfied. *Shannon v. Reed,* 355 Pa. 628, 50 A. 2d 278. It declares that the residue of the estate is to go to particular persons, namely, Edna Taylor, who is identified, and the first cousins of the testatrix, who are capable of being identified. *Adams v. Adams,* 55 N.C. 215.

The words of a will are to be interpreted according to their ordinary meaning, unless it clearly appears that they were used in some other sense. *Williams v. McPherson,* 216 N.C. 565, 5 S.E. 2d 830; *Williams v. Best,* 195 N.C. 324, 142 S.E. 2; *Goode v. Hearne,* 180 N.C. 475, 105 S.E. 5.

A first cousin is the son or daughter of one's uncle or aunt. *Culver v. Union & New Haven Trust Co.,* 120 Conn. 97, 179 A. 487, 99 A.L.R. 663; *Weaver v. Liberty Trust Co.,* 170 Md. 212, 183 A. 544; *Walker v. Chambers,* 85 N. J. Eq. 376, 96 A. 359; *In re Blum's Estate,* 136 Mis. 441, 243 N.Y.S. 222. The child of one's first cousin is sometimes popularly called his second cousin, but is more properly his first cousin once removed. *Culver v. Union & New Haven Trust Co., supra; State v. Thomas,* 351 Mo. 804, 174 S.W. 2d 337; *Simonton v. Edmunds,* 202 S.C. 397, 25 S.E. 2d 284.

Inasmuch as there is nothing to indicate that the words were used in the will under scrutiny in a different sense, the provision giving a part of the residuary estate to the "first cousins" of the testatrix must be construed to include only those who are her first cousins in ordinary language, namely, the children of her uncles or aunts. *Bishop v. Russell,* 241 Mass. 29, 134 N.E. 233, 19 A.L.R. 1408. This conclusion is rightly incorporated in the judgment which declares that the sixteen first cousins of the testatrix named in paragraph 2 of the statement of facts take such part of the residuary estate to the exclusion of her five first cousins once removed designated in paragraph 3 of such statement.

This brings us to the final question whether the language of the will is clear enough to disclose the intention of the testatrix in regard to the distribution of the residue of her estate among the residuary legatees, *i.e.,* Edna Taylor and the sixteen first cousins of the testatrix.

The will provides, in substance, that Edna Taylor is to receive "her equal part" of the residuary estate, and the sixteen first cousins of the testatrix are to receive "the rest" of the residuary estate. The word "part" signifies one of the portions into which anything is divided, or regarded as divided, whether actually separate or not. *Commonwealth v. Dobson,* 176 Va. 281, 11 S.E. 2d 120. When the testatrix bequeathed her residuary estate, she regarded it as divided into these two portions: (1) the "part," which she gave to Edna Taylor; and (2) "the rest," which she allotted to her sixteen first cousins. Moreover, her words imply that the portion willed to Edna Taylor, *i.e.,* "her equal part," is to be equal in value with the portion, *i.e.,* "the rest," assigned to the sixteen first cousins.

These things being true, the language of the will discloses the intention of the testatrix that Edna Taylor is to receive one-half of the residuary estate, and that the other half of the residuary estate is to be divided equally among the sixteen first cousins of the testatrix. The judgment of the Superior Court is hereby modified to conform to this conclusion. As thus modified, it is affirmed.

Modified and affirmed.

JOHN DORSEY (DOSSEY) BATTLE AND WIFE HESTER BATTLE, WILLIAM GASTON BATTLE AND WIFE LULA BATTLE, SYLVESTER BATTLE AND WIFE MAMIE BATTLE, LENDORA YANCEY BROWN AND HUSBAND HENRY W. BROWN, SYLVESTER YANCEY AND WIFE ARTHALIA PORTER YANCEY, LILLIAN YANCEY KING AND HUSBAND JESSE KING, CHRISTINE YANCEY HUNDLEY AND HUSBAND HARVEY HUNDLEY, GRACIE YANCEY CAMPBELL AND HUSBAND CLYDE CAMPBELL, CLARENCE G. YANCEY AND WIFE MARGELINE BROWN YANCEY, ARCENIA YANCEY HINES, EULA MAE YANCEY DIXON AND HUSBAND MALACHI DIXON, DAISY BATTLE, WIDOW OF DOSSEY BATTLE, DECEASED; JAMES H. BODDIE AND WIFE LOUISE BODDIE, JULIA BODDIE GALLOWAY AND HUSBAND WILLIAM GALLOWAY, ARCENIA JONES TAYLOR, WILLIAM JONES, UNMARRIED; SARAH JONES, UNMARRIED; MARTHA ANN JONES BURNETT AND HUSBAND LONNIE BURNETT, JUDGE JONES AND WIFE LOSSIE JONES, V. HENDERSON BATTLE, UNMARRIED, NON COMPOS MENTIS; JOSEPHINE BATTLE, WIDOW OF LORENZA BATTLE, DECEASED; PEARLIE BATTLE WHITAKER AND HUSBAND JOE WHITAKER, HOWARD BATTLE AND WIFE ARTHELIA BATTLE, MARY BATTLE (WILLIAMS) HAYWOOD AND HUSBAND EARL HAYWOOD, MAGGIE BATTLE DANCY AND HUSBAND ALBERT DANCY, ELLA BATTLE ALLEN AND HUSBAND CURTIS ALLEN, JOSEPHINE BATTLE WATSON AND HUSBAND HAYWOOD WATSON, JULIA BATTLE, MINOR; ROWLAND BATTLE, MINOR; BEETIE MAE BATTLE, MINOR; DAISY ELLA BATTLE, MINOR; JAMES TAYLOR, HUSBAND OF ARCENIA JONES TAYLOR; ANNIE JONES BATTLE AND HUSBAND ROSCOE BATTLE, FLETCHER JONES AND WIFE ELVERT JONES, LOUISE BATTLE JEFFERSON, WIDOW; LILLIAN BATTLE, UNMARRIED; SAMUEL HINES, HUSBAND OF ARCENIA YANCEY HINES; LORENZA BATTLE, JR., AND WIFE NANNIE BATTLE, EDDIE JONES AND WIFE VENIE JONES, MARY JONES, UNMARRIED; HOWARD BATTLE, ADMINISTRATOR OF ARCENIA HOPKINS, DECEASED; WILKINSON, BULLUCK & COMPANY, INC., A CORPORATION; UNKNOWN HEIRS OF ARCENIA HOPKINS, DECEASED; ALL OTHER PERSONS HAVING OR CLAIMING AN INTEREST IN THE SUBJECT MATTER OF THIS ACTION AND WHOSE NAMES AND RESIDENCES ARE UNKNOWN, AND HENRY JONES (ADDITIONAL PARTY DEFENDANT).

(Filed 30 April, 1952.)

1. Adverse Possession § 3—

The owner of a lot invested her daughter and son-in-law with possession and thereafter attempted to convey the lot to them by deed which, through error, failed to include the lot in its description. *Held:* The daughter's and son-in-law's possession of the *locus* in the character of owners is adverse to the grantor and all others. *Gibson v. Dudley*, 233 N.C. 255, distinguished.

2. Adverse Possession §§ 4a, 7—

A daughter maintained adverse possession of the *locus* against her mother and all others, but her mother died intestate prior to the expiration of twenty years. The daughter remained in exclusive possession, but was entitled to the interest of a tenant in common therein. *Held:* Although the daughter may not tack the adverse possession against her

mother to her possession against her cotenants, nevertheless her adverse possession for more than twenty years after her mother's death ripens title in her as against her cotenants.

3. Adverse Possession § 13e—

Where the statute of limitations has begun to run against the ancestor, upon the ancestor's death, the statute continues to run against the ancestor's children notwithstanding that they are minors.

4. Same—

Where a person is *non compos mentis* at the time the statute of limitations begins to run against him, his interest cannot be barred during his disability.

5. Insane Persons § 15—

An admission by a guardian *ad litem* does not adversely affect the rights of the person *non compos mentis* which are existent upon the admitted facts.

6. Trial § 32—

A party desiring more specific instructions on any subordinate phase of the evidence must aptly tender request therefor.

APPEAL by defendants from *Bone, J.*, November-December Term, 1951, of NASH. Modified and affirmed.

Spruill & Spruill for plaintiffs, appellees.
J. J. Sansom, Jr., for defendants, appellants.

DEVIN, C. J. This was an action to determine the title to certain lots in the city of Rocky Mount on West Thomas Street. It was established by the verdict of the jury that the plaintiffs James H. Boddie and Julia Boddie Galloway were the owners of the lot known and designated as No. 817, and that the plaintiffs and defendants as heirs of Arcenia Hopkins were tenants in common in the other adjoining lots described in the pleadings. The bone of contention was the title to lot No. 817. There was no controversy as to the title to the other lots.

These several lots had been originally conveyed to Arcenia Hopkins in 1902. The plaintiffs' evidence tended to show that in 1908 Arcenia Hopkins placed her daughter Arcenia Boddie and her husband Julius Boddie in possession of lot No. 817, and that Arcenia Hopkins joined with them in building a house thereon in which the daughter and husband made their home and reared their children. In 1919 Arcenia Hopkins made a deed to Arcenia and Julius Boddie intending to convey this lot to them, but by some mistake, not discovered at the time, the particular description of the lot did not include No. 817. Arcenia and Julius Boddie continued in the exclusive and undisturbed occupancy of this house and lot claiming it as their own, paying taxes, making additions,

and holding adversely to Arcenia Hopkins and all others until the death of Arcenia Hopkins which occurred in 1925. Thereafter Arcenia and Julius Boddie continued in the exclusive possession of this house and lot, holding adversely to the heirs of Arcenia Hopkins, until the death of Arcenia Boddie in 1941. Julius Boddie had predeceased her. Thereafter plaintiffs James H. Boddie and Julia Boddie Galloway, the only children and heirs of Arcenia and Julius Boddie, continued in possession of the house and lot, either occupying it or renting it, and have continued to do so up to the present time. This suit to clarify the title was instituted 5 May, 1950.

There was no exception to the evidence or to the charge of the court to the jury. The defendants noted exception to the denial of their motion for judgment of nonsuit, but we think the evidence was sufficient to carry the case to the jury on the question of adverse possession and to support the verdict in favor of plaintiffs on this issue.

Plaintiffs' claim of title was based on adverse possession for 20 years under known and visible lines and boundaries. G.S. 1-40. The court properly submitted to the jury the question of whether the possession and occupancy of the house and lot by plaintiffs and those under whom they claim was permissive or adverse, and, if so, whether it was continually and exclusively maintained for the statutory period.

The evidence of the investiture of Arcenia Boddie and her husband in possession of this lot and of the execution of a deed intended by the owner to convey it to them, was properly submitted to the jury to be considered with the other evidence of continuous and exclusive occupancy in the support of plaintiffs' contention that possession thereafter by them and those to whom their right descended was adverse, and that it was maintained with intent to claim against the former owner and all other persons.

This was not a case of mistaken boundary, but on the contrary plaintiffs' evidence tended to show claim of title as owners of a particular lot ascertained under known and visible lines and boundaries. *Gibson v. Dudley,* 233 N.C. 255, 63 S.E. 2d 630. The court correctly instructed the jury as to the elements necessary to constitute adverse possession under the facts here in evidence, and properly submitted to them the question whether plaintiffs' possession was by permission of the owner or owners, or was adverse to them and to all other persons. *Locklear v. Savage,* 159 N.C. 236, 74 S.E. 347.

But the plaintiffs in making out their case were unable to show adverse possession for a sufficient length of time to ripen title before the death of Arcenia Hopkins in 1925, and could not in law under the circumstances of this case, tack that inadequate period to their subsequently continued possession after her death, for the reason that their title to the house and

lot not having ripened, upon the death of Arcenia Hopkins, in whom the title still remained, Arcenia and Julius Boddie became tenants in common with the other children of Arcenia Hopkins. *Brite v. Lynch, ante,* 182, 69 S.E. 2d 169.

Thereupon the possession of lot No. 817 by Arcenia and Julius Boddie and their successors by descent (*Boyce v. White,* 227 N.C. 640, 44 S.E. 2d 49) became in law the possession also of their cotenants, and it required 20 years adverse possession thereafter to constitute an ouster. *Crews v. Crews,* 192 N.C. 679 (686), 135 S.E. 784; *Bailey v. Howell,* 209 N.C. 712, 184 S.E. 476; *Winstead v. Woolard,* 223 N.C. 814 (817), 28 S.E. 2d 507.

However, we think there was evidence as found by the jury tending to show possession by Arcenia and Julius Boddie and by the plaintiffs James H. Boddie and Julia Boddie Galloway, their successors by descent, adverse to their cotenants and all others for more than 20 years, sufficient to ripen title against those who were not under disability at the time the statute began to run.

There was no exception to the charge or request for further or more specific instructions on any phase of the evidence, and appellants' assignments of error as to the judge's charge cannot be upheld. *S. v. Warren,* 228 N.C. 22, 44 S.E. 2d 207; *S. v. Brooks,* 228 N.C. 68, 44 S.E. 2d 482; *Metcalf v. Foister,* 232 N.C. 355, 61 S.E. 2d 77; *S. v. Reeves, ante,* 427. It may be noted that a majority of the heirs of Arcenia Hopkins have joined with James H. Boddie and Julia Boddie Galloway as parties plaintiff and are asking that these two be declared sole owners of Lot No. 817.

All the defendants are of full age except the four children of Dorsey Battle who was a son of Arcenia Hopkins. These are represented by a guardian *ad litem,* who, after investigation, has admitted the facts alleged in the complaint. None of the children of Arcenia Hopkins were under disability at the time the statute of limitations began to run against them. There is a well recognized rule that when the statute of limitations has begun to run no subsequent disability will interfere with it. *Cameron v. Hicks,* 141 N.C. 21 (34), 53 S.E. 728. "Where the statute of limitations begins to run in favor of one in adverse possession against an owner who dies leaving heirs who are minors, their disability of infancy does not affect the operation of the statute, since the disability is subsequent to the commencement of the running of the statute." 1 Am. Jur. 803, 43 A.L.R. 943 (note). However, this rule does not apply to Henderson Battle, a son of Arcenia Hopkins, who was and has been since infancy *non compos mentis.* The statute of limitations would not bar his right to an undivided interest in lot No. 817, nor would adverse possession ripen plaintiffs' title as against him. It is apparent, therefore, that Henderson

Battle's one-ninth interest in this lot has not been divested. Though his guardian *ad litem* admitted the facts alleged in the complaint, this would not adversely affect rights which the admitted facts disclose. It follows that plaintiffs James H. Boddie and Julia Boddie Galloway have acquired title to eight-ninths undivided interest in lot No. 817, and are tenants in common therein with Henderson Battle who is entitled to a one-ninth undivided interest in the fee thereof. The judgment must be modified accordingly.

The motion for judgment of nonsuit was properly denied. No material or prejudicial error has been made to appear, and the result will not be disturbed except in respect to the rights of Henderson Battle as herein pointed out. Judgment will be entered in accordance with this opinion.

Modified and affirmed.

STATE v. RANSOM MURPHY.

(Filed 30 April, 1952.)

1. Intoxicating Liquor § 9d—

Testimony of one witness that he bought a quantity of nontax-paid whiskey from defendant, and of another witness that she saw defendant sell the whiskey to the first witness, is sufficient to take the case to the jury on the charges of possession of whiskey for the purpose of sale and selling whiskey.

2. Criminal Law § 34b—

Defendant was charged with possession of whiskey for the purpose of sale, selling whiskey, and operating a public nuisance. *Held:* Under the facts of this case, the solicitor's statement to the effect that defendant's premises had been padlocked which restricted the charge "to the sale of whiskey," construed in its setting, eliminated the nuisance charge, but preserved both the charges relating to whiskey, and did not amount to an acquittal on the charge of possession for the purpose of sale.

3. Intoxicating Liquor § 9g: Criminal Law § 60b—

In this prosecution for possession of whiskey for sale, selling whiskey, and operating a nuisance, the solicitor elected not to proceed on the charge of operating a public nuisance. *Held:* The jury's verdict "guilty of possession for the purpose of sale and operating a public nuisance" supports judgment on the verdict for possession of whiskey for sale, and the verdict of "operating a public nuisance" will be disregarded as surplusage.

4. Criminal Law § 81c (3)—

The admission of evidence over objection is rendered harmless by the admission of similar testimony without objection.

5. Intoxicating Liquor § 9c—

Testimony tending to show the drunken demeanor of groups of persons seen loitering around defendant's place of business is competent as corroborative evidence of the State's witnesses to the effect that defendant sold one of them liquor.

APPEAL by defendant from *Stevens, J.*, and a jury, at December Term, 1951, of SAMPSON.

Criminal prosecution tried on appeal from the County Recorder's Court upon a warrant charging the defendant with (1) possession of nontax-paid whiskey for the purpose of sale, (2) selling whiskey, (3) aiding and abetting others in the commission of crimes, and (4) operating a public nuisance.

The court charged the jury that the defendant was being tried on two counts, (1) possession of nontax-paid whiskey for the purpose of sale and (2) selling whiskey.

Verdict: "Guilty of possession for the purpose of sale and operating a public nuisance."

From judgment on the verdict imposing penal servitude of eighteen months, the defendant appealed, assigning errors.

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

David J. Turlington, Jr., for defendant, appellant.

JOHNSON, J. The defendant's motion for judgment as of nonsuit, first made at the close of the State's evidence and renewed at the conclusion of all the evidence, was properly overruled. One witness testified he bought a Coca-Cola bottle full of nontax-paid whiskey from the defendant. Another witness testified she was present when the defendant sold this whiskey and saw him receive one dollar for it. This was sufficient to take the case to the jury on the counts in respect to possession and sale of whiskey.

The defendant contends the trial court erred in charging the jury that the defendant was being tried on two counts: (1) possession of nontax-paid whiskey for the purpose of sale, and (2) selling whiskey. The defendant urges that the Solicitor, by announcement previously made in open court, had elected to restrict the prosecution solely to the sale of whiskey, and that therefore the verdict of "guilty of possession for the purpose of sale and operating a public nuisance," was fatally at variance with the charge on which he was tried. Thus the defendant insists the judgment rendered below is unsupported by the verdict. Here the defendant seeks to invoke the rule that where, upon the trial of an indictment containing more than one count, the solicitor elects to try the case

upon one count only, such election is equivalent to a verdict of not guilty on the other counts. (*S. v. Sorrell,* 98 N.C. 738, 4 S.E. 630.)

These contentions of the defendant require that we examine and interpret the statement made by the Solicitor to see if it constitutes in law an election to restrict the charge to the sale of whiskey, as urged by the defendant. This is what the Solicitor said:

"I don't mind saying right in open court, not long after the warrant was issued,—I think the Sheriff will bear me out,—padlocking proceedings were instituted against him in my behalf and he was closed for a period of about six or seven months and by judgment of court it was agreed that he reopen his place,—signed by Judge Grady, holding court, —with the understanding his place would be properly operated and conducted from that time on, and I don't suppose it would be proper what took place that night; it wouldn't be competent in view of the fact that the place had been padlocked. That restricts the charge to the sale of whiskey."

The presiding Judge responded: "That is right, the sale of whiskey."

The record indicates that just prior to the Solicitor's statement the witness had testified he purchased from the defendant a Coca-Cola bottle full of whiskey; whereupon the Solicitor then shifted the line of examination and focused it on the nuisance count in the warrant by interrogating the witness in respect to the size and demeanor of the crowd present at the defendant's place of business the night in question. At this juncture the Solicitor in open court made the statement relied on by the defendant.

In its logical setting, the statement of the Solicitor would seem to be nothing more than a shorthand statement that, in deference to the padlock proceeding (G.S. 19-1 to 8), he was conceding the elimination of the nuisance charge and proceeding with the related whiskey charges; and the Judge's comment appears to be nothing more than a spontaneous shorthand confirmation of this concession which the Solicitor elected to make to the defendant. Such would seem to be the only logical interpretation of what was said, and particularly so in view of the fact that the presiding Judge thereafter submitted the case to the jury on both whiskey counts, and the defendant interposed no specific objection at the time. Besides, the record reflects nothing tending to show that the defendant was misled by the statement of the Solicitor or the comment of the presiding Judge. We hold, therefore, that there was no election to eliminate either of the whiskey counts, and that the verdict of "guilty of possession for the purpose of sale" was responsive to one of the issues submitted by the court. See *S. v. Gregory,* 153 N.C. 646, 69 S.E. 674; *S. v. Foy,* 233 N.C. 228, 63 S.E. 2d 170. It follows, then, that the verdict supports the judgment. *S. v. Epps,* 213 N.C. 709, 197 S.E. 580. The Solicitor's election to eliminate the nuisance charge was equivalent to a verdict of not

guilty on that count. *S. v. Sorrell, supra.* Thus the verdict of guilty of "operating a public nuisance" is surplusage, to be disregarded. *S. v. Perry,* 225 N.C. 174, 33 S.E. 2d 869.

Another group of exceptive assignments brought forward by the defendant relate to the reception in evidence, after the nuisance charge was dropped, of the testimony of Stedman Merritt, one of the State's witnesses, tending to show bad reputation of the defendant's place of business and that drunken people frequented and loitered about the place.

Conceding but not deciding that part of the testimony of the witness Merritt relating to the reputation of the defendant's place of business may have been inadmissible, nevertheless its reception was rendered harmless in view of the admission without objection of other similar testimony of the same witness. *S. v. Wells,* 221 N.C. 144, 19 S.E. 2d 243; *S. v. Godwin,* 224 N.C. 846, 32 S.E. 2d 609; *S. v. Summerlin,* 232 N.C. 333, 60 S.E. 2d 322.

The testimony tending to show drunken demeanor of groups of persons seen loitering around the defendant's place was clearly competent as corroborative of the State's witnesses who testified to the sale of whiskey. *S. v. Ingram,* 180 N.C. 672, 105 S.E. 3.

We have examined the rest of the defendant's exceptions and find them without substantial merit. The case seems to have been tried free of prejudicial error.

No error.

ELI HOYT ANGE, C. C. FLEMING AND ALBERT J. MARTIN, TRUSTEES OF THE JAMESVILLE CHRISTIAN CHURCH, v. L. W. ANGE.

(Filed 30 April, 1952.)

1. Constitutional Law § 10d: Appeal and Error § 3—

Where appellant is not the party aggrieved but the judgment operates *in rem* in affecting title to real property, the Supreme Court in the exercise of its supervisory power will take jurisdiction for the purpose of correcting an error in the judgment. Constitution, Art. IV, sec. 8.

2. Deeds § 14b—

Ordinarily, a clause in a deed will not be construed as a condition subsequent unless it contain language sufficient to qualify the estate conveyed and provide that in case of breach the estate will be defeated.

3. Same—

Conditions subsequent are not favored by the law.

4. Same—

Grantor conveyed land to a church by deed containing full covenants and warranties and in regular form except for the phrase at the end of the

habendum "for church purposes only." *Held:* The phrase simply expressed the motive which induced grantor to execute the deed and does not have the effect of limiting the estate conveyed, and the church may convey the fee simple to the property in a sale to provide funds for the erection of another church at a different locality in keeping with the growth of the congregation and changing conditions.

APPEAL by defendant from *Frizzelle, J.,* 29 January, 1952, MARTIN.

Controversy without action submitted upon an agreed statement of facts.

On 22 February, 1886, Thomas H. Burras and wife, Mary E. Burras, executed and delivered to the Trustees of the Christian Church in Jamesville, North Carolina, and their successors in office, a deed to ½ acre of land in the town of Jamesville. The deed contained full covenants and warranties and was regular in form, except the last line of the *habendum* clause contained this language, "for church purposes only." This deed was properly acknowledged, probated and recorded in the Public Registry of Martin County.

The Church went into possession of the land under the said deed and thereon erected a wooden structure which was used in the usual way for a place of worship and for church purposes. With the passing of time, the building became dilapidated and in a bad state of repair, and with the development of the town and community and the growth of the church, the building site became unsuitable for a church and the building inadequate for the needs of the growing congregation. In order to meet this situation and provide for the expanding usefulness of the church, another lot was acquired and a modern brick structure erected in keeping with the progress of the community and the needs of the congregation. After full deliberations and discussions, the present trustees of the church decided to sell the lot of land with the old building and negotiated a sale of the same to the defendant for the price of $2,000.00, which sum is to be used as a part of the payment upon the new church building. When a deed conveying a fee simple title was prepared and tendered to the defendant, he declined to accept the deed and pay the purchase price on the ground that the trustees of the church are unable to convey an indefeasible title because of the provision in the *habendum* clause in the deed under which the church acquired title to the property.

The matter was then submitted upon an agreed statement of facts as a controversy without action to the judge holding courts of the Second Judicial District. Pursuant thereto a judgment was entered holding and adjudging that the defendant is not required to accept the deed tendered. From this judgment the defendant excepted and appealed to the Supreme Court, assigning error.

Peel & Peel for plaintiffs, appellees.

Chas. H. Manning for defendant, appellant.

VALENTINE, J. It will be noted at the outset that the judgment rendered was in favor of the defendant and did not adversely affect any substantial right of his. Therefore, he was not the proper party to appeal from the judgment. Hence, the appeal is subject to dismissal. Even so, the proceeding is *in rem* and the judgment entered in the court below vitally affects the title to real property. For that reason we take jurisdiction for the purpose of correcting the error in the judgment. This we may do in the exercise of our supervisory power. N. C. Const., Art. IV, sec. 8; *S. v. Cochran,* 230 N.C. 523, 53 S.E. 2d 663.

The only question posed by this appeal is: Do the words "for church purposes only" appearing at the conclusion of the *habendum* clause have the effect of reducing the estate from an indefeasible title to some lesser estate? It will be noted that there is no language which provides for a reversion of the property to the grantors or any other person in case it ceases to be used as church property.

Ordinarily a clause in a deed will not be construed as a condition subsequent, unless it contains language sufficient to qualify the estate conveyed and provides that in case of a breach the estate will be defeated, and this must appear in appropriate language sufficiently clear to indicate that this was the intent of the parties. *Braddy v. Elliott,* 146 N.C. 578, 60 S.E. 507.

"A clause in a conveyance will not be construed as a condition subsequent unless it expresses, in apt and appropriate language, the intention of the parties to this effect (*Braddy v. Elliott,* 146 N.C. 578, 60 S.E. 507), and a mere statement of the purpose for which the property is to be used is not sufficient to create such condition. *Hall v. Quinn, supra* (190 N.C. 326, 130 S.E. 18); *Church v. Refining Co., supra* (200 N.C. 469, 157 S.E. 438); *Shields v. Harris,* 190 N.C. 520, 130 S.E. 189; *Shannonhouse v. Wolfe,* 191 N.C. 769, 133 S.E. 93; *University v. High Point,* 203 N.C. 558, 166 S.E. 511; *Tucker v. Smith,* 199 N.C. 502, 154 S.E. 826; *Lassiter v. Jones, supra* (215 N.C. 298, 1 S.E. 2d 845); *Cock v. Sink,* 190 N.C. 620, 130 S.E. 714.

"'A grantor can impose conditions and can make the title conveyed dependent upon their performance. But if he does not make any condition, but simply expresses the motive which induces him to execute the deed, the legal effect of the granting words cannot be controlled by the language indicating the grantor's motive.' 2 Devlin on Deeds, sec. 838; *St. James v. Bagley, supra* (138 N.C. 384, 50 S.E. 841); *Mauzy v. Mauzy,* 79 Va. 537." *Oxford Orphanage v. Kittrell,* 223 N.C. 427, 27 S.E. 2d 133; *Shaw University v. Ins. Co.,* 230 N.C. 526, 53 S.E. 2d 656.

Rigid execution of conditions subsequent are not favored by the law and are strictly construed because they tend toward the destruction of estates and in many instances are not reconcilable with good conscience. *Hinton v. Vinson,* 180 N.C. 393, 104 S.E. 897; *Church v. Refining Co., supra.*

It is clear from a fair interpretation of the entire deed under which the church took title to the property that the grantors intended by the last line of the *habendum* clause only to express their motive in deeding the property to the church. Upon the authorities herein cited, we reach the conclusion and so hold that the Christian Church of Jamesville acquired an indefeasible title to the property in question and has a right to convey the same in fee simple. It follows, therefore, that the judgment below must be

Reversed.

RALEIGH CEMETERY ASSOCIATION v. CITY OF RALEIGH.

(Filed 30 April, 1952.)

Municipal Corporations § 32: Taxation § 20—

Property held by a nonprofit cemetery association *is held* subject to assessment for public improvements notwithstanding the provisions of G.S. 105-296 (2) and the provision of the association's charter that its property be exempt from assessment and taxation, since the statutory and charter exemptions relate to *ad valorem* taxes, and further, an exemption from assessment for public improvements would in any event be unconstitutional. No burial lots had been sold and no interments made, and therefore whether public policy would forbide the sale of a grave lot is not presented.

APPEAL by defendant from *Hatch, Special Judge,* March Term, 1952, of WAKE.

The City Council of the City of Raleigh, a municipal corporation, pursuant to the provisions of Article 9, Chapter 160, of the General Statutes of North Carolina, has adopted a resolution approving a petition for local improvements to certain streets in the municipality including Madison and Monroe Drives, which real property of the plaintiff abuts. The plaintiff instituted this action to restrain the City from making a local improvement assessment against its property in view of the provision in its charter (ratified by the General Assembly of North Carolina 26 February, 1869), which provides: "That the real estate of said corporation, and the burial plots conveyed by said corporation to individual proprietors, shall be exempt from assessment and taxation, . . ."

The property involved consists of 31.3 acres of land owned by the plaintiff since 1888, and held by it for cemetery purposes, no part of

which has been divided into burial plots and no interments have been made thereon.

The court below entered judgment to the effect that the City of Raleigh, by virtue of the provision contained in the plaintiff's charter, was prohibited from confirming or collecting any public improvement assessment against the aforesaid lands of the plaintiff; but, since the defendant agreed to delay any further action, in the matter at issue, until a decision of this Court was obtained, and further agreed to abide by such decision, the injunctive relief sought by the plaintiff was not granted.

From the judgment entered the defendant appeals and assigns error.

James H. Pou Bailey and George F. Bason for plaintiff, appellee.

Paul F. Smith for defendant, appellant.

DENNY, J. The question posed for determination is simply this: Does the above provision in the plaintiff's charter exempt its real property, held for burial purposes, from local improvement assessments? The answer must be in the negative.

Article V, section 5, of our State Constitution, contains the following provisions: "Property belonging to the State or to municipal corporations, shall be exempt from taxation. The General Assembly may exempt cemeteries and property held for educational, scientific, literary, charitable or religious purposes; . . ."

The constitutional provision to the effect that property belonging to the State and to municipal corporations, shall be exempt from taxation, is self-executing and requires no legislation to make it effective. *Hospital v. Guilford County,* 218 N.C. 673, 12 S.E. 2d 265; *Hospital v. Rowan County,* 205 N.C. 8, 169 S.E. 805; *Andrews v. Clay County,* 200 N.C. 280, 156 S.E. 855. Even so, this Court has uniformly held that property belonging to municipal corporations is not exempt from assessment for local improvements. *Raleigh v. Public School System,* 223 N.C. 316, 26 S.E. 2d 591; *Raleigh v. Bank,* 223 N.C. 286, 26 S.E. 2d 573; *Hollingsworth v. Mount Airy,* 188 N.C. 832, 125 S.E. 925; *Tarboro v. Forbes,* 185 N.C. 59, 116 S.E. 81. In the last cited case, *Adams, J.,* in speaking for the Court, said: "Both the Constitution of North Carolina and the statute law provide that property belonging to the State or to municipal corporations shall be exempt from taxation. . . . But there is a distinction between local assessments for public improvements and taxes levied for purposes of general revenue. It is true that local assessments may be a species of tax, and that the authority to levy them is generally referred to the taxing power, but they are not taxes within the meaning of that term as generally understood in constitutional restrictions and exemptions. They are not levied and collected as a contribution to the main-

tenance of the general government, but are made a charge upon property on which are conferred benefits entirely different from those received by the general public. They are not imposed upon the citizens in common at regularly recurring periods for the purpose of providing a continuous revenue, but upon a limited class in return for a special benefit."

And *Devin, J.* (now *Chief Justice*), in speaking for the Court in *Raleigh v. Public School System, supra,* said: "While the Constitution of North Carolina provides that property belonging to the State or to municipal corporations shall be exempt from taxation (Art. V, sec. 5), assessments on public school property for special benefits thereto caused by the improvement of the street on which it abuts are not embraced within the constitutional prohibition."

In 48 Am. Jur., section 98, page 649, it is said: "The general rule that exemption from taxation does not mean exemption from a special or local assessment, applies with respect to cemetery property," citing *Hollywood Cemetery Asso. v. Powell,* 210 Cal. 121, 291 Pac. 397, 71 A.L.R. 310; *Adams County v. Quincy,* 130 Ill. 566, 22 N.E. 624, 6 L.R.A. 155; *Garden Cemetery Corp. v. Baker,* 218 Mass. 339, 105 N.E. 1070, Ann. Cas. 1916B 75; *Macon v. Patty,* 57 Miss. 378, 34 Am. Rep. 451; *Lima v. Cemetery Asso.,* 42 Ohio St. 128, 51 Am. Rep. 809; *Philadelphia v. Union Burial Ground Soc.,* 178 Pa. 533, 36 A. 172, 36 L.R.A. 263; *In re City of Seattle,* 59 Wash. 41, 109 Pac. 1052, Ann. Cas. 1912A 1047.

Real property set apart for burial purposes, in this State, is exempt from taxation, unless the property is held for personal or private gain. G.S. 105-296 (2). Hence, the property of the plaintiff is exempt from *ad valorem* taxes both under the provision contained in its charter and the general law. But, neither the provision in its charter nor the general law authorizes its exemption from a local improvement assessment made pursuant to and in conformity with the law authorizing such assessment. No land in a municipality is exempt from assessment for local improvements. Chapter 56, Section 8, Public Laws of 1915, C.S. 2710, now G.S. 160-85 (4); *Winston-Salem v. Smith,* 216 N.C. 1, 3 S.E. 2d 328; *Raleigh v. Public School System, supra.*

Moreover, in our opinion, the exemption from "assessment and taxation" granted to the plaintiff in its charter was intended by the Legislature to exempt its real estate, held for burial purposes, from assessment for *ad valorem* taxes only, and not from assessment for local improvements.

Any intent or attempt, on the part of the Legislature, to grant an exemption from any tax or assessment on real property, pursuant to the provisions of Article V, Section 5, of our Constitution, other than for *ad valorem* taxes, would, under our decisions, be without constitutional authorization. *Hospital v. Guilford County, supra; Odd Fellows v.*

Swain, 217 N.C. 632, 9 S.E. 2d 365; *Stedman v. Winston-Salem,* 204 N.C. 203, 167 S.E. 813.

We express no opinion on whether public policy would forbide the sale of a burial plot, in which an interment had been made, for the satisfaction of a local improvement assessment. This question is not presented on this appeal and any expression of opinion thereon would be *obiter dictum.* Nevertheless, for the reasons herein stated, the judgment of the court below is

Reversed.

RUDOLPH HODGES v. MALONE & COMPANY, INC.

(Filed 30 April, 1952.)

1. Automobiles § 24½e: Pleadings § 25—

The admission in the answer of the allegation in the complaint that at the time in question the truck of defendant was being driven by a named person as agent and employee of defendant *is held* sufficient to establish that the agent at the time was driving in the scope of his employment, relieving plaintiff of the necessity of introducing evidence on the issue of *respondeat superior.*

2. Appeal and Error § 39d—

Where the admissions in the pleadings establish that defendant's agent was acting in the course of his employment at the time in question, any error in the charge on the issue of *respondeat superior* could not be prejudicial to defendant.

3. Appeal and Error § 6c (5)—

An exception to the charge on the ground that it failed to comply with G.S. 1-180, without specifying and pointing out in what particular the charge was deficient, is ineffectual as a broadside exception.

4. Appeal and Error § 38—

The burden is upon appellant not only to show error but also that the alleged error was prejudicial.

APPEAL by defendant from *Godwin, Special Judge,* October 1951 Term, of HARNETT.

Civil action for personal injury and property damages.

The plaintiff, a minister of the Gospel, sustained personal injury and property damages when the automobile owned and operated by him collided with a truck owned by the defendant and operated by defendant's agent, servant and employee, Jan J. Hogue. The collision occurred on Highway 451 between Buies Creek and Lillington on 13 November, 1950, at about 7:00 p.m.

Just before the collision, defendant's truck with lights burning was driven in a westerly direction along said highway and was turned off the highway into a side road for a distance of about 15 feet, where the lights were cut off and the truck remained in that position for about two minutes. Defendant's truck was then backed out into and across said highway immediately in front of plaintiff's automobile, which was being operated in a westerly direction at a speed of 40 to 50 miles per hour. The lights on plaintiff's automobile were burning, but there were no lights on the truck as it was backed out across the highway. Plaintiff, upon seeing the truck directly in his path and across the highway, applied his brakes and attempted to stop, but unable to do so ran into the side of the truck, knocking the truck over, damaging the plaintiff's automobile, and resulting in serious and painful injury to the plaintiff.

The evidence of agency and scope of employment consisted of paragraph three of plaintiff's complaint and the corresponding paragraph of defendant's answer. Paragraph three of the complaint reads as follows: "3. That on the 13th day of November 1950 the defendant was the owner of a 1947 Chevrolet truck bearing N. C. License No. 50-909937, and which truck, at the times hereinafter stated, was being driven by Jan J. Hogue, as agent, servant and employee of the defendant." Paragraph three of the answer reads as follows: "3. That the allegations of paragraph 3 are admitted."

Plaintiff's proof of the negligence of the driver of defendant's truck and plaintiff's damages are not challenged by the defendant either by the introduction of evidence or in the argument in the brief.

Issues of negligence, contributory negligence and damages were submitted to and answered by the jury in favor of the plaintiff. From a judgment upon the verdict, the defendant appeals, assigning errors.

Wilson & Johnson for plaintiff, appellee.

Neill McK. Salmon for defendant, appellant.

VALENTINE, J. The defendant contends and strongly urges that the court below should have dismissed plaintiff's action by judgment as of nonsuit on the ground that he failed to show that the driver of the truck was acting within the scope of his employment at the time of the collision. This point is urged here with great earnestness, but the difficulty of defendant's position on this point lies in the fact that defendant has admitted in its answer that defendant's driver was its agent and acting within the scope of his duty and authority at the time of the collision. While this admission is not couched in direct and specific language, that the defendant's driver was acting within the scope of his authority at the time of the collision the defendant does admit in his pleadings and thereby

puts at rest forever the fact that the driver was operating the truck as defendant's agent at the time of and in respect to the exact transaction resulting in the collision out of which the injury arose. This is in effect an admission and the phraseology connotes action and conduct within the scope of the duty of his employment at the exact moment of the collision. It was competent but not necessary that the plaintiff put these two paragraphs of the pleadings in evidence. The allegation of agency and scope of employment were issuable facts which, when admitted, are put beyond the range of questioning and need not be introduced in evidence. *Royster v. Hancock,* 235 N.C. 110, 69 S.E. 2d 29.

The facts in this cause with respect to agency and scope of employment go far beyond the principle discussed in *Freeman v. Dalton,* 183 N.C. 538, 111 S.E. 863, and *Toler v. Savage,* 226 N.C. 208, 37 S.E. 2d 485, and *Carter v. Motor Lines,* 227 N.C. 193, 41 S.E. 2d 586. Clearly in the case at bar, it was unnecessary to submit to the jury the question of agency and scope of employment in view of the defendant's admissions. *Webb v. Theatre Corp.,* 226 N.C. 342, 38 S.E. 2d 84. A submission of this phase of the case to the jury therefore resulted in no harm to the defendant.

The defendant brings forward and discusses in his brief a number of other exceptions, most of which arise from exceptions to the charge of the court upon the doctrine of *respondeat superior.* In the view we take of the law relating to defendant's motion for judgment as of nonsuit, it becomes unnecessary to discuss such of defendant's exceptions as relate to agency and scope of employment. Ordinarily the doctrine of *respondeat superior* in cases of this nature are substantive features upon which the court is required to give instructions. Such a requirement is eliminated on the facts in this case. However, the court did charge with sufficient clarity that phase of the case. *Webb v. Theatre Corp., supra.* Under the facts in this case it would not have been reversible error if his Honor had entirely omitted a reference to the doctrine of *respondeat superior.* Upon the entire charge, it appears that the court sufficiently instructed the jury with respect to proximate cause, including a detailed definition thereof. *Gibbs v. Telegraph Co.,* 196 N.C. 516, 146 S.E. 209.

The defendant's broadside charge that his Honor failed to comply with the provisions of G.S. 1-180 is without merit because it fails to particularize, specify and point out in what particular way the court failed. *Price v. Monroe,* 234 N.C. 666, 68 S.E. 2d 283. On an examination of the whole charge, we are led to the opinion that the charge fairly embraced all elements of the evidence necessary with the proper application of the law. Viewing the entire charge and its parts contextually, his Honor appears to have sufficiently met the requirements of G.S. 1-180, both with respect to the law, the evidence and the instructions prayed for by the defendant. A complete perusal of the charge and an analysis of

the jury's verdict on the issues leads to the conclusion that the charge was sufficiently clear and enlightening to aid the jury in reaching a just verdict.

The burden always rests upon the appellant not only to show error in the record, but he must go further and point out some manner in which his substantial rights were materially affected by the errors of the trial judge. *Call v. Stroud,* 232 N.C. 478, 61 S.E. 2d 342; *Stewart v. Dixon,* 229 N.C. 737, 51 S.E. 2d 182; *Collins v. Lamb,* 215 N.C. 719, 2 S.E. 2d 863. After an examination of the entire record, we reach the conclusion that the case was fairly tried and find no sufficient grounds to disturb the results of the trial.

No error.

I. J. LIVINGSTON v. ALICE F. LIVINGSTON.

(Filed 30 April, 1952.)

Divorce and Alimony § 15—

Pending the husband's suit for absolute divorce on the ground of two years separation a consent judgment was entered awarding the wife a specified sum each month during her natural life or until she remarries. Thereafter decree of absolute divorce was entered. *Held:* The decree of absolute divorce terminated all rights arising out of the marital relationship, including defendant's right to alimony and counsel fees, and defendant may not seek to enforce the consent order as an alimony judgment. G.S. 50-11.

APPEAL by plaintiff from *Hatch, Special Judge,* 9 February, 1952, WAKE.

Civil action for absolute divorce on the grounds of two years separation under G.S. 50-6.

On 23 November, 1945, plaintiff instituted this action by the issuance of summons and the filing of his complaint. The original summons was returned on 24 November, 1945, endorsed as follows: "After due and diligent search the defendant, Alice F. Livingston, is not to be found in Wake County." On 8 January, 1946, plaintiff caused to be issued an *alias* summons, which was personally served upon the defendant on 10 January, 1946.

Plaintiff alleges that on 12 September, 1943, he, at the request and demand of the defendant, separated himself from the defendant with the firm and avowed intention at the time of said separation of remaining separate and apart from her for the balance of his natural life. No answer was filed to the complaint. On 20 March, 1946, a paper writing was executed by plaintiff and defendant signed by Judge W. C. Harris

and filed as a consent order in this case. The said paper writing provided for the payment to the defendant for her support and maintenance the sum of $80.00 on the first day of each month during her natural life or until she remarries. There was included in said paper writing as a part of the adjudication a provision that the consent order should not be affected by a divorce decree based on the ground of separation.

At the regular April 1946 Term of Wake Superior Court, this action was tried before a jury upon the usual issues, all of which were answered in favor of the plaintiff. Thereupon judgment of absolute divorce was entered dissolving the bonds of matrimony theretofore existing between the plaintiff and the defendant. This judgment made no reference to the consent order.

On 29 January, 1952, defendant served upon plaintiff a written notice directing and notifying him to appear on Saturday, 9 February, 1952, before the Honorable William T. Hatch, Special Judge, in Chambers in Wake County, to show cause for his failure to comply with the order entered on 25 March, 1946. It is assumed that this notice had reference to the consent order entered on 20 March, 1946, although it refers to an order of 25 March, 1946.

Pursuant to said notice the plaintiff appeared and through his counsel contended that the said order was of no force and effect as an alimony judgment and that he was not required to show cause for failure to comply therewith. After arguments of counsel, Judge Hatch signed an order finding as a fact that under the terms of the consent order the plaintiff was in arrears in the payments to defendant in the amount of $240.00. The court further found as a fact that "it is reasonable and proper for the plaintiff to pay to the defendant at this time the sum of $100.00 on account, and pay the sum of $50.00 to Douglass & McMillan, attorneys for the defendant, as attorney fees for the defendant." His Honor then ordered the plaintiff to pay to the defendant $100.00 on account and attorney fees in the amount of $50.00 to defendant's attorneys.

From this order, plaintiff excepted and appealed to the Supreme Court, assigning errors.

Clem B. Holding for plaintiff, appellant.
Douglass & McMillan for defendant, appellee.

VALENTINE, J. The only question presented by this appeal is the validity of the consent order as an alimony judgment and the allowance of counsel fees based thereon.

In this jurisdiction, both temporary and permanent alimony may be awarded in a proceeding for alimony without divorce prosecuted under authority of G.S. 50-16, or in an action for divorce from bed and board

under G.S. 50-7. In actions for absolute divorce, temporary alimony may be awarded during the pendency of the litigation under G.S. 50-15.

G.S. 50-11 provides, "After a judgment of divorce from the bonds of matrimony, all rights arising out of the marriage shall cease and determine, and either party may marry again unless otherwise provided by law: Provided, . . . that a decree of absolute divorce upon the ground of separation for two successive years as provided in 50-5 or 50-6 shall not impair or destroy the right of the wife to receive alimony under any judgment or decree of the court rendered before the commencement of the proceeding for absolute divorce." *Stanley v. Stanley,* 226 N.C. 129, 37 S.E. 2d 118.

At the threshold of this appeal we are met with the fact that the order upon which the notice to show cause was issued *was not rendered before the commencement of the present action,* but was entered while this suit was pending and is filed as a part of the judgment roll. The defendant did not pursue the statutory authority for the establishment of her rights to collect alimony from her husband, but attempted to secure the same results by the filing of a consent order in her husband's pending suit for absolute divorce. A decree providing for permanent alimony as an outcome of an action for absolute divorce is in violation of public policy and contrary to the statutory laws of North Carolina. *Stanley v. Stanley, supra.*

A dissolution of the bonds of matrimony existing between the plaintiff and the defendant were made absolute and complete by the judgment of the court in this action, and all rights arising out of the marital relationship, including defendant's right to permanent alimony and counsel fees, were thereby completely destroyed. *Duffy v. Duffy,* 120 N.C. 346, 27 S.E. 28; *Hobbs v. Hobbs,* 218 N.C. 468, 11 S.E. 2d 311.

We are, therefore, led to the conclusion that his Honor was without authority to enter the order appealed from, and the judgment below is

Reversed.

T. L. GARLAND v. HEATH PENEGAR, TRADING AND DOING BUSINESS AS PENEGAR MOTOR COMPANY.

(Filed 30 April, 1952.)

1. Automobiles § 6f—

Evidence tending to show that the dealer represented the car to be in good condition and that it was a "new demonstrator" driven only a thousand miles, but that in fact the car had been sold to a person who drove it eight thousand miles and then turned it back to the dealer, and that it was not in good condition, *is held* sufficient to be submitted to the jury on the issue of actionable fraud and deceit in the sale of the car.

2. Appeal and Error § 39f—

In an action for fraud in the sale of an automobile, error in the charge in failing to specifically instruct the jury that the measure of damages is the difference between the real value of the car at the time it was purchased and the value it would have had if it had been as represented, *held* not prejudicial in view of the fact that the parties agreed as to the value of the car if it had been as represented, and the fact that the rule for the measurement of damages was properly given in stating the contentions and was apparently fully understood by the jury.

3. Appeal and Error § 38—

Appellant has the burden not only of showing error but that the alleged error was prejudicial.

APPEAL by defendant from *Clement, J.*, November Term, 1951, of MECKLENBURG. No error.

This was an action to recover damages for fraud in the sale of an automobile.

Plaintiff alleged and offered evidence tending to show that the defendant, an automobile dealer, falsely and fraudulently represented that the automobile then being sold him was a "new demonstrator," that it had been driven only 1,000 miles as the speedometer apparently indicated, and that the automobile was in perfect condition. Plaintiff testified that instead of being as represented the automobile was not a new one but had been previously sold to another person who drove it 8,000 miles and then turned it back to the defendant. Plaintiff also testified the automobile was not in good condition, and that he had incurred trouble and expense in repairs.

It was stipulated at the trial that the sale price of the automobile in question was $2,434.60. Plaintiff testified the fair market value of the automobile in the condition it was when he bought it was $1,800. He further testified that it was by accident he discovered the automobile had been previously sold and driven 8,000 miles.

The defendant denied the allegations of fraud and offered evidence in contradiction of plaintiff's claim.

On issues submitted the jury returned verdict for plaintiff, finding that defendant made the false and fraudulent representations alleged, and that plaintiff was induced thereby to purchase the automobile, and assessed damages therefor in the sum of $634.60.

On plaintiff's second cause of action as to defendant's charges for certain automobile parts and labor, the verdict was in favor of the defendant.

From judgment on the verdict defendant appealed.

Shannonhouse, Bell & Horn for plaintiff, appellee.

J. C. Sedberry for defendant, appellant.

DEVIN, C. J. It is apparent from an examination of the record that the plaintiff offered sufficient evidence to carry the case to the jury on the issue of actionable fraud and deceit, and that defendant's motion for judgment of nonsuit was properly denied. *Whitehurst v. Ins. Co.,* 149 N.C. 273, 62 S.E. 1067; *Ward v. Heath,* 222 N.C. 470, 24 S.E. 2d 5; *Gray v. Edmonds,* 232 N.C. 681, 62 S.E. 2d 77.

The defendant assigns error in the court's charge to the jury, particularly on the issue of damages. It is urged that the court failed properly to instruct the jury as to the measure of damages and failed to apply the rules of law applicable to the evidence in the case as required by G.S. 1-180. While the form and manner in which the instructions were given were open to criticism, we are unable to reach the conclusion that the defendant was prejudiced thereby. We gather the impression from reading the court's charge as set out in the record, and the jury's response thereto, that they sufficiently understood that the measure of damages was the difference between the real value of the automobile as and when purchased and the value it would have had if it had been as represented. *May v. Loomis,* 140 N.C. 350, 52 S.E. 728; *Kennedy v. Trust Co.,* 213 N.C. 620, 197 S.E. 130; *Hutchins v. Davis,* 230 N.C. 67, 52 S.E. 2d 210. It was stipulated that the sale price of the automobile was $2,434.60, and the plaintiff testified its market value—its real value—in the condition it was when he purchased it was $1,800. The jury accepted the plaintiff's estimate and wrote in answer to the issue $634.60.

While the rule for the admeasurement of damages for fraud in the sale of personal property should have been given as a specific charge, yet when it was stated with substantial accuracy as a contention, and was apparently fully understood and acted upon by the jury, we are unable to perceive resultant harm to the defendant, or that the verdict was improperly influenced. The burden is upon the appellant not only to show error but also to make it appear that the result was materially affected thereby to his hurt. *Call v. Stroud,* 232 N.C. 478, 61 S.E. 2d 342; *Stewart v. Dixon,* 229 N.C. 737, 51 S.E. 2d 182; *Collins v. Lamb,* 215 N.C. 719, 2 S.E. 2d 863.

The defendant noted exception to the statement by the court in his charge to the jury that the plaintiff said the market value of the car "if it had been as he thought it was when he bought it" was $2,434.60. This exception is without merit. The court was not stating the rule for the measure of damages but reciting the testimony of the plaintiff. Besides the figures $2,434.60 seem to have been agreed to.

After an examination of the entire record we reach the conclusion that no sufficient grounds have been shown to disturb the result of the trial.

No error.

F. J. THOMPSON v. J. S. DEVONDE.

(Filed 30 April, 1952.)

1. Negligence § 4f—

A patron of a rooming house who undertakes to make a trip to the basement at the request of the operator of the establishment is at least an invitee, and the operator owes him the duty to keep the premises in a reasonably safe condition and to warn him of any hidden peril or danger.

2. Same—

Evidence tending to show that a patron of a rooming house knew the condition of the basement steps, but that thereafter defendant removed the light cord extending over the stairway and that about three inches of the tread had been broken off of the step near the place where a person would normally stop to turn on the light, and that plaintiff was not warned of this danger and when he stopped to turn on the light and failed to find the cord he took a step down and "there wasn't any step there" *is held* sufficient to be submitted to the jury on the question of defendant's negligence and proximate cause.

3. Same—

Whether an invitee was guilty of contributory negligence when, after failing to find the cord on the steps to turn on the light necessary to illuminate the remaining steps, he attempted to proceed down the stairway, *is held* a question for the jury upon evidence tending to show that the steps had become more dangerous subsequent to his knowledge of their condition.

APPEAL by defendant from *Burgwyn, Special Judge,* January Extra Civil Term, 1952, MECKLENBURG. No error.

Civil action to recover damages for personal injuries.

Defendant operates a rooming house and permits his tenants or roomers to use space in the basement of his home for the storage of excess baggage. The steps to the basement were worn, chipped, and uneven. Defendant maintained a light near the head of the steps which, when turned on, would light the steps about one-half the way down. He also maintained a light cord, extending over the stairway, to turn on the basement light, before a person descending the stairway passed out of the range of the hall light. Plaintiff had been in the basement a number of times and was familiar with the condition of the steps and the lighting arrangements.

About a week before the mishap about which plaintiff complains, defendant removed the light cord. He also broke off about three inches of one of the treads about two or three steps from where one would normally turn on the basement light.

On 30 March, 1951, at approximately 10:30 p.m., defendant had a water hose attached to a faucet in the basement and extending up the

basement stairway on out the front door. Plaintiff, at the request of defendant, started to roll up the hose and return it to the basement. He turned on the light in the hall and proceeded down the stairway. He reached for the cord to turn on the basement light, and "there wasn't no cord there." He then made another step and "stepped on a step that wasn't solid" and lost his balance and fell. "I could judge a step, and I stepped for the next one and there wasn't any step there."

Plaintiff suffered serious bodily injuries.

Defendant failed to notify plaintiff of the removal of the cord to the basement light and of the broken tread, of which plaintiff had no knowledge at the time he started down the stairway.

In the trial below appropriate issues were submitted to the jury and answered in favor of plaintiff. From judgment on the verdict defendant appealed.

Alvin A. London for plaintiff appellee.

Tillett, Campbell, Craighill & Rendleman for defendant appellant.

BARNHILL, J. The defendant relies solely upon his exception to the refusal of the court below to dismiss the action as in case of involuntary nonsuit. The exception is untenable and must be overruled.

The plaintiff started down the basement steps on a mission for the defendant. Hence he was at least an invitee, *Pafford v. Construction Co.*, 217 N.C. 730, 9 S.E. 2d 408; *Coston v. Hotel,* 231 N.C. 546, 57 S.E. 2d 793, and defendant owed him the duty to keep the premises in a reasonably safe condition and warn him of any hidden peril or unsafe condition in the stairway. *Schwingle v. Kellenberger,* 217 N.C. 577, 8 S.E. 2d 918; *Brown v. Montgomery Ward & Co.,* 217 N.C. 368, 8 S.E. 2d 199; *Pridgen v. Kress & Co.,* 213 N.C. 541, 196 S.E. 821; *Anderson v. Amusement Co.,* 213 N.C. 130, 195 S.E. 386.

While it is true the plaintiff had knowledge of the general conditions of the stairway, those conditions had been changed for the worse by the defendant. The light cord had been removed and a part of the tread of one of the steps had been broken off. Of the hidden peril and unsafe condition thus created, defendant failed to give notice or warning. The testimony—indeed the defendant's frank admission—to this effect is sufficient evidence of negligence to require the submission of appropriate issues to the jury.

But defendant contends there is no evidence the broken tread caused plaintiff's fall. There is, however, evidence that the broken tread was within two or three steps of the place a person would normally stop to turn on the light; that plaintiff tried to find the light cord and then took a step down, and "there wasn't any step there." This is sufficient to

support an inference that the lack of light and the broken tread were the proximate cause of plaintiff's fall.

Under the circumstances here disclosed, whether it was an act of negligence on the part of plaintiff to proceed down the stairway after he failed to find the cord to the basement light was a question of fact for the jury. We could not so hold as a matter of law. He proceeded down the stairway at the request of plaintiff. He knew the general conditions but had not been warned of the newly created danger. He had the right, therefore, to assume the steps were in the same condition as when he last used them. These facts take this case out of the line of decisions represented by *Batson v. Laundry Co.*, 205 N.C. 93, 170 S.E. 136; *Clark v. Drug Co.*, 204 N.C. 628, 169 S.E. 217, and *Benton v. Building Co.*, 223 N.C. 809, 28 S.E. 2d 491, cited and relied on by defendant.

In the trial below we find

No error.

G. N. CHILDRESS, TRADING AND DOING BUSINESS AS G. N. CHILDRESS TRANSPORTATION COMPANY, v. JOHNSON MOTOR LINES, INC.

(Filed 7 May, 1952.)

1. Courts § 15—

In an action instituted in this State involving a collision in the State of Virginia, the substantive law of Virginia applies while the adjective law of North Carolina, including the rules of evidence and the *quantum* of proof necessary to make out a *prima facie* case, controls.

2. Automobiles §§ 13, 18h (2)—Evidence held sufficient for jury on question of defendant's negligence in invading traffic lane reserved exclusively for vehicles traveling in the opposite direction.

The accident in suit took place on a three lane highway in the State of Virginia between plaintiff's vehicle traveling north and defendant's vehicle traveling south. At the place of the collision the highway was divided into three lanes and marked so that only the east lane was allotted to vehicles traveling north while the west lane and the center lane were reserved for vehicles traveling south. Plaintiff's evidence, considered in the light most favorable to him, was sufficient to sustain the inference that plaintiff's vehicle was being driven in its right hand lane and that defendant's vehicle was driven out of its right hand lane into the center lane in order to pass a car in front of it, but that it was driven too far to the left so that it protruded into plaintiff's traffic lane and collided with the left side of plaintiff's vehicle opposite the cab. *Held:* The evidence was sufficient to be submitted to the jury on the question of defendant's negligence *per se* in the violation of the statutes of the State of Virginia regulating travel on three lane highways, and defendant's motions to nonsuit were properly overruled.

3. Automobiles § 18i—

It is error for the court to read to the jury the reckless driving statute in force in the state in which the accident occurred without charging the jury in regard to the maximum speeds referred to in the statute, and when all the evidence tends to show that defendant's vehicle was not exceeding the speed limit of that state, although its speed was in excess of the maximum allowable speed for such vehicles in this State, the error must be held prejudicial.

4. Trial § 31b—

It is error for the court to charge the jury in regard to abstract propositions of law which are not pertinent to the facts in evidence.

5. Automobiles § 18i—

It is error for the court to instruct the jury in regard to safety statutes relating to principles of law which are not based upon or pertinent to any facts in evidence.

6. Injunctions § 4f—

While the courts of this State will not seek to restrain the prosecution of an action in the court of another state by order directed to such court or any of its officers, our courts may restrain a party from prosecuting an action in another state when it is made to appear that such action will unduly and inequitably interfere with the progress of litigation here or with the establishment of rights properly justiciable in our courts, particularly where the parties are residents of this State.

7. Same—

Subsequent to the institution of an action here involving the rights of the parties growing out of a collision in another state, defendant in the action here instituted suit against plaintiff in a court of such other state to determine the liabilities of the parties arising out of the same collision. *Held:* Our State court, upon supporting findings, properly issued an order restraining defendant from prosecuting such other suit.

8. Appeal and Error § 6c (2)—

An exception to the signing of an order is insufficient to bring up for review the findings of fact upon which the order is predicated, and the order will be upheld when it is supported by the findings.

APPEAL by defendant from *Burgwyn, Special Judge,* and a jury, at November Special Term, 1951, of LEE.

Civil action to recover for damage to property resulting from a collision of two tractor-trailer units, in which the defendant pleads contributory negligence and also sets up a counterclaim.

The plaintiff, a resident of Lee County, North Carolina, is engaged in operating a fleet of large tractor-trailer units for the transportation of freight for hire. The defendant, a corporation, with office and principal place of business in the City of Charlotte, is engaged in a similar business.

The collision occurred on U. S. Highway No. 1 about a mile and a half north of Dinwiddie Courthouse, Virginia. The two vehicles were meet-

ing and were about to pass. The plaintiff's tractor-trailer unit was traveling northward, the defendant's southward.

As the two vehicles approached each other, the defendant's tractor-trailer, which had been following behind a passenger type automobile, pulled out to its left to overtake and pass the automobile, but before completing the passing movement the collision occurred. Both vehicles were badly wrecked. They turned over, immediately caught fire, and became enveloped in flames. Both drivers, and also the defendant's relief driver, died almost instantly, and both tractor-trailer units and their cargoes were completely demolished and burned up. This action relates only to issues of property damage.

The defendant's motion for judgment as of nonsuit, first made when the plaintiff rested his case and renewed at the conclusion of all the evidence, was overruled, after which the issues of negligence, contributory negligence, and damages arising upon the pleadings were submitted to the jury. The issues of negligence and contributory negligence were answered in favor of the plaintiff and the jury awarded the plaintiff damages of $11,925 for the tractor-trailer, and $24,439.78 for loss of the cargo. Thereupon judgment was entered for the plaintiff in the sum of $36,364.78.

From judgment so entered, the defendant appealed, assigning errors.

Gavin, Jackson & Gavin and Pittman & Staton for plaintiff, appellee.

Smith, Leach & Anderson, W. M. Seymour, and J. G. Edwards for defendant, appellant.

JOHNSON, J. The defendant places chief stress upon exceptions which relate (1) to the refusal of the trial court to allow the motion for judgment as of nonsuit, (2) to the charge of the court, and (3) the order of injunction restraining the prosecution of an action in Virginia involving the same subject matter.

It is admitted that the collision occurred in Virginia. Therefore the questions of liability for negligence must be determined by the law of that State. The rule in such cases is that matters of substantive law are controlled by the law of the place—the *lex loci,* whereas matters of procedure are controlled by the law of the forum—the *lex fori.* Thus the methods by which the parties are required to prove their allegations, such as the rules of evidence and the *quantum* of proofs necessary to make out a *prima facie* case, are matters of procedure governed by the law of the place of trial. *Clodfelter v. Wells,* 212 N.C. 823, 195 S.E. 11. Therefore, the question whether the evidence offered was sufficient to carry the case to the jury over the defendant's motion for judgment as of nonsuit is to be determined under application of the principles of law prevailing in

this jurisdiction. *Clodfelter v. Wells, supra; Harrison v. Atlantic Coast Line R. Co.*, 168 N.C. 382, 84 S.E. 519.

1. *The refusal to nonsuit.*—The controlling background facts are these: The highway is straight for a considerable distance both north and south of the scene of the collision, but is over rolling country with crests and hills. The highway runs approximately north and south. It is 30 feet wide, paved with black asphalt materials, and divided into three traffic lanes. South of the point of collision these lanes are separated and marked by broken white lines, each lane being about ten feet wide. Beginning at a point about 235 feet south of the point of collision, the westernmost traffic lane (the one on the extreme left looking north) is separated from the middle lane by a solid white line and a broken white line, constituting a double line. The solid line runs parallel with the broken white line northwardly for a distance of about 100 feet, at which point the solid line runs diagonally to the east and north across to the easternmost and outside traffic lane (looking north), continuing in a solid white line from the point of collision up to the crest of a hill north of the scene of the collision. This solid line is east (to the right looking north) of the broken white line which parallels the solid line from the point where the solid line begins to run diagonally across the highway and until the solid white line reaches the easternmost traffic lane. After the solid line reaches the easternmost traffic lane, it is paralleled by another solid white line from that point up to the crest of the hill north of the scene of the collision.

In force at the time of the collision were these pertinent rules of the road, as prescribed by the Code of Virginia, 1950 (Michie):

"46-222. SPECIAL REGULATIONS APPLICABLE ON STREETS AND HIGHWAYS LANED FOR TRAFFIC.—Wherever any highway has been divided into clearly marked lanes for traffic, drivers of vehicles shall obey the following regulations:

"(1). A vehicle shall normally be driven in the lane nearest the right-hand edge or curb of the highway when such lane is available for travel except when overtaking another vehicle or in preparation for a left turn or as permitted in paragraph (4) of this section;

"(2) A vehicle shall be driven as nearly as is practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety;

"(3) Upon a highway which is divided into three lanes a vehicle shall not be driven in the center lane except when overtaking and passing another vehicle or in preparation for a left turn or unless such center lane is at the time allocated exclusively to traffic moving in the direction the vehicle is proceeding and is signposted or marked to give notice of such allocation;

"(4) (not applicable to instant case).

"(5) Wherever a highway is marked with double traffic lines consisting of a solid line immediately adjacent to a broken line, no vehicle shall be driven to the left of such solid line if the solid line is on the right of the broken line;

"(6) Wherever a highway is marked with double traffic lines consisting of two immediately adjacent solid lines, no vehicle shall be driven to the left of such lines."

Therefore, according to the motor vehicle laws of Virginia and the manner in which the highway admittedly was marked and laned for traffic at the scene of the collision, the easternmost lane was reserved for use of northbound traffic and the center and westernmost lanes were reserved for the use of southbound traffic only.

Thus at the point of collision it was unlawful, and therefore negligence *per se* (*Crist v. Fitzgerald,* 189 Va. 109, 52 S.E. 2d 145), for the driver of a northbound vehicle to cross to his left over the solid line, or for the driver of a northbound vehicle to travel into and upon the center traffic lane; whereas, for some distance north and south of the point of collision it was lawful and permissible for the driver of a southbound vehicle, in the exercise of due care, to travel into and upon the center traffic lane for the purpose of overtaking and passing a southbound vehicle traveling in the westernmost lane.

The plaintiff's tractor-trailer unit was proceeding north. The defendant's unit, going south, was overtaking and attempting to pass to the left of a Chevrolet automobile which was proceeding southwardly in the same direction. The collision occurred before the passing movement was completed. All three vehicles were involved in the collision.

The plaintiff alleges and contends that his tractor-trailer was where it rightly belonged—within the easternmost traffic lane, reserved for northbound traffic, and that the driver of defendant's vehicle, in overtaking and pulling out to pass the Chevrolet automobile, negligently swung too far to his left into the easternmost traffic lane and struck the plaintiff's tractor-trailer, thus causing the collision in suit.

The defendant, on the other hand, alleges and contends that its driver in so passing the Chevrolet automobile remained within the confines of the middle lane which at that point the defendant's driver had the right to use for passing purposes, and that the plaintiff's driver suddenly swerved across the forbidden solid line to his left and struck the defendant's tractor-trailer unit over in the middle lane.

An examination of the record discloses that the evidence is sharply conflicting on the crucial question of whether the collision occurred inside the easternmost lane reserved for northbound traffic. However, as bear-

ing on the question of nonsuit, these phases of the evidence, tending to support the plaintiff's theory of the case, come into focus:

(1) The witness J. S. Baker, who was driving another tractor-trailer unit belonging to the plaintiff, testified that at the time of the collision he was just ahead of the plaintiff's vehicle that was in the collision. He said he left Sanford the morning of the collision with Neville, the driver of the tractor involved in the collision; that after various stops along the way they reached Dinwiddie, Virginia, in the late afternoon; that he got ahead of Neville coming out of Dinwiddie, and drove along northwardly therefrom at a speed of from 40 to 45 miles per hour; that Neville did not try to pass him, but drove along, keeping behind "a good 300 feet or more," to the scene of the collision. He said: "At various times I was looking in the mirror at what was behind me . . . Neville was traveling directly behind me . . . in the northbound lane of traffic. . . . I could see his lights in my rear-view mirror. . . . I was as far on the right-hand side as I could get and his right-hand light was in the view of my mirror, where I could see in the mirror." The witness Baker further stated that at a point about a mile and a half north of Dinwiddie he met the defendant's tractor-trailer unit. It was immediately behind a Chevrolet automobile. He said: "At the time I met the Johnson Motor Lines truck, Mr. Neville was right behind me." The defendant's truck "was traveling a very close distance, . . . 12 or 15 feet from . . . the Chevrolet car. . . . As I got past the car and truck coming over the hill, the Johnson truck swings to the middle lane in order to pass the car. . . . That's when the wreck taken place. . . . I saw the truck when it pulled out to pass the automobile. . . . It made a left turn to the middle of the road. . . . He was going toward the middle lane of the road going out from behind the automobile in order to get in the middle lane to pass." At that time he said Neville was traveling in the "northbound lane of traffic directly behind me. I could see his lights in my rear-view mirror. . . . I was as far on the right-hand side as I could get and his right-hand light was in the view of my mirror, where I could see in the mirror. . . . I looked in the mirror and seen the truck and when I looked back to see if he was doing all right, I looked in the mirror and the thing was on fire. . . . I can't say I seen anything that happened. I was looking in my mirror when the fire went up. I couldn't see the trucks when they went together. . . . I could not completely see over . . . the hill where the fire or collision took place,—riding in a truck like this I could not completely see across the hill and down to the bottom on the other side. . . . I could see the truck. I could not see down to the ground, but I could see any moving vehicle that was traveling in that lane in the mirror. . . . When I saw the flash of fire, I wasn't exactly to the bottom of that hill north of the accident; I was nearing the bottom; I was going down the

slope of the hill, which is not too much of a grade. . . ." The last mile or mile and a half "he (Neville) stayed right directly behind me and I was on my right-hand side of the road all the time. . . . Neville turned his marker lights on the truck after we left the store at Dinwiddie. The only thing I was going by was the marker lights on the trailer and the bumper lights on each one of his headlights."

(2) Jesse Holland, the driver of another tractor-trailer unit belonging to the plaintiff Childress, testified he was following along behind the Neville unit that was in the collision. He said: "As we left . . . Dinwiddie, I was just a good traveling distance behind the nearest truck. . . . Both of the trucks were in my view. As I approached the point of the accident I could see the truck in front of me. He was on his right-hand side of the road in the right-hand lane. . . . (Two cars were between the witness and the Neville unit which was in the collision.) I was keeping a good safe distance behind these cars, at least 400 or 500 feet, . . . No, I did not see the accident. . . . I just saw the flash of the fire. At the time I saw the flash my truck was right in a hollow right back of him. Immediately before the flash, "I could see better than the top of his (Neville's) trailer, half way." It was "on the right-hand side, the right-hand lane. . . . It seemed to raise up and fall over kind of off the road, bias the road, you might say. . . . No it wasn't dark enough to turn on the headlights. We had on clearance lights. I could see the clearance lights on the trailer. From the top to about half way down the body. . . ."

(3) There was evidence tending to show that the points of impact on the two tractors were as follows: The left-hand front fender and wheel of the defendant's tractor made contact with the "left corner of the cab" of the plaintiff's tractor.

(4) The Chevrolet car which the defendant's driver was attempting to pass appears to have been hit on the left side, opposite the rear wheel and door.

(5) There was evidence that the defendant's driver was about the defendant's business at the time of the collision.

This evidence when considered with the rest of the evidence, in its light most favorable to the plaintiff, as is the rule on motion to nonsuit (*Donlop v. Snyder,* 234 N.C. 627, 68 S.E. 2d 316), was sufficient to sustain the inference that the plaintiff's vehicle was in the easternmost traffic lane where it rightly belonged at the time of the collision and that plaintiff's loss and damage was proximately caused by the negligence of the driver of the defendant's tractor in swinging too far to his left in overtaking and attempting to pass the Chevrolet car. See *Robinson v. Transportation Co.,* 214 N.C. 489, 199 S.E. 725; *Gladden v. Setzer,* 230 N.C. 269, 52 S.E. 2d 804; *Wallace v. Longest,* 226 N.C. 161, 37 S.E. 2d 112; 61 C.J.S., Motor Vehicles, Sec. 518.

It follows, then, that the motion for judgment as of nonsuit was properly overruled.

2. *The Charge of the Court.*—The defendant urges that the court erred in failing to declare and explain the statutes of Virginia regulating the speed of motor trucks on public highways as required by the provisions of G.S. 1-180 as amended. Here the defendant insists that the speed of its tractor-trailer was a substantive phase of the case on which it was the duty of the trial court to charge fully and completely.

It is specifically alleged in the complaint that the defendant "operated its truck at a speed greater than that allowed by law." And the witness Torain (who was in a car in front of the Chevrolet at the time of the collision) testified that the defendant's vehicle followed along behind him from Petersburg to the scene of the collision, a distance of 11 or 12 miles. The plaintiff's counsel on cross-examination further drew from the witness Torain these statements: "From Petersburg to the place of collision, I was driving between 40 and 50 miles an hour, pretty regular speed. I passed the Johnson truck in the city limits of Petersburg coming out. . . . He followed me all the way to the scene of the accident. I ran in behind the Chevrolet and passed, and then the Chevrolet was between me and the Johnson truck. He (the Johnson driver) kept up with me. . . ."

The trial court read to the jury the Virginia statute on reckless driving (46-208, Code of Virginia, 1950 (Michie)), which is as follows: "Irrespective of the maximum speeds herein provided, any person who drives a vehicle upon a highway recklessly or at a speed or in a manner so as to endanger life, limb or property of any person shall be guilty of reckless driving; . . ."

The Virginia statute which prescribes speed limits, 46-212 (3), Code of Virginia, 1950 (Michie), provides (subject to the reckless driving statute—46-208), for a maximum allowable speed of 50 miles per hour for trucks.

After reading the statute on reckless driving (46-208), the court failed to tell the jury what the maximum speeds referred to in the statute were. The court neither read to the jury the Virginia speed statute, 46-212 (3), nor explained the law concerning the maximum allowable speed for trucks as fixed by the statute. This was error for failure to comply with the provisions of G.S. 1-180 as amended. See *Chambers v. Allen,* 233 N.C. 195, 63 S.E. 2d 212; *Lewis v. Watson,* 229 N.C. 20, 47 S.E. 2d 484.

That this error was prejudicial to the defendant seems all the more likely in view of the fact that the maximum allowable speed of the defendant's tractor-trailer under the North Carolina law is 45 miles per hour (G.S. 20-141 as rewritten by Chapter 1067, Session Laws of 1947), and until 1947 the *prima facie* limit was 35 miles per hour. (G.S. 20-141).

In connection with another group of exceptions the defendant urges that the court below erred in reading to the jury a number of highway safety statutes which had no application to the evidence in the case. The challenged statutes were read to the jury as being "the law in the State of Virginia in respect to the matters we are now considering. . . ."

It is established by our decisions that an instruction about a material matter not based on sufficient evidence is erroneous. *Dorsey v. Corbett,* 190 N.C. 783, 130 S.E. 842, and cases there cited. See also *Maddox v. Brown,* 232 N.C. 542, 61 S.E. 2d 613.

And it is an established rule of trial procedure with us that an abstract proposition of law not pointing to the facts of the case at hand and not pertinent thereto should not be given to the jury. *Cashwell v. Bottling Works,* 174 N.C. 324, 93 S.E. 901; *Farrow v. White,* 212 N.C. 376, 193 S.E. 386; *Williams v. Hunt,* 214 N.C. 572, 199 S.E. 923.

Here the defendant challenges the action of the court in reading to the jury these portions of 46-209 of the Virginia Code of 1950 (Michie), which provide that "A person shall be guilty of reckless driving who shall: (1) Drive a vehicle . . . with inadequate or improperly adjusted brakes. . . . (2) While driving a vehicle, overtake and pass another vehicle proceeding in the same direction, upon or approaching a crest or grade or upon or approaching a curve in the highway, where the driver's view along the highway is obstructed; . . . (3) Pass or attempt to pass two other vehicles abreast moving in the same direction. . . . (4) Overtake or pass any other vehicle proceeding in the same direction at any steam or electric railway grade crossing or at any intersection of highways, or while pedestrians are passing or about to pass in front of such vehicle unless permitted to do so by traffic light or police officer."

A perusal of the record fails to disclose any evidence whatsoever tending to show either (1) that the defendant's truck was driven with inadequate or improperly adjusted brakes, (2) that his driver's view was obstructed while attempting to pass the Chevrolet automobile, (3) that the defendant's driver was attempting to pass two other vehicles abreast moving in the same direction, or (4) that the collision occurred at or near a grade crossing, intersection, or that pedestrians were affected by the movement of the vehicles. It follows, then, that neither of these statutes was pertinent to any phase of the evidence. See *Williams v. Hunt, supra; Maddox v. Brown, supra.*

The record discloses that the dominant theory of the trial below revolved around application of the statute which prescribes regulations in respect to driving on highways which have been divided into clearly marked lanes for traffic (46-222). This being so, the prejudicial character of error here pointed out is made more manifest by reason of the

apparent conflict between this statute and the statute prohibiting overtaking and passing when the driver's view is obstructed (46-209 (2)).

3. *The Order of Injunction.*—After the commencement of this action, the defendant instituted an action against the plaintiff in Virginia involving the same subject matter. Thereafter, an order was entered in the instant action permanently restraining the defendant from prosecuting the Virginia action. The defendant's exception to the order has been brought forward on this appeal. However, the exception seems to be without merit.

It is fundamental that a court of one state may not restrain the prosecution of an action in a court of another state by order or decree directed to the court or any of its officers. 21 C.J.S., Courts, Sec. 554.

Nevertheless, it is well established that "a court . . . which has acquired jurisdiction of the parties, has power, on proper cause shown, to enjoin them from proceeding with an action in another state . . ., particularly where such parties are citizens or residents of the state, or with respect to a controversy between the same parties of which it obtained jurisdiction prior to the foreign court." 43 C.J.S., Injunctions, Sec. 49, p. 499. See also 21 C.J.S., Courts, Sec. 554; 28 Am. Jur., Injunctions, Secs. 204 and 205.

However, the rule is that this power of the court should be exercised sparingly, and only where "a clear equity is presented requiring the interposition of the court to prevent manifest wrong and injustice." 43 C.J.S., Injunctions, Sec. 49. See also *Wierse v. Thomas,* 145 N.C. 261, 59 S.E. 58; *Boyd v. Hawkins,* 17 N.C. 329, p. 336; Anno.: 6 A.L.R. 2d 896.

In accordance with these principles, an action or proceeding in another state ordinarily may be enjoined where it is made to appear that its prosecution will interfere unduly and inequitably with the progress of local litigation or with the establishment of rights properly justiciable in the local court; or that it is unduly annoying, vexatious, and harassing to the complainant, and reasonably calculated to subject him to oppression or irreparable injury. See 43 C.J.S., Injunctions, Sec. 49, p. 499; 28 Am. Jur., Injunctions, Sec. 211.

The court below, after hearing the affidavits of each side, found facts and entered an order permanently enjoining the prosecution of the Virginia action. It would serve no useful purpose to recapitulate here the facts found by the court. They are set out in meticulous detail in the order. Under application of the controlling rules of equity jurisprudence, the facts found by the court are sufficient to support the order of injunction.

The defendant's only exception is to the signing of the order. This is insufficient to bring up for review the findings of fact. The exception challenges only the sufficiency of the findings to support the order.

Weaver v. Morgan, 232 N.C. 642, 61 S.E. 2d 916; *Burnsville v. Boone,* 231 N.C. 577, 58 S.E. 2d 351; *Thompson v. Thompson, ante,* 416. It follows then that since the order is supported by the findings, the order of injunction will be upheld. The case of *Evans v. Morrow,* 234 N.C. 600, 68 S.E. 2d 258, cited by the defendant, is distinguishable. There, among other factual differences, the North Carolina court had not acquired jurisdiction of the action prior to the commencement of the out-of-state proceeding, as in the instant case.

The errors herein pointed out, when considered in the aggregate, necessitate a new trial, and it is so ordered. This being so, it is not necessary to discuss the rest of the defendant's assignments of error.

New trial.

STATE OF NORTH CAROLINA ON THE RELATION OF E. J. HANSON, RECEIVER FOR JAMES M. YANDLE, EX-CLERK OF THE SUPERIOR COURT OF MECKLENBURG COUNTY, AND EX-RECEIVER IN VARIOUS RECEIVERSHIP ESTATES UNDER ORDER OF COURT, IN HIS OWN RIGHT AS SUCH RECEIVER AND FOR AND ON BEHALF OF ALL PARTIES AND CLAIMANTS HAVING CLAIMS AGAINST THE SAID YANDLE IN HIS SAID OFFICIAL CAPACITY AND HIS SURETY AND/OR HAVING CLAIM AGAINST PLAINTIFF OR ANY INTEREST IN SAID RECEIVERSHIP AND SUCH OTHER PARTIES AS MAY DESIRE TO INTERVENE IN THIS ACTION AND MAKE THEMSELVES A PARTY THERETO, v. JAMES M. YANDLE; MASSACHUSETTS BONDING & INSURANCE COMPANY, A CORPORATION; J. LESTER WOLFE, CLERK OF SUPERIOR COURT OF MECKLENBURG COUNTY; CITY OF CHARLOTTE; UNIVERSITY OF NORTH CAROLINA; MECKLENBURG COUNTY; ET AL.

(Filed 7 May, 1952.)

1. Judgments § 25—

If the court is without jurisdiction or power to enter an order contained in a paragraph in its judgment, such paragraph is void and may be attacked whenever and wherever it is asserted, without any special plea.

2. Judgments § 2: Courts § 2—

If the court is without jurisdiction of the subject matter of a judgment, such judgment can attain no validity because entered by consent of the parties, since jurisdiction may not be conferred upon a court by consent.

3. Principal and Surety § 9: Escheat § 1—Where surety on clerk's bond pays into court total liability as shown by clerk's records, court has jurisdiction to provide that unclaimed funds be returned to surety.

Where action by the receiver of a clerk and other actions instituted in behalf of infants and incompetents to recover on the official performance bonds executed by the clerk are consolidated and judgment is rendered against the surety for the full amount necessary to discharge all the liabilities of the clerk as disclosed by his records, *held:* The trial judge has jurisdiction of the subject matter of the action and of all the parties, and

therefore has authority to enter an order that all funds not called for and claimed by any particular claimants should be turned back to the surety instead of escheating, and after the elapse of sufficient time to bar all individual judgments, the surety is entitled to summary judgment for such amount as against the claim of the University to a part of such funds by escheat or the claim of the county thereto for its school fund. Constitution of North Carolina, Art. IX, sec. 5, G.S. 115-179, G.S. 115-183.

APPEAL by defendant Massachusetts Bonding & Insurance Company from *Moore, J.*, February Term, 1952, MECKLENBURG.

Civil action to recover on official performance bonds, heard on motion for summary judgment for the return of certain funds paid into the office of the clerk of the Superior Court of Mecklenburg County under judgment entered at the September Term, 1936.

James M. Yandle was the clerk of the Superior Court of Mecklenburg County for three successive terms, his last term of office ending on the first Monday in December, 1934. The defendant Bonding Company was his surety upon his performance bond in the sum of $60,000 for each of said terms. Said clerk was unable to make settlement with his successor. A receiver was appointed to take charge of the assets, records, etc., in the hands of the retiring clerk. The receiver instituted this action to recover on the official performance bonds executed by said former clerk and his surety. Certain other actions were instituted in behalf of infants and incompetents, which actions were consolidated with this action by order of the court.

The assets and liabilities of the clerk were divided in two groups: (1) assets in the hands of and liabilities due by the clerk as such, and (2) assets in the hands of and liabilities incurred by the clerk as receiver for various infants and incompetents.

An interim settlement of the liability of the clerk for funds coming into his hands by virtue of his office was effected by the payment into the hands of the successor clerk of the sum of $41,094.89, which, together with funds on hand, was found to be sufficient to discharge the liabilities of the clerk as such. Judgment was entered accordingly by Harding, J., at the March Term, 1935. This judgment contained the following paragraph:

"4. And should it hereafter appear that the liabilities of James M. Yandle, as Clerk of the Superior Court with reference to his liabilities as said Clerk of the Superior Court but not as Receiver in the various receivership estates be paid off and discharged for a sum less than the amount of $52,093.87, then in that event the residue or remainder of the said amount paid in by Massachusetts Bonding & Insurance Company hereunder, shall be paid to said Massachusetts Bonding & Insurance Company and retained by it as its sole property."

The receiver thereafter filed his report in this consolidated cause to which he attached a written proposal of settlement of all claims of the Yandle receivership and of all matters and things involved in each and all of the individual actions consolidated herewith. Under this proposed settlement the defendant Bonding Company agreed to pay into the office of the clerk of the Superior Court the sum of $37,992.12 in full and complete settlement of its liability as surety on the three several performance bonds which were the subject matter of the action, subject to the provisions hereinafter noted.

The judge found the facts in detail, particularly in respect to the rights of the infant and incompetent claimants, and entered judgment approving the settlement and directing its execution. The judgment recites "that the University of North Carolina has consented to said agreement or compromise . . ."

It then entered its judgment approving the settlement and allowing the claims reported in detail by the receiver and directing the receiver upon the payment of the sum agreed upon to turn over and deliver to the Bonding Company "all of the assets of said receivership . . . being all of the assets remaining in the hands of the said Hanson after the disbursement hereinbefore provided for . . ." Said judgment likewise contained the following provisions:

"(18) That the payments heretofore ordered to be paid to the clerk of this court in satisfaction of this judgment and the claim of various claimants be and the same are paid to the court as upon the payment of a judgment in favor of the various claimants as their interest might appear and against James M. Yandle and his surety, Massachusetts Bonding & Insurance Company.

"(19) And it is further ORDERED, ADJUDGED and DECREED that in the event that any particular claimant or claimants shall fail to call for and claim his or her respective funds paid into the Court under this order that the same, rather than escheats the University of North Carolina, be paid over to the Massachusetts Bonding & Insurance Company as its sole property."

On 23 January 1952 the defendant Bonding Company filed a motion in the consolidated cause for summary judgment against the present clerk of the Superior Court of Mecklenburg County for the sum of $5,040.75 plus the sum of approximately $4,000 now remaining in his hands as the balance of the sum paid in under the settlement judgment which has not been claimed by creditors whose claims were allowed in the judgment entered in 1936 "and not required to discharge the obligations, as aforesaid, and which said sum according to the terms of the final judgment in said receivership is the sole property of the Massachusetts Bonding & Insurance Company" under the provision of paragraph (19) of said judg-

ment above quoted. Notice of the motion was duly served on the University of North Carolina and Mecklenburg County. The respondents answered. Each respondent pleaded the invalidity of paragraph (19) of said judgment for want of jurisdiction in the court to enter the same. The University further asserted its right to the sum of $5,040.75 held by the clerk under the law of escheats, and the County claimed the right to $8,917.07, "being all of the assets and funds remaining in said receivership." Its claim is bottomed on the provisions of N. C. Const., Art. IX, sec. 5, and G.S. 115-179, 183.

The court below, upon hearing said motion, adjudged that paragraph (19) of the said final judgment "is null and void and of no effect, and that the said court was without authority to make such order as set forth in said paragraph 19." It further ordered that the clerk forthwith pay to the University the sum of $6,058.24 and to the treasurer of Mecklenburg County $2,858.83, the total of said sums being the balance of the original fund paid into the office of the clerk of the Superior Court by appellant herein, found to be now remaining in the hands of the clerk and "not claimed or demanded by the parties entitled thereto for more than five years after the same became due." Defendant Bonding Company excepted and appealed.

J. F. Flowers for Massachuetts Bonding & Insurance Company, appellant.

Attorney-General McMullan and Raymond C. Maxwell, Special Assistant to the Attorney-General, for University of North Carolina, appellee.

Taliaferro, Clarkson & Grier and William E. Poe for Mecklenburg County, appellee.

BARNHILL, J. This appeal poses for decision only one question, to wit: Was the Superior Court judge vested with authority to enter the adjudication contained in paragraph (19) of the final judgment herein entered 15 September 1936?

If the court was without authority, its judgment as contained in said paragraph is void and of no effect. A lack of jurisdiction or power in the court entering a judgment always avoids the judgment, *Clark v. Homes,* 189 N.C. 703, 128 S.E. 20; *Boone v. Sparrow, ante,* p. 396, and a void judgment may be attacked whenever and wherever it is asserted, without any special plea. *Monroe v Niven,* 221 N.C. 362, 20 S.E. 2d 311; *McRary v. McRary,* 228 N.C. 714, 47 S.E. 2d 27; *High v. Pearce,* 220 N.C. 266, 17 S.E. 2d 108; *McCune v. Manufacturing Co.,* 217 N.C. 351, 8 S.E. 2d 219; *Boone v. Sparrow, supra.*

So then, there is no question but that the respondents may assail paragraph (19) of the final judgment herein as a nullity for want of jurisdiction of the judge to grant the relief therein attempted.

The contention is advanced that the final judgment is a consent judgment. It does recite a proposed settlement and the consent of the respondent University. Even so, on the question here presented, it is immaterial whether it was or was not entered by consent. If the court was without jurisdiction of the subject matter in the first instance, the consent of the parties adds nothing to the force and effect of the judgment, for jurisdiction of the subject matter cannot be conferred by consent of the parties. *McRary v. McRary, supra; Reaves v. Mill Co.*, 216 N.C. 462, 5 S.E. 2d 305; *High v. Pearce, supra; McCune v. Manufacturing Co., supra.* The provision must stand or fall on the authority or want of authority of the judge to insert it as a part of the final judgment.

On this question the respondents contend the adjudication constitutes an attempt on the part of the court to enter an anticipatory judgment settling rights that might accrue at some time in the future upon a state of facts which had not arisen when the judgment was entered and might never arise in the future. If their premise is sound, their conclusion that the judgment is void is well founded and must be sustained.

On the other hand, the appellant Bonding Company contends that the subject matter under consideration was the settlement of its liability as surety upon the performance bonds of the former clerk and the question immediately at issue was the amount to be paid by it in settlement of its liability and the conditions upon which it should pay the sum agreed into the office of the clerk of the Superior Court. The judgment fixed the amount to be paid and paragraph (19) decreed the conditions upon which it was to be paid. These were matters clearly within the jurisdiction of the court. So it asserts.

We are constrained to concur in the view of the appellant. While the record is not entirely clear on that point, it seems the court allowed all claims as they appeared on the books and records of the former clerk (including claims not filed with the receiver) except such as were expressly rejected or denied by the judgment entered. It is a matter of common knowledge, at least among lawyers and judges, that many small amounts of money from various sources come into the hands of the clerks of the Superior Court for the use of various and sundry persons who never appear and claim what is theirs. The Bonding Company was willing to pay into the office of the clerk of the court a sum sufficient to meet the liability of its principal for the payment of the several amounts which might in fact be claimed by those for whose use and benefit they were held. It was unwilling to pay any amount which would eventually escheat to the University or revert to the school fund. The receiver was unwilling to agree to the deposit of any amount less than that required to discharge the liabilities of the former clerk as disclosed by his records.

It is apparent this was the situation which faced the parties as they sought a basis of settlement satisfactory to all.

The problem could have been solved by the adoption of any one of several plans. For instance, the money could have been deposited in escrow to be withdrawn as and when claimants actually appeared and demanded the amounts due them, or it could have been stipulated that the Bonding Company should pay claims as and when they were duly approved by the receiver or the clerk. The plan adopted was the simplest and most direct approach to the settlement of the problem presented.

The court recognized the merit of the contention of the Bonding Company in respect to the payment of amounts which might never be claimed by those to whom they were due. At the same time it deemed it imperative that all claimants who might appear and claim funds held to their use by the clerk should be protected, on a basis of equality, within the limits of the total amount agreed to be paid. It should not be a case of first come, first served, and the devil take the hindermost. It therefore required the payment of the total sum agreed upon but attached to the payment the conditions set forth in paragraph (19). This constituted a payment on condition. In effect, it was a payment in escrow, the successor clerk being the depositee with instructions to expend the fund in the payment of such of the judgment creditors in whose favor judgments were entered against the former clerk and his surety as might appear and claim the several amounts adjudged to be due them, and then to return the balance, if any, to the defendant bonding company, depositor.

We are unable to perceive any reason why this was not permissible and well within the authority of the trial judge. The liability of the bonding company was the primary subject matter of the action instituted by the receiver against the former clerk and his surety. It cannot be gainsaid that the judge had the power to authorize and approve a compromise settlement of that liability. Neither may it be denied, as we view it, that he had the power to attach to the payment such conditions and stipulations as to him seemed wise under the circumstances then existing. He had jurisdiction both of the parties and of the subject matter of the action. His judgment was confined to a disposition of the subject matter as it affected the rights of the parties over whom he had acquired jurisdiction.

At the time the judgment was signed, the funds in which the respondents may have had a contingent interest had been pilfered. As to such funds, the former clerk was in default. Hence the judgment entered deprived the respondents of no right either vested or contingent. Their rights, if any, must attach to the fund paid in by the appellant. Since the fund was paid under valid conditions imposed by the provisions of paragraph (19), neither respondent has acquired any interest in any part thereof.

It was suggested in the argument here that the judgment fails to stipulate the time when the right of reversion to the appellant shall accrue. But under these circumstances the law would require the appellant to allow a reasonable time for the several claimants to appear and claim the several amounts due them. It has waited more than fifteen years and until the individual judgments are barred by the statute of limitations, G.S. 1-47. It cannot be said that it has acted with undue haste in asserting its right to the balance now remaining in the hands of the clerk.

For the reasons stated, the judgment entered is

Reversed.

OSBORNE ECKARD v. THURMAN R. JOHNSON AND RAYMOND W. JOHNSON T/A JOHNSON BROTHERS TRUCKING CO., AND HARVEY C. BRADY.

(Filed 7 May, 1952.)

Carriers § 5: Master and Servant §§ 18, 22b: Automobiles § 24b—Lessee of truck for trip in interstate commerce may not be held liable for accident occurring after truck had been returned to lessor's place of business.

Where the evidence discloses that the trip in interstate commerce for which a truck was leased had been completed and the truck returned empty to the lessor, and that the injury in suit occurred thereafter while lessor was on a trip to lessee's place of business to deliver the freight bill and collect his compensation; *held:* The interstate carriage for which lessee's franchise was necessary had terminated and the use of the truck for the trip in question was not required, and therefore lessee may not be held responsible under the doctrine of *respondeat superior.*

APPEAL by plaintiff from *Burgwyn, Special Judge,* Extra Civil Term, 1952, of MECKLENBURG. No error.

This was an action to recover damages for a personal injury alleged to have been caused by the negligence of the defendants.

The plaintiff alleged that while he was at work near the highway between Conover and Hickory he was struck and injured by one of the rear dual wheels of defendant Brady's motor truck. It was alleged that the wheel came off while the truck was being driven along the highway by defendant Brady, that this was due to the negligent manner in which the wheel had been put on and secured, and that at the time defendant Brady was agent and employee of his codefendants Johnson and acting within the scope of his employment.

Defendant Brady did not answer and did not appeal from the judgment on the verdict fixing him with damages for plaintiff's injury.

As to the liability of the defendants Johnson, the court submitted the following issue: "2. On the occasion in question was the defendant Brady

the agent of defendants Thurman R. Johnson and Raymond W. Johnson and acting within the scope of his employment." To this issue the jury for their verdict answered, "No."

From judgment that plaintiff recover nothing from defendants Johnson, the plaintiff appealed.

G. T. Carswell and Shannonhouse, Bell & Horn for plaintiff, appellant.
McDougle, Ervin, Horack & Snepp for defendants, appellees.

DEVIN, C. J. Plaintiff's appeal brings up for decision the question of the liability of the defendants Johnson for the injury sustained by the plaintiff as result of the negligence of defendant Brady. There was no controversy as to the material facts. At the time of the transactions herein complained of the defendants Johnson, residents of Elkin in Surry County, were engaged in business as carriers of freight by motor trucks and were duly licensed as interstate carriers by the Interstate Commerce Commission. They also maintained a warehouse and office in Hickory.

The defendant Brady was a resident of Conover in Catawba County, self-employed, and owned a ton and a half Chevrolet truck. His driver was one Gene Hester. Brady had no permit for interstate hauling.

On 25 September, 1947, defendants Johnson engaged defendant Brady to haul a truck load of furniture from Conover to Richmond, Virginia, and entered into a trip-lease agreement whereby the truck of Brady driven by Hester was enabled to transport the shipment of furniture in interstate commerce under the license of defendants Johnson. By this lease agreement it was stipulated that Brady agreed to furnish the truck and bear the expense of the operation in consideration of 80% of gross freight to be paid by the Johnsons. In addition the lease contained these pertinent provisions: "2. This lease is made for the purpose of moving one lot of freight from Conover, North Carolina, to Richmond, Virginia. . . . 3. This lease becomes effective September 25, 1947, and terminates upon completion of delivery to the consignee of the freight at final destination. . . . 7. During the effective period of the lease, the possession and control of the leased equipment shall be entirely vested in the party of the second part (Johnson), and the said party of the second part will have complete supervision of the operation. Public liability, property damage insurance and cargo insurance are provided under blanket policies. For the duration of this lease, the drivers shall be deemed to be in the employment of the party of the second part."

According to the testimony of Brady, offered by plaintiff, the delivery of the freight to the consignee was completed by Brady's driver and the truck returned empty to Conover. Brady's driver was under instruction to secure a return load if possible, but this was not done on this occasion.

The truck was returned to Brady in Conover 27 September, but Brady did not recall whether it came the night before or that morning. He said the truck may have been there 8 to 18 hours, when he, Brady, undertook to drive the truck to Hickory. It was on this trip to Hickory that the wheel came off and injured the plaintiff. Brady testified he went to Hickory to collect his pay for the trip and to check the freight bill, that he had on occasion sent freight bills by mail. There was no provision in the lease agreement requiring Brady to drive the truck to Hickory, nor was there request from defendants Johnson that he do so. Brady had previously leased his truck to the Johnsons for numerous other interstate trips.

The plaintiff bases his right to recover against defendants Johnson on the ground that when these defendants leased Brady's truck and used it under their Interstate Commerce Commission license to haul freight in interstate commerce, they could not avoid liability for the negligence of the driver of the leased truck, even after delivery and on return trip, until the truck returned to its point of origin and the interstate transaction was completed, which included the return of the freight bill to defendants Johnson in Hickory. Plaintiff embodied this view in appropriate prayers for instruction based on *Brown v. Truck Lines,* 227 N.C. 299, 42 S.E. 2d 71, and *Hodges v. Johnson,* 52 F. Sup. 488. Pressing this view of the legal consequence of the trip-lease transaction, plaintiff requested the court to charge the jury as follows: "If you find from the evidence and by its greater weight that on the occasion in question defendant Harvey C. Brady, in returning the freight bills to the Hickory terminal of Johnson Bros. Trucking Company, was performing a necessary function as a part of an interstate haul to Richmond, Virginia, which he was making for the defendants Johnson under their Interstate Commerce Commission permit, then it would be your duty to answer the second issue yes."

The court did not charge in the language requested, but did charge the jury that before they could answer the issue "Yes" they must find from the evidence and by its greater weight that Brady was at the time of the injury the agent and employee of defendants Johnson, and that Brady's action in driving the truck was done in the prosecution of the business of the Johnsons, and that the act was connected with some mission or the performance of some service for the Johnsons, and was necessary to complete the purpose of his employment and so intended. The jury answered the issue "No."

If we accept the plaintiff's view that the legal effect of the trip-lease agreement was to constitute Brady the agent and employee of defendants Johnson not only for the haul to Richmond, but also for the return journey to Conover, notwithstanding the provision in the lease that it terminated upon completion of delivery to consignee at final destination, the

determinative question still remains whether in subsequently driving the truck to Hickory to collect his pay and check freight bill Brady continued to occupy the relationship of employee of defendants Johnson and was acting in the scope of that employment. Was the interstate trip complete and the employment ended, or did the trip-lease agreement extend the employment to include driving to Hickory for the collection of pay and the delivery of freight bills?

In *Brown v. Truck Lines, supra,* the facts were that under the terms of a similar trip-lease agreement Brown, the driver of the leased truck, was injured and killed while en route to deliver the freight to the consignee. It was held that for the purpose of that trip Brown was the employee of the lessee, and that his dependents were entitled to compensation under the Workmen's Compensation Act. In the opinion this Court cited the case of *Hodges v. Johnson,* 52 F. 2d 488, in which it was held that under a similar trip-lease agreement the relationship of employer and employee continued during the return trip, and that the lessee was liable for injury caused by the negligence of the driver of the truck.

The plaintiff excepted to the refusal of the court to hold that Brady at the time of the injury complained of, as an independent contractor, was employed by defendants Johnson under their Interstate Commerce Commission license to carry on an activity involving unreasonable risk of harm to others, which could only be carried on under the franchise granted, and that this imposed liability on the employer for the negligence of the contractor employed to carry on this activity (Restatement Law of Torts, sec. 428). Plaintiff also excepted to the court's refusal to submit an issue embodying this view. But we do not think this principle of law is applicable here. The injury complained of did not occur while goods were being transported in Brady's truck in interstate commerce under Johnson's franchise. The injury was sustained while Brady was driving the empty truck along a North Carolina Highway some time after the freight had been delivered and the truck returned to the place of origin. *Costello v. Smith,* 179 F. Supp. 715 (718). Nor should the Court characterize the driving of an empty ton and a half truck along the highway as an activity involving unusual or unreasonable risk of harm to others.

The principle is firmly established that when a common carrier of freight by motor vehicles in interstate commerce lends the protection of his franchise to the vehicle of an independent contractor for a specified carriage, he may not be permitted to avoid responsibility for injuries resulting from the performance of the delegated authority. But this principle may not be extended to impose liability for the negligence of an independent contractor after the reason for the rule has ceased to exist. *Brown v. Truck Lines, supra; Wood v. Miller,* 226 N.C. 567, 39 S.E. 2d 608; *Motor Lines v. Johnson,* 231 N.C. 367, 57 S.E. 2d 388; *Roth v.*

McCord, 232 N.C. 678, 62 S.E. 2d 64; *Costello v. Smith, supra; Virgil v. Riss & Co.,* 241 S.W. 2d 96; *Cotton v. Ship-By-Truck Co.,* 337 Mo. 270.

Except as modified by the trip-lease agreement under the Interstate Commerce Commission regulations as set out in the record, the relationship of Brady to Johnson was always that of an independent contractor. *Jones v. Tobacco Co.,* 231 N.C. 336, 56 S.E. 2d 598; *Wood v. Miller, supra; Hayes v. Elon College,* 224 N.C. 11, 29 S.E. 2d 137.

Brady's truck, for the purpose of the interstate transportation, was by virtue of the trip-lease agreement under the supervision and control of the interstate franchise carrier. Brady's relation to the transaction during this period ceased to be that of an independent contractor and became that of a servant or employee of the defendant, for the reason that Brady could only operate in interstate transportation under the authority of the interstate franchise carrier, and the Johnsons could not escape liability by engaging an independent contractor to carry on this activity for them. For injury to third persons caused by the negligence of the driver of the leased truck, during the period of the lease, the franchise carrier which authorized the activity of the truck could not avoid liability. By virtue of the lease agreement, for the designated period, the truck remained under the supervision and control of the lessee for the limited purpose of safety to the public and safe delivery of the shipment. *Virgil v. Riss & Co., supra.*

While the lease agreement provided only for transportation of the cargo from Conover to Richmond, the plaintiff urges the view that its scope was not limited by the delivery of the goods in Richmond as it was in the contemplation of the parties to the lease that the truck would necessarily have to be returned to Brady at Conover before the transaction could be regarded as finished. This was the view of the Supreme Court of Missouri in *Cotton v. Ship-By-Truck Co.,* 337 Mo. 270, where it was held that the liability of the lessee did not end with the completion of the journey. *Hodges v. Johnson,* 52 F. 2d 488.

In *Costello v. Smith,* 179 F. Supp. 715, it was held that the franchise carrier lessee was not liable for an injury caused by the driver of the leased truck on the return trip, but it will be noted that the lease in that case specifically provided that upon discharge of the load at destination the lessee would immediately "deliver said vehicular equipment into the possession of the lessor or its agent at the point of discharge and all obligations and responsibilities of the lessee under the terms of this lease shall immediately cease."

If Brady's driver Eugene Hester had been able to secure a return load, admittedly his agency and employment by defendants Johnson would have ended. Brady was Johnson's employee only for the purpose of the

interstate transportation. His employment and authority to bind Johnson expired with the accomplishment of that purpose.

Whether the lease terminated at Richmond or Conover, it is apparent that the trip contemplated by the lease had come to an end when the driver of the leased truck having delivered the cargo to the consignee returned the empty truck to the point of origin in Conover. Johnson's right of control or supervision of the transportation of the truck had ceased. The interstate carriage for which Johnson's franchise was necessary was ended. At the time of the plaintiff's injury Brady was using the truck for a trip to Hickory to receive his pay and check freight bills. We perceive no valid ground for holding that the relationship which the law created for the Virginia trip by the use of Johnson's permit continued thereafter to characterize Brady's activity on this trip to Hickory. His trip to Hickory to check the freight bill and collect his pay was in his own interest rather than in the service of Johnson. For this purpose the use of the truck was not required.

There was no controversy as to the essential facts. The verdict of the jury on the issue submitted, to the effect that on the occasion of plaintiff's injury Brady was not engaged in the performance of a service or mission for defendants Johnson, decided what the court might well have determined by sustaining defendants Johnson's motion for nonsuit, or by a peremptory instruction. In any event no legal harm has resulted to the plaintiff from the ruling of the court below. The action of the court in leaving the matter to the jury in the form submitted was the most the plaintiff could ask. He cannot now complain that the court failed to give a more peremptory instruction in his favor. In this view the exceptions to the charge brought forward in plaintiff's assignments of error cannot be sustained.

Plaintiff's recovery for his injury as against defendant Brady was not controverted, but his effort to establish liability therefor on the part of defendants Johnson must be held to have been precluded by the verdict and judgment. The result will not be disturbed.

No error.

JOHN B. HILLEY v. BLUE RIDGE INSURANCE COMPANY, A CORPORATION.

(Filed 7 May, 1952.)

1. Contracts § 8: Insurance § 13a—

Where the agreements of the parties are in writing and are clear and unambiguous, the legal effect of the writings is a question of law for the court and not for the jury.

2. Insurance §§ 43½, 44d—Breach of subrogation agreement by insured held to preclude recovery on collision policy.

Insured's car was struck by a locomotive at a grade crossing. The policy of collision insurance in suit provided that upon payment of loss, insurer should be subrogated to the rights of insured against any third party, and that insured should do nothing after loss to prejudice such rights. Before payment of loss by insurer, insured paid the railroad company for damage to the engine and executed a release of any rights insured might have had against the railroad company. *Held:* The breach of the subrogation provisions of the policy, established by unambiguous writings, precludes insured from maintaining an action against insurer for the loss, and insurer's motion to nonsuit should have been allowed.

APPEAL by defendant from *Godwin, Special Judge,* at October Civil Term, 1951, of GASTON.

Civil action to recover on policy of automobile insurance against loss by collision.

Plaintiff alleges in his complaint, substantially, these facts:

1. That on 20 October, 1949, and in consideration of certain premium paid it, defendant, Blue Ridge Insurance Company, a corporation, issued to him, the plaintiff, John B. Hilley, of Gastonia, North Carolina, a certain policy of insurance, in which it insured him against any loss or damage to his 1949 model tudor Mercury automobile, motor number 9CM-264860, caused by collision of it with another object, to the amount of actual cash value in excess of $75.00—occurring during the period from 14 October, 1949, to 14 July, 1951.

2. That on 21 January, 1951, about 7 o'clock p.m., plaintiff delivered his said automobile into the custody of one Tillman Yearwood, with express permission to operate it, and that about 10:30 p.m., as Yearwood "was attempting to cross the Southern Railroad main track in the town of Lowell, North Carolina, a fast train ran into and completely demolished" the automobile,—by reason of which plaintiff sustained loss in certain amount.

3. That plaintiff gave to defendant due notice of the collision, and, on 23 March, 1951, defendant denied liability, and this action is commenced within twelve months of the date of loss and damage to plaintiff as stated.

Defendant, answering, admitted (1) the issuance of the policy of insurance subject to all the terms and conditions therein contained, (2) that

same was in effect on the date alleged, 21 January, 1951, and (3) that plaintiff gave notice of the collision, and filed proof of loss and commenced this action within twelve months from the date of the loss, but denied all other allegations of the complaint; expressly denying that damage to plaintiff's automobile was caused by accidental means.

And for a further answer and defense, defendant avers:

"1. That the contract of insurance between plaintiff and defendant contained the following provisions: 'In the event of any payment under this policy, the company shall be subrogated to all the insured's rights of recovery therefor against any person or organization and the insured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The insured shall do nothing after loss to prejudice such rights.'

"2. That on January 24, 1951 the plaintiff admitted to the Southern Railroad Company his liability for the damage done its engine in the collision with the plaintiff's car, and paid to said company the sum of $157.50. And on said date the plaintiff executed to the Southern Railroad Company a full release of any claim he had against said company for damages to his car arising out of the collision between his car and the railroad engine.

"3. That the admission of liability by the plaintiff, and his release of the Southern Railroad Company from any claim existing in his favor against said company for damage to his automobile, violated the terms and conditions of his insurance contract with the defendant and prejudiced and defeated this defendant's right of subrogation for any payment required to be made by it under the terms of its insurance contract with the plaintiff, and said facts are hereby pleaded in bar of any recovery by the plaintiff in this action.

"4. (Not now pertinent)."

Upon the trial in Superior Court plaintiff offered evidence relating to the circumstances leading up to and surrounding collision, and to incidents following, tending to show this narrative:

On 21 January, 1951, Tillman G. Yearwood, accompanied by plaintiff, was driving plaintiff's car in South Carolina and had a wreck,—doing some small damage to the car. After the wreck, they came home. Yearwood asked plaintiff if he could use the car, and plaintiff gave him permission. About 8:30 on night of that date, Yearwood and one Houser Dewey Darnell got together. They went down to Lowell, where, as Yearwood testified, "I was supposed to meet a person." Yearwood was driving plaintiff's car, and Darnell driving his own car. They drove across the tracks, turned the cars around and parked 25 or 50 feet from, and heading toward the tracks, and the town of Lowell. It was then about 8:30. They took a drink, and while they were sitting there parked, five

boys came by, and talked to them, about five minutes. Darnell left "at about a quarter until ten."

Yearwood testified, "Darnell left and I sat there about an hour and a half. I started rolling off in the car, and I rolled on down to the railroad. When I mashed the gas for the car to go, it wouldn't go. The motor was dead, and I looked up and saw this train to my left. I jumped out of the car just before the train hit it, and the steam blew on my clothes." And, later in his testimony Yearwood said: "I got up a little speed to pull out of the gully, and then took my foot off the gas, and the car rolled and stopped on the railroad track. I didn't put on brakes at any time. The car was free wheeling." A colored man came along "about that time," and Yearwood asked to be taken to Gastonia. There he met Darnell, who told him "to go on back down there, as they would be hunting for somebody." Yearwood testified, "I went back down, and they got me and locked me up." Darnell "put up his bond" for driving drunk. Plaintiff Hilley was told about 3:30 the next morning that his car had been destroyed at the railroad crossing.

Plaintiff, who worked for a motor line, then made a run to New York on the truck which he drove, and on his return he was stopped by a State patrolman who was accompanied by Captain Brown, of the Southern Railway Company. Captain Brown then told plaintiff that he had five affidavits from five boys who saw Houser Darnell push the car on the tracks; and that plaintiff could come over to Charlotte, if he wanted to, and see if they could get "this thing settled," since, he said, Yearwood was drunk. Plaintiff went to Charlotte that night with Darnell and Yearwood. Plaintiff testified: "When I talked to Captain Brown in Charlotte, he accused Yearwood and Darnell of placing my car on the railroad tracks. They both denied this. After I heard that accusation and heard them deny it I then paid the Southern Railway $157.50 for damage done to their engine at the time my car was destroyed. At the same time I signed a release to the Southern Railway Company, releasing them from any claim which I might have against them for damages for destroying my car." Plaintiff identified the release signed by him, and by Darnell and Yearwood, and it was read into the evidence.

The plaintiff continued: "I never did bring suit against the Southern Railway Company for tearing up my car . . . At the time I signed the release with the Southern Railway Company, I knew that I couldn't thereafter sue them for running over my car. I knew the release was the end of any claim I had or might have against Southern Railway. When I paid the $157.50 I didn't feel like it was my fault that the engine was damaged, but I paid them because of the way it was put to me, since I hadn't done any wrong at that time . . . I can be scared into anything. Nobody accused me of doing anything wrong. After I signed this release and

after I paid this money, I then made a claim on the insurance company." Plaintiff also testified, "I read that release that I signed." And plaintiff also testified: "He (referring to Captain Brown) said if I signed the release, they would drop the matter where it was."

Plaintiff also introduced in evidence the policy of insurance, "Master Policy Number N C F-1" containing provision for "Collision or Upset" coverage for "direct and accidental loss of or damage to the automobile caused by collision of the automobile with another object or by upset of the automobile, but only for the amount of each such loss in excess of the deductible amount, if any, stated in the declarations as applicable hereto," and showing the amount deductible to be $75.00; and also containing "Conditions of Master Policy," among which is No. 9 entitled "Subrogation" in words identical with those set out in paragraph 1 of defendant's further answer and defense as hereinabove recited.

At the conclusion of the evidence for plaintiff, defendant moved for judgment as of nonsuit. Motion was denied and defendant excepted.

These issues were thereupon submitted to and answered by the jury as shown:

"1. Did the defendant issue and deliver to the plaintiff its policy of insurance insuring the plaintiff against loss by collision to his 1949 model Mercury automobile, as alleged in the complaint? Answer: Yes.

"2. If so, was said policy of insurance in force and effect on January 21, 1951? Answer: Yes.

"3. Was the plaintiff's automobile damaged by accidental means by collision with a train of the Southern Railroad Company on January 21, 1951, as alleged in the complaint? Answer: Yes.

"4. Did the plaintiff pay to the said Railroad Company $157.50 as damage to the train and execute and deliver to the Railroad Company a release of liability for damage to his automobile resulting from said collision, as alleged in the Answer? Answer: Yes.

"5. If so, did such acts and conduct of the plaintiff constitute a breach of his contract of insurance and prejudice the subrogation rights of the insurer, as alleged in the Answer? Answer: No.

"6. What amount, if anything, is the plaintiff entitled to recover of the defendant? Answer: $1,450.00."

From judgment signed in accordance with the verdict, defendant appeals to Supreme Court, and assigns error.

Frank P. Cooke and R. R. Friday for plaintiff, appellee.
Horace Kennedy for defendant, appellant.

WINBORNE, J. The sole question presented on this appeal is based upon exception by defendant to the ruling of the trial court in overruling its motion for judgment as of nonsuit.

Defendant contends, and we hold properly so, that since the terms of the policy of insurance, and of the release given by plaintiff to Southern Railway Company are in writing, and free from ambiguity, and are in evidence, the ascertainment of their meaning and effect is for the court and not for the jury.

The terms of the condition of the policy relating to subrogation are clear, and speak for themselves. Likewise the terms of the release are clear, and speak for themselves. *Brock v. Porter,* 220 N.C. 28, 16 S.E. 2d 410. Hence the ascertainment of their meaning and effect is for the court, and not for the jury. *Young v. Jeffreys,* 20 N.C. 357; *Patton v. Lumber Co.,* 179 N.C. 103, 101 S.E. 613; *Drake v. Asheville,* 194 N.C. 6, 138 S.E. 343.

One of the conditions on which the policy of insurance here involved was issued provides that "in the event of any payment under this policy, the company shall be subrogated to all the insured's rights of recovery therefor against any person or organization and the insured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights," and that "the insured shall do nothing after loss to prejudice such rights."

This clearly and expressly gave to the insurance company right of subrogation—and obligated the insured, the plaintiff, to secure to it such right, and to do nothing after loss to prejudice such rights.

On the other hand, the terms of the release read as follows:

"I, J. B. Hilley, H. D. Darnell and T. G. Yearwood of Gastonia, North Carolina, in consideration of the payment to me/us by Southern Railway Company of the sum of One Dollar ($1.00) and other valuable considerations, the receipt of which is hereby acknowledged, hereby release and forever discharge the said Southern Railway Company from any and all claims, demands, actions, or causes of actions of any kind whatsoever which I/we have or could hereafter have on account of, arising out of, or in connection with, personal injuries and property damages at or near Lowell, North Carolina, on or about the 21st day of January, 1951. This release is fully understood by me/us and constitutes the entire agreement between the parties hereto and is executed solely for the consideration above expressed without any other representation, promise or agreement of any kind whatsoever."

Thus it appears that plaintiff has released and discharged the railway company "from any and all claims, demands, actions, or causes of actions of any kind . . . arising out of or in connection with . . . property damages" at time and place in question.

And in this connection this Court, in opinion by *Barnhill, J.,* in *Ins. Co. v. Motor Lines, Inc.,* 225 N.C. 588, 35 S.E. 2d 879, in keeping with prior decisions, declared: "When property upon which there is insurance

is damaged or destroyed by the negligent act of another, the right of action accruing to the injured party is for an indivisible wrong,—and a single wrong gives rise to a single indivisible cause of action . . . The whole claim must be adjudicated in one action . . . The cause of action abides in the insured through whom the insurer, upon payment of the insurance, must work out his rights," citing *Powell v. Water Co.*, 171 N.C. 290, 88 S.E. 426; 1 Am. Jur. 493.

And it is a well established rule that if an insured settles with or releases a wrongdoer from liability for a loss before payment of the loss has been made by the insurance company, the insurance company's right of subrogation against the wrongdoer is thereby destroyed. Appleman on Insurance Law and Practice, Vol. 6, p. 580, Sec. 4092.

Hence plaintiff, in the present action, having released the railway company from liability for the loss caused by the collision of its train and plaintiff's automobile, covered by the policy here involved, and before payment of loss by the insurance company, the insurance company's right of subrogation is destroyed. Hence, the condition as to subrogation as set forth in the policy has been breached.

The question then arises as to the effect of such breach on right of plaintiff, the insured, to maintain against the insurance company an action on the policy for loss.

While this question appears to be one of first impression in this State, we find that courts of other states, in well reasoned opinions, have passed upon the question, and that text writers have treated the subject. The purport of these is that where the insured releases his right of action against the wrongdoer before settlement with the insurer, that release destroys, by operation of law, his right of action on the policy. *Farmer v. Union Ins. Co.*, 146 Miss. 600, 111 So. 584; *Packham v. Fire Ins. Co.*, 91 Md. 515, 46 Atl. 1066; 50 L.R.A. 828, 80 Am. St. Rep. 461; *Auto Owners' Protective Exchange v. Edwards*, 82 Ind. App. 558, 136 N.E. 577; *Maryland Motor Car Ins. Co. v. Haggard* (Court of Civil Appeals of Texas), 168 S.W. 1011; *Superior Lloyd's of America v. Loan Co.* (1941) (Texas), 153 S.W. 2d 973; *Remedial System v. Ins. Co.*, 227 Ky. 652, 13 S.W. 2d 1005; *Brown v. Fire Ins. Co.*, 83 Vt. 161, 74 A. 1061, 29 L.R.A. N.S. 698; Couch's Enc. of Insurance Law, Vol. 8, Sec. 2003, p. 6610; Appleman on Insurance Law and Practice, Vol. 6, Chap. 176, Sec. 4093, p. 587, and cases there cited; 29 Am. Jur., Insurance, Sec. 1344; Ann. 26 A.L.R. 429, at 432; Ann. 54 A.L.R. 1454, at 1456.

Hence we hold in the present action that, having released the railway company, before defendant, the insurance company, had paid the loss, and thereby destroyed the insurance company's right of subrogation, the plaintiff destroyed his right to maintain an action against the insurance company on the policy for the loss in question.

Therefore, motion of defendant for judgment as of nonsuit should have been sustained.

Reversed.

D. A. McDONALD, JR., v. DAN McCRUMMEN AND JOHN McCRUMMEN.

(Filed 7 May, 1952.)

1. Trial § 22a—

The evidence must be considered in the light most favorable to plaintiff on motion to nonsuit.

2. Ejectment § 15—

In an action for the recovery of real property the burden is on plaintiff to make out a *prima facie* showing of title in himself, and he may not rely upon the weakness of defendant's title.

3. Ejectment § 17—

In an action for the recovery of real property, plaintiff's evidence establishing a State grant to a certain person and a subsequent deed from another person with the same surname to plaintiff's predecessor in title, with testimony only that the persons of the same surname were kin, *is held* insufficient to make out a *prima facie* title, since the chain of title is not connected to the grantee of the State grant, and defendant's motion to nonsuit was properly allowed.

APPEAL by plaintiff from *Moore, J.*, at November Civil Term, 1951, of MOORE.

Civil action for recovery of, and for removal of cloud upon title to, land in Moore County, N. C.

Plaintiff alleges in his complaint: (1) That he is the owner in possession and entitled to possession of approximately 45 acres of land in Mineral Springs Township known as the "Murchison land," which was granted to Aaron Murchison by grant recorded in grant book 2, page 1290. (2) That defendants are attempting to trespass upon said land, and to take possession thereof, and have unlawfully placed on record a purported grant from the State of North Carolina, dated 22 March, 1941, which is a cloud upon plaintiff's title and should be stricken from the record.

Defendants, answering the complaint of plaintiff, admit that the State granted some land in Moore County to Aaron Murchison by grant recorded as alleged, but deny that the land described therein is the same land as that covered by the State grant under which they claim, that is, a grant to Daniel C. McCrummen (the defendant Dan McCrummen), dated 22 March, 1941; and they deny that plaintiff is the owner in possession and entitled to the land described in the complaint.

And for further answer and defense, and an affirmative cause of action, defendants aver: (1) That under and by virtue of the State grant to Daniel C. McCrummen, as aforesaid, he became the legal owner of the land therein described, and, by virtue of a deed from him, dated 30 December, 1941, to John McCrummen, the latter is now the owner in possession and entitled to the possession of said land. (2) That under said grant and deed, as color of title, defendants have been in open, notorious and undisputed adverse possession under known and visible lines and boundaries, of the land therein described for more than seven years prior to the institution of this action, and, by virtue thereof defendant John McCrummen is now the owner of said land.

When the case came on for trial in Superior Court, plaintiff offered the following as evidence: (1) Record of a grant from the State of North Carolina, recorded in book of grants 2, page 1290, dated 23 December, 1852, purporting to grant to Aaron Murchison forty-four acres of land in Moore County, specifically described, entered 1 December, 1849.

(2) Deed from O. B. Murchison to D. A. McDonald, dated 21 February, 1920, registered 5 March, 1920, purporting to convey a certain specifically described tract of land, containing 30 acres, more or less, "known as the Murchison tract of land."

(3) Judgment dated 16 April, 1948, entered in special proceeding for partition of lands of D. A. McDonald among his heirs, by terms of which there was allotted to Alice Glenn Roberts the "twentieth parcel" described in the petition.

(4) Deed from Mrs. Alice Glenn Roberts to D. A. McDonald, Jr., dated 21 June, 1949, registered 11 July, 1949, purporting to convey the said "twentieth parcel" of land.

Then plaintiff testified in pertinent part as follows: ". . . I am son of D. A. McDonald, Sr., who died December 8, 1931. Alice Glenn Roberts is my oldest sister. I know the tract of land known as the Murchison Tract. I know where it is located . . . (The witness points out to the court where the Aaron Murchison grant is located on the map). After my father's death I found this paper among his valuable papers . . . in my father's desk. It is in my father's handwriting . . . I found the instrument and the plot attached to it. (The original was offered. Quitclaim deed from O. B. Murchison to D. A. McDonald identified, marked Exhibit A for plaintiff, introduced and received in evidence). I know where the land is. I have been out to it and it is known as the Murchison Tract. I did not know old man Murchison. I do not know what kin O. B. Murchison was to A. A. Murchison; they were some of my own people, but I didn't know the kin . . . I had Mr. Paschal to survey it. Mr. Paschal is a surveyor in this county. . . . I went with him . . . No,

Sir, it is not farming land. It is all in woods. I saw pine timber on the land. There was no fence on it at all. No plowed ground . . ."

The surveyor, Baxter W. Paschal, as witness for plaintiff, after counsel handed to him a map, testified: "This is the outline of the Aaron Murchison Grant . . . I surveyed it with Mr. McDonald. When we ran the courses and distances we found all the old corners . . . The John McCrummen entry crossed into the Aaron Murchison tract . . . the land was woodland. Nobody was living on it and there were no fences on it . . ."

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

W. Clement Barrett and H. F. Seawell, Jr., for plaintiff, appellant.

Spence & Boyette for defendants, appellees.

WINBORNE, J. While appellant, the plaintiff, in brief filed on this appeal, states six questions as presented, the only assignment of error is based on exception to the ruling of the trial court in allowing motion for, and entering, judgment as of nonsuit.

In considering such motion, the evidence offered by plaintiff is to be taken in the light most favorable to him. When so considered, we are constrained to hold that the evidence offered by plaintiff on the trial in Superior Court, as shown in the record on this appeal, fails to make out a *prima facie* showing of title in him.

When in an action for the recovery of land, defendant denies plaintiff's title, an issue of fact arises as to the title of plaintiff,—the burden being on plaintiff. *Mortgage Corp. v. Barco,* 218 N.C. 154, 10 S.E. 2d 642; *Smith v. Benson,* 227 N.C. 56, 40 S.E. 2d 451; *Locklear v. Oxendine,* 233 N.C. 710, 65 S.E. 2d 673; *Williams v. Robertson, ante,* 478.

In such action the general rule is that plaintiff must rely upon the strength of his own title, and not upon the weakness of that of defendant. *Love v. Gates,* 20 N.C. 498; *Newlin v. Osborne,* 47 N.C. 163; *Spivey v. Jones,* 82 N.C. 179; *Keen v. Parker,* 217 N.C. 378, 8 S.E. 2d 209; *Stewart v. Cary,* 220 N.C. 214, 17 S.E. 2d 29; *Williams v. Robertson, ante,* 478; *Murphy v. Smith, ante,* 455.

This requirement may be met in various methods which are specifically set forth in *Mobley v. Griffin,* 104 N.C. 112, 10 S.E. 142. See also, among many others, these cases: *Prevatt v. Harrelson,* 132 N.C. 250, 43 S.E. 800; *Moore v. Miller,* 179 N.C. 396, 102 S.E. 627; *Smith v. Benson, supra; Locklear v. Oxendine, supra; Williams v. Robertson, supra.*

In the *Mobley case,* it is said that "the plaintiff may safely rest his case upon showing such facts and such evidences of title as would establish

his right to recover, if no further testimony were offered. This *prima facie* showing of title may be made by either of several methods." These, in so far as here pertinent, are:

"1. He may offer a connected chain of title or a grant direct from the State to himself. . . .

"3. He may show title out of the State by offering a grant to a stranger, without connecting himself with it, and then offer proof of open, notorious, continuous adverse possession, under color of title in himself and those under whom he claims, for seven years before the action was brought."

And in this connection, it is appropriate to note that in all actions involving title to real property, title is conclusively presumed to be out of the State unless it (the State) be a party to the action, G.S. 1-36, but "there is no presumption in favor of one party or the other, nor is a litigant seeking to recover land otherwise relieved of the burden of showing title in himself." *Moore v. Miller, supra; Smith v. Benson, supra; Locklear v. Oxendine, supra; Williams v. Robertson, supra.*

In the light of these rules, since the evidence in the case in hand discloses that the land in controversy is unoccupied woodland, plaintiff apparently has undertaken to make out title by showing State grant for the land, and a connected chain of title from the State's grantee to the plaintiff. But the trouble with this effort is that it does not connect. The fact that land was granted to a person named Aaron Murchison, and years later there is a deed from another named O. B. Murchison, purporting to convey the same land as that to which the grant relates, is not evidence from which it may be found that the O. B. Murchison had acquired the title of Aaron Murchison. It may be that O. B. Murchison is the heir, or an heir of the first, and as such could maintain an action against a third party to recover the land, *Locklear v. Oxendine, supra,* but the testimony of plaintiff is that "I do not know what kin O. B. Murchison was to A. A. Murchison,—they were some of my own people." Titles to land may not rest in so thin veil of uncertainty.

Manifestly, this action has been prosecuted under misapprehension of applicable principles. The rules of evidence as to proof of matters of pedigree within the family are liberal. See Stansbury on North Carolina Evidence, Sec. 149, and cases cited. If proof be available plaintiff may yet make out a case of *prima facie* title in a new action. G.S. 1-25. *Craver v. Spaugh,* 227 N.C. 129, 41 S.E. 2d 82; *Locklear v. Oxendine, supra.*

But on this record, the judgment of nonsuit is

Affirmed.

J. E. ALLEN v. JONAH ALLEN AND WIFE MABEL ALLEN, CURTIS ALLEN AND WIFE DOROTHY ALLEN, HERBERT ALLEN AND WIFE MARY LEE ALLEN.

(Filed 7 May, 1952.)

Appeal and Error §§ 19, 31g—

Appeal from judgment of the Superior Court dismissing action in summary ejectment for want of jurisdiction in the justice of the peace will be dismissed in the Supreme Court when the record fails to contain summons, pleadings or affidavit required by G.S. 42-28.

APPEAL by plaintiff from *Moore, J.*, November Term, 1951, of MOORE.

This is a summary proceeding in ejectment begun before a Justice of the Peace. Judgment was rendered 9 June, 1950, for the plaintiff. Defendants appealed to the Superior Court.

On the trial in the Superior Court, after hearing the testimony of the plaintiff, the court held that the action involves title to real estate and the question of betterments, as set out in the answer of the defendants, and that the Justice of the Peace before whom the case was tried had no jurisdiction to try the same; that the relation of landlord and tenant does not exist between the plaintiff and the defendants; and that there is a fatal misjoinder of parties and causes of action as alleged by the defendants in their answer.

Judgment was entered dismissing the action. The plaintiff appeals and assigns error.

Seawell & Seawell for plaintiff, appellant.

Spence & Boyette for defendants, appellees.

DENNY, J. The affidavit, summons, and pleadings of the plaintiff are not set forth in the transcript of the record, docketed in this Court, as required by Rule 19, sec. 1, of our Rules of Practice, 221 N.C. at page 553. The pleadings are an essential part of the record in order that we may be advised as to the nature of the action or proceeding. *Insurance Co. v. Bullard*, 207 N.C. 652, 178 S.E. 113.

Moreover, in a summary proceeding in ejectment the "oath in writing," required by G.S. 42-28, must allege certain essential facts in order to confer jurisdiction. *Howell v. Branson*, 226 N.C. 264, 37 S.E. 2d 687. Therefore, the omission of these essential parts of the transcript, as required by our Rules, is fatal to the appeal. *Ericson v. Ericson*, 226 N.C. 474, 38 S.E. 2d 517; *Washington County v. Land Co.*, 222 N.C. 637, 24 S.E. 2d 338; *Bank v. McCullers*, 211 N.C. 327, 190 S.E. 217; *Insurance Co. v. Bullard, supra; S. v. Lumber Co.*, 207 N.C. 47, 175 S.E. 713; *Waters v. Waters*, 199 N.C. 667, 155 S.E. 564; *Plott v. Construction Co.*,

198 N.C. 782, 153 S.E. 396; *Schwarberg v. Howard,* 197 N.C. 126, 147 S.E. 741. "Failure to send up necessary parts of the record proper has uniformly resulted in dismissal of the appeal." *Goodman v. Goodman,* 208 N.C. 416, 181 S.E. 328; *Payne v. Brown,* 205 N.C. 785, 172 S.E. 348; *Riggan v. Harrison,* 203 N.C. 191, 165 S.E. 358; *Pruitt v. Wood,* 199 N.C. 788, 156 S.E. 126.

Appeal dismissed.

STATE v. CLAUDE NEEDHAM.

(Filed 21 May, 1952.)

1. Criminal Law § 52a (3)—

While circumstantial evidence is an accepted instrumentality in the ascertainment of truth, it must establish facts so connected and related as to point unerringly to defendant's guilt and exclude any other reasonable hypothesis in order to withstand defendant's motion to nonsuit, and when the facts are consistent with innocence and raise a mere inference or conjecture or possibility of guilt, nonsuit should be entered.

2. Criminal Law § 51—

While the weight and credibility of circumstantial evidence, as well as whether the facts in evidence are so connected or related as to exclude every reasonable hypothesis of innocence, are all questions of fact for the jury, it is for the court to determine in the first instance whether the evidence considered in the light most favorable to the State is of sufficient probative force to justify the jury in drawing the affirmative inference of guilt.

3. Arson § 7: Homicide § 25—Circumstantial evidence of defendant's guilt of arson and murder held insufficient for jury.

The State's evidence tended to show that defendant and the wife of deceased had carried on illicit relations over a period of years to the knowledge of the husband, but that the parties remained on good terms except at times when they were drinking, and that defendant and deceased seemed friendly on the day in question. The evidence further tended to show that the three of them, in company with three others, engaged in a drinking party at deceased's residence until at least all of them but defendant and deceased went to sleep, that one of them was later awakened by some noise and saw a man standing in the kitchen with a lighted stick or pine knot, cursing, whereupon the witness ran from the house, awoke one of his companions on the front porch and stated that another companion (not the defendant) was trying to burn up the house, and that defendant was seen driving his car on the highway away from the scene at a rapid rate on a circuitous route about the time of the fire. Deceased's body was found in the house after the fire. *Held:* Conceding that the evidence was sufficient to show the fire was of incendiary origin, it raises only a conjecture or suspicion as to defendant's identity as the incendiary, and defendant's motion to nonsuit should have been allowed upon the prosecutions

for arson and murder, the facts in evidence being consistent with defendant's version of the occurrences and being consistent with his innocence.

4. Arson § 7—

The State's evidence tending to show that defendant and deceased's wife had carried on illicit relations over a period of years, that defendant was displeased when deceased and his wife moved to a place some distance from defendant's residence, and stated that a good way to get them to move would be to burn the house, but that the statement was made some three or four years before the fire in question and that deceased and his wife had thereafter twice moved, *is held* of little probative force on the question of the identity of defendant as the incendiary of the house in which the parties last resided.

5. Same—

Evidence that oil was found in the well and burned chips and paper found in the kitchen at the home of the deceased, without any evidence tending to connect defendant therewith, is without probative force on the question of defendant's identity as the incendiary.

6. Same—

Evidence of illicit relations between defendant and deceased's wife is without probative force on the question of defendant's identity as the incendiary of the fire in which deceased was burned to death when the evidence further shows that though deceased knew of the relations between his wife and defendant, he and defendant nevertheless remained in harmonious and friendly relations, and there is no evidence of a plan or scheme on the part of defendant to burn the house.

APPEAL by defendant from *Rudisill, J.*, and a jury, January Term, 1952, of STOKES.

Criminal prosecutions tried upon two bills of indictment, consolidated for trial, charging the defendant with arson and murder in the first degree.

The theory of the alleged dual crimes is that the defendant (1) by willfully and feloniously burning a tenant house occupied by James O. Lawson thereby committed the crime of arson, and (2) that the further crime of murder in the first degree was consummated when Lawson was burned to death in the house. (G.S. 14-17 as amended.) The fire occurred Sunday afternoon, 26 August, 1951.

The jury returned a verdict of guilty as to each charge, with recommendation of life imprisonment. Thereupon judgment was entered in each case directing that the defendant "be confined in the State's Prison at hard labor for the remainder of his natural life."

The defendant appealed, assigning errors.

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

Woltz & Barber and Folger & Folger for defendant, appellant.

JOHNSON, J. The crucial exception presented by this appeal tests the sufficiency of the evidence to carry the case to the jury over the defendant's motions for judgment as of nonsuit, made in apt time under the provisions of G.S. 15-173.

The gist of the State's case as gleaned from the testimony of the witnesses called by the Solicitor is in substance as follows:

For eight years or more the defendant, father of nine children, had been engaged in illicit relations with the wife of the deceased, mother of four children. The defendant began visiting the Lawson home when the family lived on the Napier farm about four miles from Pilot Mountain. About 1943 the Lawson family moved to the Jim Hill place, which adjoins the defendant's farm. It was then that the association between the defendant and the deceased's wife became more intimate and constant. The wife of the deceased testified she started having intercourse with the defendant two or three months after the family moved to the Hill place. She said: "I got to know Mr. Needham when he kept coming there and all drinking together. Sometimes he furnished the liquor and sometimes my husband." The family stayed at the Hill place three years, and then moved to the Carson place where they remained a year. Mrs. Lawson said the defendant came to see her three or four times a week while she and the family were living at the Hill and Carson places.

From the Carson place the family moved to Sid Johnson's at Germanton in Stokes County, a distance of some 20 miles from Needham's home. The wife of the deceased testified Needham "didn't like us moving to the Johnson place because it was too far," but he "came about every week-end and sometimes during the week. . . . He wanted us to move to the Boyles place near where he lived. . . . He said a good way to get us out would be to burn the house to get us away from down there. . . ."

After one year at the Johnson place the family moved to the "mountain at Pinnacle" about 1948. (Distance from defendant's home not given.) The deceased's wife said the defendant kept coming "to see us about the same as when we lived at the other places," but he "wanted us to move to the Boyles place."

The family made the last move in January, 1951,—this time to the Nelson place, where the fire occurred. Needham continued to visit the Lawson home "two or three times a week" down to the time of the fatal event.

The evidence discloses that during all this time the deceased knew about the illicit relations between his wife and the defendant. She testified: "My husband knew about the relationship between Needham and me." The deceased and the defendant appeared to be on friendly terms, except at times when they were drinking. On such occasions they quarreled, threatened each other and slapped each other, but as the wife put it, there

was "no serious injury." Needham frequently brought liquor and sometimes groceries. "He kinda wanted to be boss."

The tenant house on the Nelson place in which the Lawsons lived was located 300 or 400 feet west of State Highway No. 66 in Stokes County. There was a "front yard or driveway going all the way from the highway to the house. . . . nothing to interfere with . . . view of the house from the highway," except a pack house located between the highway and the house. ". . . woods extend close to the north side of the house and out near the highway. There are two tobacco barns located across the road (highway) from the house. . . . There was a well behind the house very close to the house . . . The woods behind the house were about 50 feet from the well . . ."

The house "was a five room, one-story frame house. . . . Approaching the house from the front there were three bedrooms on the right-hand side, and on the left-hand side there was a living room or front room, and the kitchen was directly behind the front room. There was no hall in the house. There were two outside doors. One entering from the front porch into the front room and the other from the kitchen out onto the back porch." There was no outside door leading from the back bedroom. To get out of that bedroom it was necessary to go through the kitchen. "There were three doors in the kitchen—one opening into the west bedroom, one outdoors, and one into the front room."

Only the two younger Lawson children, a girl 16 and a boy 10, were living with the family, and both were visiting away from home the Sunday afternoon of the fire.

The defendant came to the Lawson home the Saturday before the fire. Lawson's wife testified: "He came in a blue Ford . . . about 3 o'clock. . . . He brought about a quart of liquor in a half gallon can. . . . We were curing tobacco at the barn . . . across the road. . . . We all lay behind the barn on a quilt."

Early the next morning the three rode off in Needham's car to get whiskey and groceries. They returned about 8 o'clock with a quart of whiskey, some groceries, and a half gallon of kerosene oil. Needham's car was left parked in the yard near the pack house. Mrs. Lawson had built a fire in the stove to cook breakfast and it was still burning when they returned. They started drinking early.

Later in the morning Walter Inman, Curt Shelton and Claude Gordon arrived on the scene.

Inman testified the three of them went to the Lawson place in Gordon's pick-up truck, taking about half a gallon of whiskey. They arrived around 10 or 11 o'clock. Inman said: ". . . I was drinking right smart. The three of us went into the house taking liquor with us. We found Claude Needham and Mr. and Mrs. Lawson there . . . setting in the

kitchen at the table. I started passing around the liquor. . . . I drank about a cup full of liquor, and was drunk and went in the front room and went to sleep . . . on the floor beside the couch." Later "some kind of noise woke me up. I jumped up and turned around, couldn't think where I was. I had been pretty drunk, and whirled around to leave when I saw a whole lot of smoke and a little fire in the kitchen. I saw a man through the smoke in the kitchen standing up with something in his hand and heard him say, 'G— damn, G— damn.' I don't know whether it was a stick, or pine knot or what it was in his hand, but it was on fire and he started cursing and then he turned and his arms obstructed a view of his face. I couldn't tell how far in the kitchen the man was. I don't remember who it was or what size man it was but he was cursing and I thought he was trying to burn the house up and I left there. I ran out the front door and into Curt Shelton who was setting in the swing in the front porch. I told him Claude Gordon was trying to burn the house up." Then, according to Inman, both men ran around the side of the house, Shelton tried to get in the house at the back, and then both men ran off into the woods, where they remained 15 or 20 minutes while the house burned. Inman further said: "When I went out the front door and saw Curt Shelton (in the swing) . . . I didn't see nobody else in front of the house. I didn't see any automobile in the yard at the house. . . . When I went out the door and started around to the right, I didn't see nobody leave the house and didn't see nobody going in the direction of the road and the tobacco barn. . . ."

Curt Shelton testified he went to the Lawson home with Inman and Claude Gordon; that he carried there about three pints of liquor in a half gallon jar and put it on the table in the kitchen where Mr. and Mrs. Lawson and the defendant Needham were sitting around the table eating. He said they all continued to drink, and after a while he left the kitchen and went to the swing on the porch and went to sleep. He said: "I figured I was drunk, and don't know what time that was. The last time I saw Needham, he was in the kitchen and Mr. and Mrs. Lawson went out to the well and was drinking water. I was asleep (in the swing) when Inman woke me up. . . . I was not conscious from the time I lay down there until awakened by Inman. . . . I saw smoke all around the eaves of the house. . . . I started to go in the front door and saw an awful smoke and went around to the back where I saw the first blaze in the kitchen. I was not able to go in. I was too drunk. I heard Mr. Lawson in there calling sort of low. I knew his voice, hollering, 'Oh, Lordy, help me.' I couldn't understand him. I heard it at the kitchen window. . . . The voice sounded close to the window. . . . I don't know whether Mr. Lawson was drunk or not the last time I saw him in the kitchen. . . ." Then after failing to get in the kitchen, Shelton said he and Inman

went on to the woods and stayed there probably 10 or 15 minutes before returning to the house. He said Needham's 49 blue Ford was parked in the yard in front of the house when he arrived that morning. "When Inman woke me up, if the car was there I didn't pay any attention to it." Shelton further said that earlier that day he had trouble with Gordon and Gordon left.

Claude Gordon testified he went to the Lawson home with Shelton and Inman, but stayed there only about an hour. He said: "Curt (Shelton) smacked me and I got in my truck and left. . . . I got home ten to twelve and didn't go back over there any more that day."

The wife of the deceased testified that sometime during the morning she left the kitchen. "When I got drunk I usually left the house and lay down and went to sleep." On this occasion she said she went back below the house and lay down. "I don't remember where . . . or how long I was there. I don't remember who was at the house when I left. It seems to me the best I remember Claude (Needham) had left." When she waked up and arrived at the house, it was in flames.

The defendant was arrested about midnight after the fire. He was found at his home asleep at a tobacco barn. He appeared to be sober. He "didn't seem to be excited" when arrested. He admitted he was over at Lawsons that afternoon. When asked what time he left, he hesitated at first,—"said he didn't have any time and didn't know. . . . He finally said he left there about 4 o'clock." He was then interrogated about his route home from the Lawson place, and the evidence tends to show "it would be five miles nearer by Old Rock House to Pilot Mountain than the way he took."

One of the officers testified the defendant stated to him that sometime in the afternoon "he moved his car from the pack house up across the hard surface road behind the tobacco barn, and . . . lay down on a pallet and went to sleep, where he and Mr. Lawson slept the night before, and when he got up he looked towards the house and saw Shelton in the swing on the porch, and then . . . got in his car and left and said nothing to nobody. . . . He saw no fire at that time. . . . There wasn't any smoke at the house at all at that time. He said he didn't know the house was on fire until he was arrested . . ."

Will Hicks testified he passed the Lawson place on the highway twice the afternoon of the fire. The first time, around 2:30 or 3, he saw a car parked behind the barn across the road. It looked like a black car, but he couldn't tell what kind. When he came back about 4, the same car was there at the barn. He saw no one about the barn or car either time he passed. About 30 minutes after he last passed, he saw smoke—white at first then later black—and on investigation found the Lawson house on fire.

G. Willis Burrell testified he passed the Lawson place about 3:35 the afternoon in question and saw Mr. Lawson coming out of the barn. "He bent over like he was mending the fire and he raised on up. I have seen him often before, sometimes three or four times a day passing by there. The barn is not but about 10 feet from the road. Mr. Lawson did not seem to be drunk. I didn't see anyone else around the barn. I saw a car behind the barn, a blue looking Ford, don't know what model but seemed like a 49 or 50. I went straight on home (about a mile and a half) . . . and (later) saw smoke. . . . about 30 or 40 minutes after I passed. . . . We went to the fire.

Mrs. Vance Jones testified she and her husband came by the Lawson place the afternoon in question "sometime before 4 or 5 o'clock." My husband was driving and no one else was with us. I saw a man cross the road and go between the barns. He came straight across the road from the one that goes to the Lawson home. I didn't know who it was and he was some distance away. He had on a white looking shirt and a blue hat. He was as far away from me as the distance between the two barns and was traveling afoot pretty fast. (One witness said the barns were "farther apart than 100 feet," another said "it is about 75 yards between the two . . . barns). . . . I don't have any idea who the man was. . . . I didn't see anything or anybody at the barn and didn't notice whether there was a car there or not." After reaching home 10 or 15 minutes later, she saw smoke and on investigation found the Lawson home was on fire.

Vance Jones testified that as he and his wife drove by on the way home he "saw a sorter blue looking Ford sitting behind the tobacco barn. . . . I did not see a man cross the road near the Lawsons or near the tobacco barn. My wife later told me that she had seen a man cross the road. We went on to the house and down to our tobacco barn. After we had been there awhile we saw smoke. . . . It was about 10 or 15 minutes after we had turned into our house." As he drove on to the Lawson house, he said, "I didn't see the automobile sitting behind the barn when I returned."

Mrs. Johnny Boles testified she lives about a quarter of a mile north of the Lawson's, "right on the side of the road," and that she had seen him (Needham) passing three or four times a week since the Lawsons moved to the Nelson place. She said on this afternoon "I saw Mr. Needham going north toward Sam Simmons' service station. I didn't see anybody in the car with him. About thirty minutes after I saw him pass . . . I saw smoke in the direction of the Lawson house. . . . when we got there the house was beginning to fall in."

Jack Roberts testified he lives south of the Lawson place—a mile and a half from the Lawsons on a dirt road about a quarter of a mile off Highway No. 66, and was curing tobacco at his barn on the Sunday afternoon of the fire. He said he saw some smoke between 4 and 5 o'clock and

started to the Lawson home and "met Claude Needham in a blue Ford. He was traveling pretty fast, about 40 or 45 miles an hour. . . . He was going south towards the gap of the mountain. It was about a mile and a quarter from where I met Needham to the Lawson home. . . ."

The defendant told the officers he went home by way of Pilot Mountain Inn, where he stopped and got a sandwich. Officer Christian testified the defendant could have gone either by Sam Simmons' or the Rock House Church Road; that the distance from the Lawson home to Pilot Mountain Inn by the Church Road is 9.6 miles, by Mount Olive and Chestnut Grove it is 17.4½. Officer Christian said the defendant told the officers that night "he went to Mt. Olive Church and by Chestnut Grove Church and on to 52 at Dalton and on up to Pilot Mountain Inn. Sheriff Johnson testified: "I guess it would be five miles nearer by the Old Rock House to Pilot Mountain than the way he took." But "at that time they were working on this road and grading it."

The evidence also tends to show traveling south on Highway No. 66, the way the defendant allegedly went home, a dirt road leads off from the highway "about a quarter of a mile below the Lawson house and circles around and comes back to the same highway on what is known as the Gap Mountain. . . . The road was a bumpy dirt road." The witness Jack Roberts lives on this road. Over this road the distance from the Lawson's to the Gap was half a mile farther than the direct route down Highway No. 66.

Officer Christian further said that the night the defendant was arrested he "denied he took the dirt road." But ". . . next day when I talked to him he told me he took the dirt road that (the) Roberts boy lived on and come out over at the Gap." Needham also told this witness he had on "a light shirt with a black dot in it," the day of the fire.

M. M. Gordon testified he was returning to his home near Pilot Mountain from Hanging Rock by way of the Rock House Church Road. "After we saw the smoke a dark looking car went by that was a Ford. This was about 300 or 400 yards from the Lawson place. The car was going pretty fast. We stopped at the fire and . . . saw a couple of men in the yard and the couple crossed the yard and stepped up on the porch and it looked like they were looking in the window. . . . and when we got about half way down to the house they stepped off of the porch and went to the left of the house and I never saw any more of them. I don't know whether that was Curt Shelton and Inman or not. As we started around the corner of the house we heard a voice behind the house and as I got around the right-hand corner a man went through the woods and I turned and went to the left and turned to the window and heard a voice. The two men we saw on the porch when we started went to the left-hand side facing the road. I saw the other man on the right-hand side and didn't know

any of them. I heard a man's voice in the house but could not distinguish anything he said. He was kinder groaning and puffing. . . . I didn't see Curt Shelton and Inman around there and I know them. . . . I got there before Vance Jones did. . . . The man I saw went off to the right, north. That wasn't in the direction of the road but was going back from the road. The man went off towards the back of the house in the opposite direction from where the tobacco barns across the road are. The automobile I met was 400 yards down the road before I saw someone running off. . . . The other man I saw went to the right down to the woods. . . . (he) had on a dark colored shirt. . . . I was about 50 yards or something like that from the men I saw. . . ."

Curt Shelton, recalled, testified: "That me and Inman went around to the left south side of the house. . . . I left there with Inman and we went around the house together. We went to the woods together. I don't know whether he was in front or behind."

John J. Coon testified he passed the Lawson place about 4:30 the Sunday afternoon in question. He said: "I saw Mr. Gordon and we walked down from the road together. There were just two people there ahead of us and I didn't know them. . . . I don't know that it was Shelton and Inman. They went around the house south, heading west. . . . They went together . . . into the woods . . . I didn't see anything more of them. . . . The first blaze I saw was in the northwest corner. I heard a groaning, inside the house. . . . We pulled the screen off and raised the window and Mr. Gordon shoved me up into it but when we did this smoke came over and closed it up. . . . but (I) still couldn't make it. . . . I later saw the Jones boy and he made an attempt to get in the house. . . . The only men I saw were the two that went around the south side of the house."

Deputy Sheriff Christian testified he went to the Lawson place after the fire was about over. A few people were still there. "They had just got the body out. . . . There was just a stub they had in a small tin tub."

He also said he went to the Lawson home the next day and found "cooking utensils and pans setting on the stove lids. All doors were closed and the lids on."

Over the defendant's objection, Mrs. Lawson and her daughter were permitted to testify that while the family lived at the Carson place they found under the kitchen safe some chips and paper that appeared to have been partly burned. And witnesses also were permitted to testify over objection that oil was found in the well once after the family moved to the Nelson place. However, there was no evidence tending to show when or by whom or under what circumstances the oil was put in the well or the chips and paper were placed under the safe. And there was no further evidence of explanation tending to connect the defendant with either event.

It thus appears that the State's case as developed in the court below rests almost entirely upon circumstantial evidence. Such evidence when properly understood and applied is a recognized and accepted instrumentality in the ascertainment of truth. *S. v. Holland,* 234 N.C. 354, p. 358, 67 S.E. 2d 272.

However, where circumstantial evidence is relied on to convict as in the instant case, the rule is, as stated by *Stacy, C. J.,* in *S. v. Harvey,* 228 N.C. 62, p. 64, 44 S.E. 2d 472: "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." See also *S. v. Stiwinter,* 211 N.C. 278, 189 S.E. 868; *S. v. Matthews,* 66 N.C. 106; *S. v. Holland, supra.*

"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, top p. 387, 64 S.E. 2d 268. See also *S. v. Harvey, supra; S. v. Murphy,* 225 N.C. 115, 33 S.E. 2d 588.

"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. Webb, supra,* quoting from *S. v. Vinson,* 63 N.C. 335. See also *S. v. Johnson,* 199 N.C. 429, 154 S.E. 730; *S. v. Boyd,* 223 N.C. 79, 25 S.E. 2d 456; *S. v. Murphy, supra; S. v. Palmer,* 230 N.C. 205, 52 S.E. 2d 908.

True, in cases wherein the State must rely on circumstantial evidence for conviction, it is for the jury to determine the weight and credit, if any, to be given the facts shown in evidence and the inference to be drawn therefrom. Therefore, the question whether the facts shown in evidence are so connected or related as to exclude every reasonable hypothesis of innocence and point unerringly to the guilt of the accused involves questions of fact to be resolved by deduction and inference of the jury. However, on motion for nonsuit, it is a question of law for the court to determine, in the first instance, whether the evidence adduced, when considered in its light most favorable to the State, is of sufficient probative force to justify the jury in drawing the affirmative inference of guilt. See *S. v. Madden,* 212 N.C. 56, 192 S.E. 859; *S. v. Jones,* 215 N.C. 660, 2 S.E. 2d 867; *S. v. Miller,* 220 N.C. 660, 18 S.E. 2d 143; *S. v. Alston,* 233 N.C. 341, 64 S.E. 2d 3; *S. v. Massengill,* 228 N.C. 612, 46 S.E. 2d 713; Stansbury, N. C. Evidence, Sec. 210, pp. 453 and 454.

It may be conceded that the testimony of Inman, when taken as true and considered in its light most favorable to the State, is sufficient to support the inference that the fire was of incendiary origin. But it does not follow therefrom that Needham was the incendiary. Inman in his testimony neither identified the man he saw in the kitchen with the stick

of fire, nor described him as resembling the defendant. In fact, the record discloses that after Inman saw the man in the kitchen he rushed out to the swing on the porch, awakened his friend Shelton, and "told him Claude Gordon was trying to burn the house up."

Thus we are at grips with the question of identity—the question whether the evidence in its over-all aspects is sufficient to show presence at the scene and opportunity of the defendant to commit the alleged crimes. Here the State points to the evidence tending to show the defendant's car was seen parked near the tobacco barn before the fire and that it was not seen there after the fire was discovered and that people along the road saw him driving in the opposite direction about the time the smoke from the fire was first seen.

However, this line of evidence seems to be entirely consistent with the defendant's statement made to the officers. He told them he left the drinking party at the house earlier that day, moved his car from the yard to the tobacco barn, lay down and went to sleep on the pallet at the barn; that he awoke about 4 o'clock in the afternoon, looked in the direction of the house, saw Curt Shelton in the swing, got in his car and left. This statement is corroborated by much of the State's evidence. That Shelton was asleep in the swing is shown by his testimony and also that of Inman. Mrs. Lawson, in relating how she, after becoming intoxicated, left the drinking party in the kitchen and went back below the house and lay down, said "The best I remember Claude (the defendant) had left." Several of the State's witnesses said the defendant's car was parked in the yard that morning. That it was moved, as he claimed, is borne out by the testimony of Inman and Shelton. Each testified that when they discovered the fire and ran out the front of the house the car was not seen in the front yard.

For the purpose of showing presence of the defendant at the house, the State relies in large part on the testimony of Mrs. Vance Jones in which she said she and her husband passed just before the fire and that she "saw a man cross the road and go between the (tobacco) barns. He came straight across the road from the one that goes to the Lawson home."

This testimony is without substantial probative force as tending either to show presence of the defendant at the house or to connect him with an incendiary burning, for these reasons: The witness, Mrs. Jones, said she had no "idea who the man was . . . just happened to glance there and saw him." He was some 300 or 400 feet from the house, crossing a "heavily traveled highway." To infer that the man Mrs. Jones saw was the person who set fire to the house would be at variance with much of the other evidence of the State, and especially with the testimony of Inman. It is noted that when Inman awoke and saw the man in the kitchen "with something in his hands . . . on fire," at that time, according to the testi-

mony of both Inman and Shelton, smoke was pouring "out the eaves of the house," and the fire had reached the point the smoke had changed from white to black. Nevertheless, both Mrs. Jones and her husband said nothing about seeing smoke in the direction of the house just across the road at the time she said she saw the man crossing the road. According to her further testimony and that of her husband, it was some 15 minutes later before they saw any smoke in the direction of the Lawson house. Also, Inman testified (as did Shelton) that when he ran out of the house after discovering the fire, no one was seen leaving the front or back of the house.

Thus, it may not be logically inferred that the man Inman saw in the kitchen with the fire stick was the same man Mrs. Jones saw crossing the highway. The more reasonable inference seems to be that the man Inman saw in the house with the stick of fire is the same man the witness M. M. Gordon said he saw when he first reached the Lawson house (and Gordon and witness Coon were the first to arrive at the scene). Witness Gordon said as he approached the house and turned the corner "a man went through the woods . . . That wasn't in the direction of the road. . . . The man went off toward the back of the house in the opposite direction from where the tobacco barns across the road are." This witness also testified he had previously met on the highway a man in a Ford car going in the other direction (the intended implication being that the man so met was the defendant Needham). Also, Mrs. Jones said the man she saw crossing the road had on a white shirt. The man Gordon saw dash off into the woods "had on a dark colored shirt." Besides, there is no direct evidence in the record indicating that the defendant was ever seen at the house after the drinking party ended earlier that day and after his car was moved from the yard to the tobacco barn.

Nor is the State's case materially bolstered by its line of testimony by which it sought to show that the defendant harbored a design or scheme to burn the Lawson dwelling. The single intimation that the defendant entertained any such thought is found in the testimony of the deceased's wife. She said the defendant was displeased when the family moved to the Johnson place because it was too far—about 20 miles—from his home. "He wanted us to move closer by . . . He said a good way to get us out would be to burn the house. He didn't make any threat,—just spoke about it." This was three or four years before the fire. The record indicates the Lawson family moved at the end of that year and that they moved a second time before going to the Nelson place where the fire occurred. The record reflects nothing thereafter tending to show, or connect the defendant with, any plan or scheme to burn the house. It would seem that this single intimation of a threat, when viewed in its logical setting, has scant evidential value as tending to show that the defendant three

or four years later burned the house at the Nelson place. Ordinarily, "evidence of threats alone is insufficient to prove the identity" of the accused in arson or to justify a conviction. 6 C.J.S., Arson, Sec. 38, p. 764; *S. v. Freeman,* 131 N.C. 725, 42 S.E. 575; *S. v. Rhodes,* 111 N.C. 647, 15 S.E. 1038. See also Wigmore on Evidence, Third Edition, Sec. 102.

As to the evidence tending to show (1) that oil was found in the well at the Nelson place, and (2) that burned chips and paper were found under the kitchen safe at the Carson place, it suffices to say there is no evidence tending in any way to connect the defendant with either of these events. However, treating this evidence as being before the court, as is required on the question of nonsuit (where the rule requires that evidence admitted erroneously over objection must be given full probative effect on the theory that if the inadmissible portions had not been received its proponent may have offered in lieu thereof admissible evidence of equal probative force—*Supply Co. v. Ice Cream Co.,* 232 N.C. 684, 61 S.E. 2d 895; *Ballard v. Ballard,* 230 N.C. 629, 55 S.E. 2d 316), even so, it is without probative force and adds nothing by way of corroboration to the State's case. Nevertheless, we think it appropriate to say that in the absence of proofs tending to connect the defendant with these purely anonymous events, the evidence in respect thereto was inadmissible. Wigmore on Evidence, Third Edition, Sec. 354, p. 263; 22 C.J.S., Criminal Law, Secs. 686 to 690. Also, the evidence that oil was found in the well relates to an event that has no "common features" with the crime of arson. See Wigmore on Evidence, Third Edition, Sec. 304, p. 202.

The evidence of illicit relations between Mrs. Lawson and the defendant was relevant and admissible only on the theory of motive. Motive is not an element of the crime of arson. 6 C.J.S., Arson, Sec. 3, p. 722, and Sec. 38, p. 764. However, the rule is that evidence of motive may be received and considered along with and as corroborative of other evidence tending to show plan or scheme to burn. 6 C.J.S., Arson, Sec. 39, pp. 764 and 765. Therefore, in the absence of other evidence tending to connect the defendant, by fixed plan or otherwise, with an incendiary burning of the Lawson home, the evidence of illicit relations between the defendant and Mrs. Lawson is without probative value of substance as bearing on the charges of arson and murder.

Besides, this record in its over-all implications tends to negative, rather than support, the theory that the illicit relations between these parties furnished a motive for the crimes here charged. The record reflects a marked degree of acquiescence on the part of the deceased. The defendant spent the week-end of the fire with the deceased and his wife, and the record points to complete harmony between them. The three slept together on a pallet at the tobacco barn part of the night before the fire.

The witness Claude Gordon said "Lawson and Needham appeared to be friendly" the day of the fire.

The evidence adduced below, if believed, involves the defendant in a sordid course of conduct and a series of infractions of the criminal laws of this State for which he may yet be tried, and for which, if convicted, the allowable punishment is substantial.

But a careful perusal of the record impels the conclusion that the evidence, when considered either as a series of events or as a composite bundle of circumstances, is insufficient in law to support the convictions for arson and murder. *S. v. Madden, supra; S. v. Jones, supra; S. v. Miller, supra.* It follows, then, that the judgment below will be vacated and reversed and the motions for nonsuit sustained.

Reversed.

E. G. MORRIS v. JENRETTE TRANSPORT COMPANY.

(Filed 21 May, 1952.)

1. Negligence § 1—

Actionable negligence is the failure to exercise proper care in the performance of some legal duty which defendant owes plaintiff under the circumstances when injurious result can be reasonably foreseen by a man of ordinary prudence, which failure produces the injury in continuous sequence and without which it would not have occurred.

2. Automobiles § 8d—

Uncontradicted evidence tending to show that the accident in suit occurred before the driver of defendant's truck had time to get out of the cab after the truck stopped because of motor failure does not show "a parking" within the meaning of G.S. 20-161 (a), and further fails to show a violation of the provision of the statute requiring the display of flares or warning signals around a disabled vehicle, since the statute contemplates that the driver should have a reasonable time within which to display such signals.

3. Same: Automobiles § 18b—

Plaintiff's evidence to the effect that he was driving forty-two miles per hour on a rainy, misty night, was blinded by the lights of an oncoming vehicle and did not see defendant's truck, which was stopped on the highway, until within fifteen or eighteen feet of the truck, *is held* to show a want of proximate cause between the failure of the truck to have lights burning on its rear and the accident in suit, even if it be conceded that defendant's testimony that he saw no lights is sufficient for the jury on the question of violation of G.S. 20-129 (a) (c) (d).

4. Automobiles § 8d—

Testimony of witnesses that no lights were burning upon a vehicle after it had had a violent collision with another vehicle on the highway has no

probative force upon the question of whether such vehicle had lights burning at the time of the collision.

5. Automobiles §§ 8d, 18h (3)—Evidence held to show contributory negligence as a matter of law on part of plaintiff in outrunning range of his lights.

Plaintiff's evidence tended to show that he was traveling forty-two miles per hour on a rainy, misty night, that he was blinded by the lights of an oncoming vehicle and did not see defendant's truck, which was stopped on the highway in his lane of traffic, until within fifteen or eighteen feet thereof, that he immediately applied his brakes and swerved to the left but was unable to avoid colliding with the rear of the truck, *is held* to disclose contributory negligence on the part of plaintiff as a matter of law in outrunning the range of his lights and traveling at excessive speed under the existing conditions. G.S. 20-141.

6. Automobiles § 8d—

While a driver is not under duty to anticipate negligence on the part of others traveling the highway, it is his duty to anticipate the presence of others and hazards of the road, such as a disabled vehicle, and to keep his automobile under such control in the exercise of due care as to be able to stop within the range of his lights.

APPEAL by plaintiff from *Godwin, Special Judge,* at January Civil Term, 1952, of WAKE.

Civil action to recover for personal injury and property damage allegedly resulting from actionable negligence of defendant,—in which upon trial in Superior Court a nonsuit was entered at close of plaintiff's evidence.

Plaintiff alleges in his complaint, in substance, these facts:

1. That about the hour of 7:15 p.m. on 3 November, 1949, plaintiff's automobile, driven by him, and traveling in a southeast or southerly direction on State Highway No. 87, which runs from Sanford to Fayetteville, in the State of North Carolina, came into collision with the rear end of defendant's tractor-trailer operated by duly authorized agent of defendant, and traveling from Sanford to Fayetteville, at a point about six miles south of Sanford.

2. That the tractor-trailer of defendant was negligently parked on the highway without lights on it, or flares upon the highway.

3. That he, the plaintiff, "was driving in a careful and prudent manner with his lights burning, operating his automobile at a speed of approximately 40 miles per hour, driving on his right-hand side of said highway, keeping a careful and proper lookout and in all respects complying with all the laws of North Carolina in such cases made and provided and all moral rules of safety. That as aforesaid, the weather was inclement and raining, and visibility was difficult. That as the plaintiff approached within a short distance of defendant's tractor-trailer motor vehicle . . .

another car approached the plaintiff from the opposite direction with bright lights burning. That the bright lights of the approaching automobile blinded plaintiff and he immediately applied his brakes and slowed down as fast as he could, but as he cleared and passed by the approaching automobile the parked truck and trailer of the defendant loomed suddenly and immediately in front of his automobile . . . That the plaintiff confronted with this sudden dangerous situation . . . immediately cut his car to the left but the distance was so short that he failed to cut completely to the left side of the road, ran into the rear of said large tractor-trailer motor vehicle of defendant . . .," to his personal injury, and damage to his automobile.

And, as the proximate cause of such injury and damage, plaintiff alleges in four paragraphs acts of negligence on the part of defendant which may be summarized as follows: (1) That defendant, knowing that there was motor trouble in connection with its tractor-trailer, negligently failed to have it repaired in the daytime of the day of the collision, and thus "caused a breakdown to occur in the night time," and (2) that defendant unlawfully and negligently parked its tractor-trailer in and blocking the right lane of a public highway, in the nighttime, while it was raining, and permitting it to remain on the highway without lights, or flares, or person to warn traffic approaching from the rear.

Defendant, answering the allegations of the complaint, admits (1) that on 3 November, 1949, its tractor-trailer, used in the conduct of its business, and operated by its authorized agent, was being run, at the time of the matters and things of which complaint is made, in a southeasterly direction along highway No. 87, and (2) that the weather was inclement, that it was raining and that the visibility was difficult. And in answer to the paragraph in which plaintiff alleges that he was "operating his automobile at a speed of approximately 40 miles per hour," defendant admits "that the plaintiff was . . . operating his automobile at a speed greater than was reasonable and prudent under the circumstances then and there existing."

And for a further answer and defense, defendant avers: That at the time and place alleged in the complaint defendant's tractor-trailer became disabled, in that its motor ceased to properly function, thereby causing the vehicle to stop upon the highway; that the driver thereof drove it as far to his right of the highway as it was possible for him to do under the circumstances before it came to a complete stop; and that, within a matter of moments thereafter, the automobile operated by plaintiff at a high, reckless and dangerous rate of speed, ran into and collided with the vehicle of defendant.

And defendant pleads in bar of this action the contributory negligence of plaintiff as a proximate cause of his injury and damage in that:

Plaintiff (a) failed to have his automobile equipped with proper lights or failed to keep a proper lookout under the circumstances and conditions then and there existing; (b) was operating his automobile in a careless and negligent manner and at a high, reckless and dangerous rate of speed; and (c) was operating his automobile without adequate or proper brakes, or failed to properly use his brakes, and to have his automobile under control, and negligently and carelessly failed to avoid collision with the vehicle of defendant.

Upon trial in Superior Court plaintiff, as witness for himself, testified: "I was living at Sanford, N. C., at time I was injured on November 3, 1949 . . . I was driving my automobile on Highway 87 in Lee County about 6 miles south or southeast of Sanford. I had a collision with a tractor-trailer belonging to the Jenrette Transport Company . . . I was driving on my right of way . . . from 40 to 45 miles an hour. I could not say definitely but I remember seeing my speedometer; it was cloudy and I had just gone through a shower of rain and had slowed down and glanced down and I was making right at 42 miles an hour at the time I saw it. There was a shower of rain just before I had this wreck. There was a fog—seemed like . . . getting up from the cement a piece and I was going slightly upgrade. I met an approaching car with very bright lights. I dimmed mine and he didn't dim his and I threw mine back on brights and I dimmed them a second time, and he didn't dim his lights and I left mine on him. I was completely blinded by the bright lights of the approaching car. I cut my speed down. I raised my foot off the accelerator and slowed down some. I was about 125 or 150 feet from the parked tractor-trailer of the Jenrette Transport Company when I was blinded by this passing car. Just as the car that was meeting me passed I saw a truck in front of me and I said 'God spare my life,' and by the time I said 'life' by the time I got by that automobile, I had already hit it. I pulled to my left. I had my foot on the brake . . . just as tight as I could have . . . at the time I hit the truck and the gravel was what caused my car not to stop quicker. When I first saw the truck I was about 15 to 18 feet from it. The truck was still. There were no lights on the rear of the truck and there were no flares out around the truck. Everything was dark and I didn't see it until it just loomed right up on me. There was nobody out there with a flashlight to give any warning. When I hit the truck I passed out . . . The . . . tractor-trailer blocked three-fourths of my right lane of traffic. The . . . tractor-trailer truck was within 18 or 20 inches of the middle line of the highway, that is, the left rear tires. There was a 6 to 8 foot shoulder to the right of the truck."

Then on cross-examination plaintiff continued: "I left Sanford a little while before this happened. I was heading south towards Fayetteville . . . I had about 350 pounds of merchandise in the car . . . I was some-

where between Sanford and where I had the wreck when a shower of rain came up. I ran through the shower. It had not completely quit raining at the time. The shower had gone and it came a little drizzle and a fog arising. It was foggy at the time I met the car . . . I couldn't see whether the road ahead of me was straight or curved about the place where the wreck occurred. I had never been on that road before one time before and that was in the daytime. I have been there since . . . I don't know of my own knowledge where the truck was . . . only what somebody showed me. I was completely blinded . . . just a short time. I couldn't say definitely how far I went while I was blinded but it was just a matter of seconds. I was blinded all the time from 125 to 150 feet, from the time he blinded me until the truck loomed up in front of me . . . At the time he blinded me I would say I went approximately 125 to 150 feet absolutely blinded because I was driving 42 miles an hour. I could not have seen that truck if I had looked good ahead, not when the car was there, not before I met it because I was on an up-cline . . . a slight up-cline. I wasn't completely blinded and I did not say I was completely blinded . . . I say I was blinded . . . I couldn't see it (the truck) at the time I was meeting the car . . . I'll say for 5 or 6 seconds . . . I didn't see it until the bright lights had passed by and that is whenever I saw it . . . At that time I would say my speed was approximately 25 miles per hour . . . I cut to the left all I could in that short space, . . . right front wheel and . . . fender from about half of the car ran on right up under the truck body on the left . . . The corner of his truck came right into the right hand side of my car all the way back and smashed it down to the seat. At the moment I saw it I put on my brakes as hard as I could. I had been driving 50 to 55 miles an hour according to the law . . . I had slowed down to 42 miles an hour . . . a mile or more away from there . . . At the time I met the car I was still making about the same speed—42 miles an hour at the time I met him . . . I am swearing that there were no lights burning on the truck, nowhere on the rear of the truck that I could see there."

O. C. McBryde, a deputy sheriff, testified: ". . . I went out and investigated the wreck on the night of November 3, 1949 . . . I went there as an officer of the law . . . Whenever I got there they were loading Mr. Morris onto the ambulance and Mr. Morris' car had swerved to the left so that the front edge of his car was out past the white line in the center of the road. That is the left front . . . I would say around 4 feet of the back of the truck was in the highway on the hard surface. There was no lights on the back of the truck at that time but the driver had a big stop light right in the middle of the truck under the body, and that didn't work. I had him put his foot on the brake, asked him to do that and it didn't work. He cut the other lights on the truck and he had some

clearance lights as well as I remember, and then this big light. When I got there nothing was showing except the one headlight which was still burning on Mr. Morris' car. The other one on there was, of course, knocked out . . . The visibility was bad . . . It was misty and foggy. The top and front of the windshield of Mr. Morris' car was all crushed down to . . . the back of the front seat. The car wasn't worth much after the wreck, I would say just junk . . ."

Then on cross-examination the witness continued: "I would say I got to the scene of the wreck some 15 or 20 minutes after it happened . . . The left side of the truck was approximately 4 feet on the highway. It was about half on and half off. The highway is just a little bit higher than the shoulder where the hard surface breaks off there and it had a slope into the side ditch. I don't remember how wide the shoulder was there but that was my impression that since it had been raining it was probably as close as he could get to the ditch without maybe sliding on in. The width of the pavement at that place was approximately 22 feet . . . The shoulders were probably a little over 4 feet . . . The road had two traffic lanes with a center line in it. . . . I talked to the driver of the truck. He said he had had trouble with the truck, had started and had driven some little distance . . . when it knocked off again. That they started pulling it off the highway and got it as far as he could get it and that he looked in his rear mirror and saw the headlights coming, that he put his foot on the brake pedal to operate it and that it was connected with the stop light in the back, that he started using that as a signal, that he didn't have time to get out of the cab. . . . Immediately after he stopped he saw the other car coming and hadn't had time to get out before it hit him. That stop light was located in the center under the body of the truck. It was an 8 inch light . . . There was nothing covering this light when I saw it. As well as I recall it was located below the body proper, and most of them are fastened in the center of the chassis. The lights would burn. The tail light was pulled loose and laying up, either on the bumper or on the fender . . . That was the light where the car ran under and . . . into. It was broken loose from the truck. The driver told me that his clearance lights were burning when he stopped."

Then on re-direct examination the deputy sheriff continued: "My recollection was that the driver told me he had been stopped and they had worked on the . . . truck nearer to Sanford than where the collision occurred . . . He said they had got it started, and . . . they had driven it on down the highway from Sanford when . . . it knocked off again . . . I believe the driver told me that he phoned to Raleigh for a mechanic . . . I'd say Raleigh was about 55 miles away from the scene of the wreck. There are good mechanics in Sanford. The driver said he had a mechanic from Raleigh . . . He told me that Mr. Jenrette and

the mechanic were walking back from the car, that they were right in front of him."

And on recross-examination the deputy sheriff concluded: "I would say in the next hundred yards past the scene of the wreck to the south there is an incline to the left,—a gradual curve . . . That is a rough road to identify skidmarks . . . Now where this car had started, I would say 8 feet or maybe 10 feet back of the truck you could see where he cut the gravel when he cut to the left. You could see the curve of the front wheel where it cut to the left."

And plaintiff offered other witnesses whose testimony tends to show that they arrived at the scene soon after the collision; that the pavement was 16 feet wide; that the truck was half on and half off the pavement; that they saw no lights on the truck; that they saw no flares on the highway; and that it was rainy and foggy. One witness, M. J. Yarborough, said: "Oh, yes, it was so foggy that you would have to take your time. It wasn't a night to be running too fast."

Motion of defendant for judgment as of nonsuit entered at the close of plaintiff's evidence was allowed, and, in accordance therewith, judgment was entered. Plaintiff appeals to Supreme Court, and assigns error.

Thos. W. Ruffin for plaintiff, appellant.
Clem B. Holding for defendant, appellee.

WINBORNE, J. When the evidence offered by plaintiff, as shown in the record on this appeal, is taken in the light most favorable to him, is there sufficient evidence to take the case to the jury? The trial court ruled in the negative, and we approve.

In order to establish actionable negligence plaintiff must show (1) that there has been a failure to exercise proper care in the performance of some legal duty which defendant owed to plaintiff, under the circumstances in which they were placed; and (2) that such negligent breach of duty was the proximate cause of the injury—a cause that produced the result in continuous sequence, and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such result was probable under all the facts as they existed. *Whitt v. Rand,* 187 N.C. 805, 123 S.E. 84, and numerous other cases.

Tested by this rule, it may be fairly doubted that there is shown any evidence of actionable negligence on the part of defendant in the present action. The uncontradicted statement of defendant's driver, offered in evidence by plaintiff through his witness, the deputy sheriff, refutes the theory of "a parking" of defendant's tractor-trailer at the place of the collision in question, within the meaning of the statute, G.S. 20-161 (a) as amended by Chap. 165 of 1951 Session Laws of North Carolina. The

statute declares that "No person shall park or leave standing any vehicle, whether attended or unattended, upon the paved or improved or main traveled portion of any highway, outside of a business or residence district, when it is practicable to park or leave such vehicle standing off of the paved or improved or main traveled portion of such highway."

And the terms "park" or "leave standing" as used in this statute have been interpreted by this Court as meaning "something more than a mere temporary or momentary stop on the road for a necessary purpose." 42 C.J. 613. *Stallings v. Transport Co.*, 210 N.C. 201, 185 S.E. 643; *Peoples v. Fulk*, 220 N.C. 635, 18 S.E. 2d 147; *Leary v. Bus Corp.*, 220 N.C. 745, 18 S.E. 2d 426; *Pike v. Seymour*, 222 N.C. 42, 21 S.E. 2d 884; *Morgan v. Coach Co.*, 225 N.C. 668, 36 S.E. 2d 263.

In *Peoples v. Fulk, supra,* in opinion by *Barnhill, J.,* it is said: "Starting and stopping are as much an essential part of travel on a motor vehicle as is 'motion.' Stopping for different causes, and according to the exigencies of the occasion, is a natural part of travel. The right to stop when the occasion demands is incident to the right to travel"—citing cases.

Hence, plaintiff's car having approached before the driver of the defendant's tractor-trailer had time, after it stopped, to get out of the cab, the tractor-trailer was not parked or left standing upon the paved portion of the highway in violation of the above quoted provision of G.S. 20-161 (a).

True, there is a proviso to G.S. 20-161 (a) which reads: "That in the event that a truck, trailer or semi-trailer be disabled upon the highway that the driver of such vehicle shall display, not less than 200 feet in the front and rear of such vehicle, a warning signal . . . after sundown red flares or lanterns . . . ." But this statute contemplates that the driver shall have a reasonable time within which to perform this duty of displaying warning signals. The law will not hold him to be negligent in failing to do that which he has not had time to do. Hence, we hold that, in the light of the uncontradicted statement of the driver of defendant's tractor-trailer, that the plaintiff's car approached before he had time to get out of the cab, so offered in evidence by plaintiff, a violation of the provisions of this proviso is not made to appear.

Now, then, is there evidence that the tractor-trailer of defendant was permitted to be on the highway without lights?

The statute, G.S. 20-129, declares when vehicles must be equipped with lights. Subsection (a) reads: Every vehicle upon a highway within this State during the period from a half hour after sunset to a half hour before sunrise, and at any other time where there is not sufficient light to render clearly discernible any person on the highway at a distance of two hundred feet ahead, shall be equipped as in this section respectively required

for different classes of vehicles, and subject to exemption with reference to lights on parked vehicles as declared in G.S. 20-134.

And subsections (d) and (e) pertain to rear lamps and clearance lamps respectively.

In this connection, the deputy sheriff, in his testimony, refers to a big stop light under, and clearance lights and tail light on defendant's tractor-trailer, and stated that the driver of the tractor-trailer said that, seeing the headlights coming, "he put his foot on the brake pedal to operate it . . . that it was connected with the stop light in the back, that he started using that as a signal . . .," and "that his clearance lights were burning when he stopped."

On the other hand, plaintiff who, according to his own statement was completely blinded, and traveling at speed of forty-two miles an hour until about 15 to 18 feet from the tractor-trailer, when he first saw it, testified that "there were no lights on the rear of the truck," and, again, "that there were no lights burning on the truck,—nowhere on the rear that I could see there."

If it be conceded that this testimony of plaintiff tends to show that defendant did not have lights on the rear of the tractor-trailer, the mere statement, in connection with surrounding circumstances, clearly shows that the absence of lights was not a proximate cause of the collision. Hence there is no evidence of actionable negligence in support of the allegations of the complaint.

And it may be noted that all other testimony as to lights on the tractor-trailer was from witnesses who arrived at the scene after the collision. Their testimony that at that time there were no lights on the tractor-trailer has no probative force upon the question as to whether the rear lights of the tractor-trailer were burning at the time of the collision. See *Peoples v. Fulk, supra.*

But if it be conceded that defendant was negligent in some respect alleged in the complaint, it is manifest from the evidence that the speed at which plaintiff was driving his automobile was the proximate cause, or at least one of the proximate causes of his injury and damage. The case comes within and is controlled by the principles enunciated and applied in *Weston v. R. R.*, 194 N.C. 210, 139 S.E. 237; *Lee v. R. R.*, 212 N.C. 340, 193 S.E. 395; *Beck v. Hooks*, 218 N.C. 105, 10 S.E. 2d 608; *Sibbitt v. Transit Co.*, 220 N.C. 702, 18 S.E. 2d 203; *Dillon v. Winston-Salem*, 221 N.C. 512, 20 S.E. 2d 845; *Pike v. Seymour*, 222 N.C. 42, 21 S.E. 2d 884; *Allen v. Bottling Co.*, 223 N.C. 118, 25 S.E. 2d 388; *Atkins v. Transportation Co.*, 224 N.C. 688, 32 S.E. 2d 209; *McKinnon v. Motor Lines*, 228 N.C. 132, 44 S.E. 2d 735; *Riggs v. Oil Corp.*, 228 N.C. 774, 47 S.E. 2d 254; *Tyson v. Ford*, 228 N.C. 778, 47 S.E. 2d 251; *Cox v. Lee*, 230 N.C. 155, 52 S.E. 2d 355; *Brown v. Bus Lines*, 230

N.C. 493, 53 S.E. 2d 539; *Hollingsworth v. Grier,* 231 N.C. 108, 55 S.E. 2d 806; *Baker v. R. R.,* 205 N.C. 329, 171 S.E. 342; *Montgomery v. Blades,* 222 N.C. 463, 23 S.E. 2d 844. See also *Marshall v. R. R.,* 233 N.C. 38, 62 S.E. 2d 489.

In this connection, the speed statute, G.S. 20-141, as rewritten in Sec. 17, Chap. 1067 of 1947 Session Laws of N. C., declares in pertinent part:

(a) "No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions then existing.

(b) "Except as otherwise provided in this chapter, it shall be unlawful to operate a vehicle in excess of the following speeds:

(1) Twenty miles per hour in any business district;

(2) Thirty-five miles per hour in any residential district;

(3) . . . ;

(4) Fifty-five miles per hour in places other than those named in paragraphs 1 and 2 of this subsection for passenger cars . . .;

(c) "The fact that the speed of a vehicle is lower than the foregoing limits shall not relieve the driver from the duty to decrease speed . . . when special hazard exists with respect to pedestrians or other traffic or by reason of weather or highway conditions, and speed shall be decreased as may be necessary to avoid colliding with any person, vehicle or other conveyance on the highway in compliance with legal requirements and the duty of all persons to use due care."

In this connection this Court, in *Weston v. R. R., supra,* speaking through *Brogden, J.,* to a factual situation somewhat similar to that here, had this to say: "The general rule under such circumstances is thus stated in Huddy on Automobiles, 7 Ed. 1924, sec. 296: 'It was negligence for the driver of the automobile to propel it in a dark place in which he had to rely on the lights of his machine at a rate faster than enabled him to stop or avoid any obstruction within the radius of his lights, or within the distance to which his lights would disclose the existence of obstructions . . . If the lights on the automobile would disclose obstructions only ten yards away it was the duty of the driver to so regulate the speed of his machine that he could at all times avoid obstructions within that distance. If the lights on the machine would disclose objects further away than ten yards, and the driver failed to see the object in time, then he would be conclusively presumed to be guilty of negligence because it was his duty to see what could have been seen.' " This principle has been brought forward and applied in *Lee v. R. R., supra; Beck v. Hooks, supra; Sibbitt v. Transit Co., supra; Dillon v. Winston-Salem, supra,* and others.

In *Beck v. Hooks, supra,* the rule is stated in this way: "It is not enough that the driver of plaintiff's automobile to be able to begin to stop within the range of his lights, or that he exercise due diligence after

seeing defendants' truck on the highway. He should have so driven that he could and would discover it, perform the manual acts necessary to stop, and bring the automobile to a complete stop within the range of his lights. When blinded by the lights of the oncoming car so that he could not see the required distance ahead, it was the duty of the driver within such distance from the point of blinding to bring his automobile to such control that he could stop immediately, and if he could not then see, he should have stopped. In failing to so drive he was guilty of negligence which patently caused or contributed to the collision with defendants' truck, resulting in injury to plaintiff."

In the light of the provisions of the statute, G.S. 20-141, as so rewritten, the contributory negligence of plaintiff clearly appears from his own testimony and the physical facts shown in the evidence. He says that while completely blinded by the bright lights of an oncoming car, he drove "for 5 or 6 seconds" at a speed of forty-two miles per hour, a distance he gives as "125 to 150 feet," but mathematically calculated for the time and at that speed, 305 to 360 feet. "Such is the stuff of which wrecks are made," wrote *Stacy, C. J.*, in *McKinnon v. Motor Lines, supra.*

While plaintiff was under no duty to anticipate negligence on the part of others traveling the highway, it was his duty to anticipate presence of others, *Hobbs v. Coach Co.*, 225 N.C. 323, 34 S.E. 2d 211, and hazards of the road, such as disabled vehicles, and, in the exercise of due care, to keep his automobile under such control as to be able to stop within the range of his lights.

The judgment of nonsuit entered below will be, and it is hereby

Affirmed.

MITTIE L. CLARK, ADMINISTRATRIX OF SAMUEL FRANKLIN CLARK, v. STANFORD LOWELL LAMBRETH.

(Filed 21 May, 1952.)

1. Negligence § 19d—

When it clearly appears from the evidence that the injury complained of was independently and proximately produced by the wrongful act, neglect, or default of an outside agency or responsible third person, defendant's motion to nonsuit is properly allowed.

2. Automobiles §§ 8d, 18d, 21—Evidence held to establish that negligence of driver in hitting parked vehicle was sole proximate cause of collision.

Intestate was riding as a passenger in his father's truck at night. The evidence tended to show that defendant's truck was parked at an angle to the curb so that its left rear protruded into the lane of travel, and that the truck driven by intestate's father collided therewith. The evidence further tended to show that no other traffic was moving along the street, that there

was abundant space for a vehicle to pass the parked truck in safety, and that the parked truck could be seen from some distance but that intestate's father did not see it. *Held:* The evidence discloses either that the truck in which intestate was riding was driven without sufficient lights or that the driver failed to keep a proper lookout and that in either event the driver was guilty of negligence constituting the active proximate cause of the injury which insulated any negligence on the part of defendant, even if it be conceded that defendant's truck was negligently parked in violation of State law and city ordinance.

APPEAL by plaintiff from *Sink, J.,* at November Term, 1951, of IREDELL.

Civil action to recover for alleged wrongful death, G.S. 28-172 and G.S. 28-173, as result of actionable negligence of defendant Lambreth.

Plaintiff alleges in her complaint that the injury to, and death of her intestate was proximately caused by these acts of negligence:

1. That defendant Lambreth negligently and unlawfully parked his 1950 Ford truck with the rear end of it "sticking and protruding out over and into Shelton Avenue directly in front of automobiles passing over and along said . . . avenue . . . and allowed same to remain so placed up and until the time of the collision . . . in violation of" ordinances of the city of Statesville, Code of 1947, Numbers 71 and 61, respectively.

2. That defendant Lambreth negligently and unlawfully allowed his 1950 Ford truck to remain so parked, as above set forth, "without having lights or reflectors" on same "to warn persons traveling over and along said Shelton Avenue, in violation of the laws of the city of Statesville, North Carolina, and the State of North Carolina as set out and provided in the General Statutes of said State."

3. That "defendant negligently, carelessly and recklessly allowed dirt and dust to collect and form on all parts of his said Ford truck, making it even more difficult to be seen by persons traveling over and along the said Shelton Avenue."

Defendant Lambreth, in his answer, denies the material allegations of the complaint, and as first further answer and defense avers, among other things, substantially these facts: That his truck was parked in a business district in full compliance with ordinances of the city and of laws of the State; and that the collision between his truck and the Clark truck was caused solely by the negligence of O. B. Clark in that he operated his truck at unlawful speed, recklessly, without keeping a proper lookout, and without sufficient lights, and at a speed greater than that at which he could stop within the range of his lights.

And, for a second and further answer and defense, defendant Lambreth avers that, if he were guilty of negligence in any respect, then the negligence of O. B. Clark, as set out in paragraph 2 of the first further answer

and defense, joined and concurred with his negligence, in manner specifically set forth.

And defendant Lambreth prayed an order making O. B. Clark a party defendant herein and summoned to answer, etc., and that judgment be rendered in accordance with answer and defense set up by him, the said Lambreth.

Accordingly O. B. Clark was made party defendant, and served with summons and copy of answer. And, answering, O. B. Clark admits that he is the father of plaintiff's intestate and that plaintiff was riding in the motor truck of O. B. Clark about 10:30 p.m. on 23 December, 1950, on Shelton Avenue in Statesville, North Carolina, but denies all other averments set forth in both the first and the second further answer and defense of defendant—upon which he prays that defendant take nothing of him, and that the cross-action be dismissed at cost to defendant.

These facts appear to be uncontroverted: Plaintiff's intestate, Samuel Franklin Clark, a boy eleven years of age and resident of Iredell County, North Carolina, died in the early morning of 24 December, 1950, as result of injuries received at or about 10 o'clock p.m. on 23 December, 1950, when an International pick-up truck, owned and operated by his father, traveling in a southerly direction along Shelton Avenue in the city of Statesville, North Carolina, and in which he was riding as a passenger and guest, collided with the left rear end of a 1950 Ford truck owned by defendant Lambreth and parked and placed by him and permitted by him to remain parked on the west side of said avenue headed in southerly direction, at a point on Shelton Avenue in the second block from, and south of the intersection of said avenue and Monroe Street,—and plaintiff Mittie L. Clark is the duly qualified administratrix of the said Samuel Franklin Clark, deceased, and summons herein issued 17 February, 1951, and was served on defendant same day.

Upon the trial in Superior Court plaintiff offered as witnesses Mrs. Mittie L. Clark, mother and administratrix of Samuel Franklin Clark, deceased, A. E. Guy, City Clerk and Treasurer of the city of Statesville, and M. W. Raymer, coroner of Iredell County, and Sgt. Tom Waugh, member of police department of Statesville, who investigated the collision, and one W. D. Everhardt of Mooresville, N. C., a passerby.

At the outset of her testimony Mrs. Clark stated: That on night of 23 December, 1950, she, her husband Oscar Bruce Clark, and her son, the intestate, came from their home near Barium Springs into Statesville and had supper at the Donut Dinette. And, quoting her, "After we had supper we decided to go home. It was about 10 minutes to 10 o'clock . . . We drove to the stop light at the bus station, turned left and were on our way . . . My husband was operating our car. I was sitting in the center and my little boy was on the outside. We stopped at the red

light at the top of the hill which is at the intersection of Shelton Avenue and Monroe Street. I think this stop light is about 100 feet from the point of the collision in which we were involved."

The testimony offered by plaintiff tends to show this factual setting at the scene, and at the time, and on the night of the collision:

(1) There are curbs on both sides of Shelton Avenue, and width inside curbs is 35 feet and 8 inches. It is a three-lane highway, with ample space for three cars. The width of the left lane, and of the right lane, is 12 feet and 9 inches, and that of the center lane is 9 feet and 10 inches. The three lanes are marked with white lines,—the two lines being approximately 5 inches wide.

(2) The Avenue, looking south from its intersection with Monroe Street is straight, in opinion of plaintiff, for a mile, and in opinion of police officer for approximately 1½ blocks north and 2½ blocks south of the place of the collision.

There is a station at the corner at the stop light and Drum's Store is at the next corner in the first block. In the next block on the west side there is the Barkley home, in front of which defendant's truck was parked, and south of it a small fruit stand and next to it a filling station. Still further south on the left side there is an ice plant.

It was a clear and rather chilly night. It was not raining, and the street was dry.

According to Mrs. Clark's testimony: There was no traffic meeting the Clark truck. There were several cars parked on the west side of Shelton Avenue, but how many she does not know. She "did not notice that any cars were parked on the opposite side of the street from where the truck was parked." The lights on the Clark truck "were good, and were on dim." Mrs. Clark said: "I could see ahead with those dim lights about 50 feet." She also testified: "There was nothing between us and the parked truck as we approached it, no obstruction, nothing to prevent me from seeing it. There was nothing between our vehicle and the parked truck from the time we passed Monroe Street up until we reached the point where the accident happened."

And Mrs. Clark also testified: "After we stopped at the stop light, we came on across and the street was dark, and I remember seeing this truck which was parked just before we hit it. I saw the corner of it and it was projecting out over that white line and I thought it was going to hit me in the face so I went over against my husband and little boy. As to this line of which I speak . . . we were driving in the center lane. We were traveling about 15 or 20 miles an hour . . . cars were parked on that side of the street and we were missing them about 4 or 5 feet. As to the manner in which the truck that we hit was parked, the left corner of the truck was hanging out or projecting out over the white line and it was sitting

at an angle. There were no reflectors and no lights or anything on the vehicle we ran into. My son . . . was injured in this collision . . . I told Mr. Marvin Raymer about how the truck was parked . . ."

On cross-examination Mrs. Clark was asked these questions, which she answered as shown: "Q. And about how far up the street were you when you saw the truck? A. We were right on it. Q. How far away would you say? A. Well, I just saw it, and we hit it. He did not have any time to make any move so he would miss it. Q. Would you say three, or four, or five feet? A. Yes, approximately." And, again, "I was looking straight ahead, but did not see this truck until we were 4 or 5 feet from it."

And immediately after the collision, Mr. Clark asked Mrs. Clark "what did we hit?" The coroner and the officer each testify that he talked with Mr. Clark after the accident, and "he said he did not see the truck before he hit it."

And further as to position of defendant's truck: Sgt. Waugh testified that defendant told him "he had parked his truck there about thirty minutes before the collision . . . and that he parked it parallel to the curb."

In this connection, Sgt. Waugh also testified: "I went to the scene of the accident. The Lambreth truck, a 1950 Ford, was on the right hand side of Shelton Avenue, facing south, and the Clark truck was in the middle of the street. The bed of the truck was not on the chassis at that time. We moved the vehicles off the street . . . The right front wheel of the Lambreth truck was on the sidewalk, and the left front wheel was on the street next to the curb. The left rear wheel was sitting out in the street. The right rear wheel . . . two dual wheels, were approximately one and one-half feet from the curb, sitting at an angle to the west curb. The Clark truck . . . facing the same way . . . south, and about ten feet from the rear of the Lambreth truck."

This witness continued, "I measured the Lambreth truck. The overall length . . . is twenty feet and ten inches. The length of the bed is twelve feet, and its width is seven feet and ten inches. The height of the bed is six feet and six and one-half inches. The distance from the bed to the ground is three feet and four inches, and the distance from the top of the wheel to the bed is four and one-half inches."

As to the lights on the street: The tenor of Mrs. Clark's testimony is that there were not any street lights burning between the stop light and the ice plant, except one at the corner of the street below, and about 50 feet from where the accident happened.

On the other hand, the policeman testified that there was a light shining in the center of Shelton Avenue and Mills Street, and another in the southwest corner of Shelton Avenue and Winston Street—one hanging in the middle of the street, and the other on the corner. And that from the light on Winston Street to the scene of the accident was approximately

125 to 130 feet, and from that in Mills Street, it was approximately 200 feet. And the coroner testified that there was a street light east of the ice plant.

Evidence as to damage to trucks: The truck of defendant had a hole near the bottom of the bed on the left hand side, facing south, approximately a foot to eighteen inches from the left edge of the truck. The bed of the Clark truck was off the chassis. The right front was damaged, fender and hood. The right windshild post was broken. The center post was not broken. The right hand door was mashed in.

The policeman also testified that from the intersection of Shelton Avenue and Monroe Street, about a block and a half away, he could see the cars at the scene of the accident. On the other hand, while the coroner testified that looking south "there is a blind spot in there that is more or less a blank wall," he stated, "the area is not a black-out . . . as long as you were driving so you could stop as far as you could see, there was no danger."

Mrs. Clark testified: "If my husband had seen the truck he could have pulled to his left."

There is other testimony. It is not in conflict with the trend as indicated by the above.

Plaintiff also offered in evidence:

(1) Section 71 of Chapter 17 of the Code for the city of Statesville, "Parking automobiles, etc.," as follows: "Vehicles with trailers or any vehicle the combined length of load and vehicle is of such dimensions as to extend into the traffic lane shall not be parked within the forty-five degree spaces indicated at the curb at any place in the city so as to obstruct traffic, but when necessary for such vehicles to park, such vehicles shall park parallel to the curb and not more than six inches therefrom"; and

(2) Part of Section 61 of said Chapter, "Obstructing Passage," as follows: "No vehicle shall stand on any street so as to interrupt or interfere with the passage of public conveyances or other vehicles."

And, in this connection, A. E. Guy, City Clerk and Treasurer of the city, as witness for plaintiff, testified on cross-examination: "I do not think there were any forty-five degree spaces marked off on Shelton Avenue during last December."

It is noted that no evidence was offered tending to support the third allegation of negligence as hereinabove set out. While the coroner, testifying in corroboration of Mrs. Clark, stated that "she said that the left rear of the large truck was out in the street, and that its color was green," she does not advert to the color in her testimony. Nor does anyone else.

Motion of defendant for judgment as in case of nonsuit made at the close of plaintiff's evidence was allowed, and from judgment in accordance therewith plaintiff appeals to Supreme Court and assigns error.

R. A. Hedrick and J. G. Lewis for plaintiff, appellant.

Scott & Collier, Smathers & Carpenter, and Wm. B. Webb for defendant, appellee.

WINBORNE, J. This is the pivotal question: Considering the evidence shown in the case on appeal contained in the record, in the light most favorable to plaintiff, is there sufficient evidence to take the case to the jury? The trial court did not consider it sufficient and, with his ruling, we agree.

This case is controlled by principles of intervening negligence applied in decisions of this Court in *Smith v. Sink,* 211 N.C. 725, 192 S.E. 108; *Powers v. Sternberg,* 213 N.C. 41, 195 S.E. 88; *Butner v. Spease,* 217 N.C. 82, 6 S.E. 2d 808.

In *Smith v. Sink, supra,* opinion by *Stacy, C. J.,* it is stated that "In negligence cases, it is proper to sustain a demurrer to the evidence and to enter judgment of nonsuit: 1. When all the evidence taken in its most favorable light for plaintiff, fails to show any actionable negligence on the part of the defendant . . . 2. When it clearly appears from the evidence that the injury complained of was independently and proximately produced by the wrongful act, neglect, or default of an outside agency or responsible third person." Cases are there cited in respect to each principle.

In *Smith v. Sink* it is also said: "We had occasion to examine anew this doctrine of insulating the conduct of one, even when it amounts to passive negligence, by the intervention of the active negligence of an independent agency or third party, as applied to variant fact situations, in the recent case of *Beach v. Patton,* 208 N.C. 134, 179 S.E. 446," and others cited. Then, continuing: "These decisions, and others, are in full support and approval of Mr. Wharton's statement in his valuable work on Negligence (Sec. 134): 'Supposing that if it had not been for the intervention of a responsible third party the defendant's negligence would have produced no damage to the plaintiff, is the defendant liable to the plaintiff? This question must be answered in the negative, for the general reason that causal connection between negligence and damage is broken by the interposition of independent responsible human action. I am negligent on a particular subject matter. Another person, moving independently, comes in, and either negligently or maliciously so acts as to make my negligence injurious to a third person. If so, the person so intervening acts as a non-conductor, and insulates my negligence, so that I cannot be sued for the mischief which the person so intervening directly produces. He is the one who is liable to the person injured.'" Then there follows, to like effect, a quotation from *R. R. v. Kellogg,* 94 U.S. 469.

And in *Powers v. Sternberg, supra,* this Court said: "Even if it be conceded that defendant's truck was negligently parked on the side of the road . . . which may be doubted on the facts revealed by the record . . . still it would seem that the active negligence of the driver of the Bedenbaugh car was the efficient cause of plaintiff's intestate's death." And, again, "The parking of the truck, if a remote cause, was not the proximate cause of the injury. The conduct of Wallis would have produced no damage but for the active intervening negligence of Bedenbaugh. This exculpates the defendants."

In the light of these principles, even if it be conceded that the truck of defendant was negligently parked on the side of Shelton Avenue, which may be doubted on the facts revealed by the record, it would seem that the active negligence of the operator of the Clark truck was the real, efficient cause of the death of plaintiff's intestate. It is clear that the operator of the Clark truck was driving either without sufficient lights, or without keeping proper lookout ahead, when there was nothing on the street to prevent him seeing the parked truck. It is also clear that there was abundant space for the Clark truck to pass the parked truck in safety.

Consideration has been given to other exceptions, and error is not made to appear.

While as in *Hammett v. Miller,* 227 N.C. 10, 40 S.E. 2d 480, the case presents a deplorable, tragic, and untimely ending of a young life, the evidence is insufficient to support a finding that it was proximately caused by the parking of the truck of defendant. Other causes are apparent.

Affirmed.

FLORA GORDY RYAN (MRS. R. G. RYAN) v. WACHOVIA BANK & TRUST COMPANY (HIGH POINT BRANCH), EXECUTOR AND TRUSTEE UNDER THE LAST WILL OF McD. GORDY.

(Filed 21 May, 1952.)

1. Appeal and Error § 40d—

Findings of fact by the trial judge, when authorized by law or consent of the parties, are as conclusive as findings by the jury if there is any competent evidence to support them.

2. Wills § 43—

Where caveator acts in good faith and with probable cause in caveating the will, he is entitled to take a legacy bequeathed him in the instrument notwithstanding a provision therein that any beneficiary taking any action in caveating the will should forfeit any interest thereunder. The forfeiture provision will not be given effect to oust the supervisory power of the courts to determine the issue of *devisavit vel non.*

APPEAL by defendant from *Nettles, J.*, October Term, 1951, of GUILFORD (High Point Division).

This is a civil action brought by Flora Gordy Ryan, a devisee under the will of her father, McD. Gordy, against the Wachovia Bank & Trust Company, Executor and Trustee under the will of McD. Gordy, to recover possession of a store building devised to the plaintiff under Article XI of her father's will.

McD. Gordy died 30 November, 1948. On 16 December, 1948, the Wachovia Bank & Trust Company presented for probate a paper writing dated 27 February, 1947, purporting to be the last will and testament of McD. Gordy. This instrument contained a provision in Article XV thereof to the effect that if any objections were made to the probate of the will, or any attempt should be made to revoke the probate thereof, by any of the testator's heirs, next of kin, legatees, devisees, or any beneficiary under the provisions of the will, those who inaugurated, or abetted any such contest should, by reason thereof, forfeit any and all right or interest which he or she might otherwise have under the terms of the will.

On 22 April, 1949, six of the testator's ten children, including the plaintiff in this action, filed a caveat alleging that said paper writing was not the last will and testament of said McD. Gordy for that, (a) his signature to said will was obtained through undue and improper influence and duress; and (b) at the time of the purported execution of said paper writing he was not capable of executing a last will and testament.

The caveat came on for hearing at the January Term, 1950, of the Superior Court of Guilford County, High Point Division. The caveators offered evidence to the effect that the testator was ninety years old when he died; that he was worn out and feeble and could not do any work for several years prior to his death; that at times he could not recognize his children; that for several years prior to his death, when his older children would visit him, Mrs. Crissman and Mrs. Plummer (daughters who are among the chief beneficiaries under the will), would make it a point for one or the other to be present; that these older children during such time never had an opportunity for a private conversation with their father.

The will provided for a trust fund, consisting of a substantial part of the estate, to take care of Mrs. Gordy, the widow of the testator, and an invalid son during their lives. The estate was appraised for inheritance tax purposes for about $232,000. According to its terms, one daughter was to receive $25, the same sum the testator gave to his Negro renters who had been renting from him for twelve months. Another daughter was given $30, and still another only $300. Seven of the testator's ten children testified for the caveators (some of them being among the largest beneficiaries under the will). Upon all the evidence, however, the jury returned a verdict in favor of the propounders.

When the plaintiff filed her complaint in this action, the defendant filed an answer and pleaded the forfeiture clause in the will as a bar to her claim.

When the cause came on for hearing, a jury trial was waived and it was agreed that the court might hear the case upon the record of the caveat proceedings, a transcript of the evidence presented in the caveat proceedings, and an affidavit filed by the plaintiff in the present action.

The court found as a fact that the plaintiff had plausible and probable ground for joining in the contest of the will and acted in good faith in so doing and was not barred by the forfeiture clause, and rendered judgment in favor of the plaintiff. The defendant excepted and appealed to this Court, assigning error.

Crissman & Bencini and Roberson, Haworth & Reese for defendant, appellant.

Frazier & Frazier for plaintiff, appellee.

DENNY, J. Two questions are presented for consideration and determination. (1) Was the trial judge justified in finding as a fact that the plaintiff had probable cause for caveating her father's will and that in so doing she acted in good faith? (2) Does the finding that a caveator acted in good faith and with probable cause in caveating a will, entitle such caveator to take a legacy thereunder where the instrument contains a no-contest or forfeiture clause?

The first question must be resolved in favor of the plaintiff. Findings of fact by the trial judge, when authorized by law or consent of the parties, are as conclusive as when found by a jury, if there is any competent evidence to support them. There is evidence to support the finding of probable cause and good faith. Hence, such finding is binding on us. *Matthews v. Fry,* 143 N.C. 384, 55 S.E. 787; *Caldwell County v. George,* 176 N.C. 602, 97 S.E. 507; *Eggers v. Stansbury,* 177 N.C. 85, 97 S.E. 619; *Tyer v. Lumber Co.,* 188 N.C. 268, 124 S.E. 305; *Tinker v. Rice Motors, Inc.,* 198 N.C. 73, 150 S.E. 701; *Lumber Co. v. Finance Co.,* 204 N.C. 285, 168 S.E. 219; *Trust Co. v. Lumber Co.,* 221 N.C. 89, 19 S.E. 2d 138; *Burnsville v. Boone,* 231 N.C. 577, 58 S.E. 2d 351; *Radio Station v. Eitel-McCullough,* 232 N.C. 287, 59 S.E. 2d 779.

The second question has not been decided in this jurisdiction unless we consider what was said by way of *dictum* in *Whitehurst v. Gotwalt,* 189 N.C. 577, 127 S.E. 582, as binding on us. In that case, the will involved contained a no-contest or forfeiture clause. A caveat was filed and upon the issue of *devisavit vel non,* raised thereby, the will was sustained. The court found as a fact that the caveat was filed without probable cause and that, therefore, all the interests of the caveators in the land devised

were forfeited under the forfeiture clause in the testator's will. *Stacy, C. J.*, in speaking for the Court, said: ". . . by the clear weight of authority, both in England and in this country, a condition of forfeiture, if the devisee shall dispute the will, is valid in law. *Cooke v. Turner,* 15 M. & W. (Eng.), 735; *Perry v. Rogers,* 114 S.W. (Tex.), 897; *Donegan v. Wade,* 70 Ala. 501; *Hoit v. Hoit,* 42 N. J. Eq. 388; *Thompson v. Gaut,* 14 Lea (Tenn.), 314; 28 R.C.L., 315, and cases there cited.

"It is further held that where there exists *probalis causa litigandi,* that is, a probable or plausible ground for the litigation, a condition in a will that a legatee shall forfeit his legacy by contesting the will, is not binding, and under such circumstances a contest does not work a forfeiture. *Morris v. Burroughs,* 1 Atk. (Eng.), 399; *Powell v. Morgan,* 2 Vern. (Eng.), 90; *In re Friend,* 209 Pa. St., 442; *Smithsonian Inst. v. Meech,* 169 U.S. 398. But here it is found as a fact that no probable cause existed for the filing of the caveat."

In a number of jurisdictions it has been held that a clause in a will providing for forfeiture of the interest of any beneficiary contesting the instrument or its provisions, is valid and enforceable, even though such contest might have been instituted in good faith and with probable cause. *Re Kitchen,* 192 Cal. 384, 220 P. 301, 30 A.L.R. 1008; *Rudd v. Searles,* 262 Mass. 490, 160 N.E. 882, 58 A.L.R. 1548; *Schiffer v. Brenton,* 247 Mich. 512, 226 N.W. 253; *Rossi v. Davis,* 345 Mo. 362, 133 S.W. 2d 363, 125 A.L.R. 1111; *Bender v. Bateman,* 33 Ohio App. 66, 168 N.E. 574; *Barry v. American Security & T. Co.,* 77 App. D. C. 351, 135 F. 2d 470, 146 A.L.R. 1204.

It seems, however, that the weight of authority in this country supports the view that a no-contest or forfeiture clause in a will is subject to the exception that where the contest or other opposition of the beneficiary is made in good faith and with probable cause, such clause is not binding and a forfeiture will not result under such circumstances. *South Norwalk Trust Co. v. St. John,* 92 Conn. 168, 101 A. 961, Ann. Cas. 1918E 1090; *Re Cocklin,* 236 Iowa 98, 17 N.W. 2d 129, 157 A.L.R. 584; *In re Kathan's Will,* 141 N.Y.S. 705; *Wadsworth v. Brigham,* 125 Or. 428, 259 P. 299; *Friend's Estate,* 209 Pa. 442, 58 A. 853, 68 L.R.A. 447; *Rouse v. Branch,* 91 S.C. 111, 74 S.E. 133, 39 L.R.A. (N.S.) 1160, Ann. Cas. 1913E 1296; *Tate v. Camp,* 147 Tenn. 137, 245 S.W. 839, 26 A.L.R. 755; *Calvery v. Calvery,* 122 Tex. 204, 55 S.W. 2d 527; *In re Chappell's Estate,* 127 Wash. 638, 221 P. 336; *Dutterer v. Logan,* 103 W. Va. 216, 137 S.E. 1, 52 A.L.R. 83; *Re Keenan,* 188 Wis. 163, 205 N.W. 1001, 42 A.L.R. 836. In our opinion, these authorities give sound and logical reasons for the adoption of the probable cause rule.

In the case of *South Norwalk Trust Co. v. St. John, supra,* the Court said: "The law prescribes who may make a will and how it shall be made;

that it must be executed in a named mode, by a person having testamentary capacity and acting freely, and not under undue influence. The law is vitally interested in having property transmitted by will under these conditions and none others. Courts cannot know whether a will, good on its face, was made in conformity to statutory requirements, whether the testator was of sound mind, and whether the will was the product of undue influence, unless these matters are presented in court . . . Courts exist to ascertain the truth and to apply it to a given situation, and a right of devolution which enables the testator to shut the door of truth and prevent the observance of the law is a mistaken public policy . . . Where the contest has not been made in good faith, and upon probable cause and reasonable justification, the forfeiture should be given full operative effect. Where the contrary appears, the legatee ought not to forfeit his legacy. He has been engaged in helping the court to ascertain whether the instrument purporting to be the will of the testator is such . . . The effect of broadly interpreting a forfeiture clause as barring all contests on penalty of forfeiture, whether made on probable cause or not, will furnish those who would profit by a will procured by undue influence, or made by one lacking testamentary capacity, with a helpful cover for their wrongful designs."

In *In re Kathan's Will, supra,* the Court said: "We must remember that the statute of wills is a part of the public law, and a condition that an heir shall not be permitted to show testator's want of testamentary capacity, or his other noncompliance with the statute of the state without forfeiting the legacy is . . . contrary to public order and policy . . ."

In the case of *Rouse v. Branch, supra,* the Supreme Court of South Carolina said: "No case has been cited, and we do not believe any can be found, sustaining the proposition that a devisee or legatee shall not have the right, upon probable cause, to show that a will is a forgery, without incurring the penalty of forfeiting the estate given to him by the will. The right of a contestant to institute judicial proceedings upon probable cause to ascertain whether the will was ever executed by the apparent testator is founded upon justice and morality. If a devisee should accept the fruits of the crime of forgery under the belief, and upon probable cause, that it was a forgery, he would thereby become morally a *particeps criminis,* and yet, if he is unwilling to commit this moral crime, he is confronted with the alternative of doing so, or of taking the risk of losing all under the will, in case it should be found not to be a forgery. Public policy forbids that he should be tempted in such a manner."

The Supreme Court of Iowa, in overruling the case of *Moran v. Moran,* 144 Iowa 451, 123 N.W. 202, 30 L.R.A. (N.S.) 898, in the case of *Re Cocklin, supra,* quoted with approval the above statement from the Supreme Court of South Carolina, and then stated: "By the same token,

if a will was executed as the result of fraud, would not a legatee, who knew of the fraud but stood silently by fearing to risk loss of his legacy and accepted the fruits of the fraud, be morally a party to it? Also, a will executed by an incompetent is legally no more his will than if it were forged and a will secured by undue influence is as repugnant to the law as one secured by fraud. Public policy forbids that one should be tempted to let such wills prevail. The administration of justice should not be frustrated in such a manner."

In *Calvery v. Calvery, supra,* the Court said: "The greater weight of authority sustains the rule that a forfeiture of rights, under the terms of a will, will not be enforced where the contest of the will was made in good faith and upon probable cause," citing *Whitehurst v. Gotwalt, supra,* and numerous other decisions.

Those authorities that hold that a clause in a will providing for the forfeiture of the interest of a beneficiary contesting the instrument or its provisions, is valid and enforceable, even though such contest might have been instituted in good faith and with probable cause, adhere to the idea that a failure to enforce the forfeiture would result in thwarting the intention of the testator and would tend to encourage litigation in families. But, if a will has been procured by undue influence or fraud, there is no intent of the purported testator to thwart, sustain, or defeat. *Tate v. Camp, supra.*

In our opinion, a *bona fide* inquiry whether a will was procured through fraud or undue influence, should not be stifled by any prohibition contained in the instrument itself. In fact, our courts should be as accessible for those who in good faith and upon probable cause seek to have the genuineness of a purported will determined, as they are to those who seek to find out the intent of a testator in a will whose genuineness is not questioned.

Forfeiture clauses are usually included in wills to prevent vexatious litigation, but we should not permit such provisions to oust the supervisory power of the courts over such conditions and to control them within their legitimate sphere. *Friend's Estate, supra.*

There is a very great difference between vexatious litigation instituted by a disappointed heir, next of kin, legatee or devisee, without probable cause, and litigation instituted in good faith and with probable cause, which leads the contestant to believe that a purported will is not in fact the will of the purported testator. We think it is better to rely upon our trial courts to ascertain the facts in this respect.

We, therefore, adhere and follow the rule laid down by way of *dictum* in *Whitehurst v. Gotwalt, supra,* not under the doctrine of *stare decisis,* but by reason of its soundness.

The judgment of the court below is

Affirmed.

CHARLES E. ADCOX v. MRS. JAMES H. AUSTIN

and

J. C. McINTYRE, TRADING AS TEXTILE MOTOR FREIGHT, v. MRS. JAMES H. AUSTIN.

(Filed 21 May, 1952.)

1. Automobiles § 18g (2): Evidence § 42b—

Testimony of spectator that, at the time of the accident, she exclaimed "that car hit the truck" *held* competent.

2. Automobiles § 18g (4)—

Testimony of a witness that she noticed defendant's car "was being driven fast" *held* competent to explain her previous testimony that she had given it more than usual attention, and certainly was not prejudicial in view of her subsequent testimony estimating its speed.

3. Automobiles § 18g (5)—

The physical facts at the scene of a collision are competent upon the question as to the speed of the vehicle at the moment of impact.

4. Automobiles § 12a—

G.S. 20-141 requires the driver of a car, in the exercise of the duty to use due care, to reduce his speed to less than the maximum permitted by the statute when special hazards exist with respect to traffic or weather conditions or when necessary to avoid colliding with any person or vehicle.

5. Automobiles § 8a—

The driver of a vehicle is under duty to maintain a proper lookout and to see that which he ought to see.

6. Trial § 19—

Upon motion to nonsuit, the trial court is limited to ascertaining whether there is any evidence of probative value sufficient to take the issue to the jury.

7. Automobiles § 18h (3)—

Evidence tending to show that defendant was driving a car fifty-five miles per hour in approaching a Y-shaped intersection on a rainy day, that a tractor-trailer had jack-knifed, skidded and come to rest on the concrete apron between the intersecting highways immediately before defendant's car reached the scene, and that defendant's car hit the right rear wheel of the tractor with such force as to spin it around and completely demolish her car, *is held* to justify the submission of the issue of contributory negligence to the jury.

8. Negligence § 21—

A finding by the jury that plaintiff was not injured by the negligence of defendant, that defendant was injured by the negligence of plaintiff, but that defendant by her own negligence contributed to her injury, *is held* not inconsistent when measured by the applicable principles of law in this case.

ADCOX *v.* AUSTIN and MCINTYRE *v.* AUSTIN.

APPEAL by defendant from *Patton, Special Judge,* and a jury, July Civil Term, 1951, SCOTLAND.

Civil actions to recover for personal injury and property damage sustained in the collision between the automobile of defendant and the tractor-trailer owned by J. C. McIntyre, trading as Textile Motor Freight, and driven by plaintiff, Charles E. Adcox.

The plaintiff in each suit alleged negligence on the part of the defendant. The defendant denied the material allegations of the complaint and filed cross-actions, alleging negligence on the part of both plaintiffs. For convenience and by consent the cases were consolidated for trial. This appeal relates to and arises from the verdict and judgment upon the cross-actions of defendant.

The plaintiffs' evidence tends to show these facts: The collision occurred on 16 August, 1949, at about 4:30 p.m., between Monroe and Wadesboro at the Y-shaped intersection formed by old U. S. Highway 74 and the new highway bearing the same number. From the junction of these two highways a concrete apron extended 352 feet in an easterly direction. The collision occurred on the surface of this concrete apron. The tractor-trailer combination was traveling in an easterly direction from Monroe following the automobile of Mrs. T. C. Watson. The weather condition was rainy and the road wet. The tractor-trailer had been following the Watson car at a reasonable distance for a mile or more, both vehicles traveling at approximately 35 miles per hour. The tractor-trailer made no effort to pass the Watson car. Upon reaching the intersection, the Watson car slowed down for the driver to ascertain from the road signs the direction she wished to take. The slowing down of the Watson car gave rise to the application of brakes on the tractor-trailer, which was then at the western end of the intersection. Immediately the tractor-trailer jack-knifed and began to skid across the intersection for a distance of 50 to 60 feet, marking a gradual curve or straight line without zig-zagging and came to a full stop on the concrete apron in the jack-knifed position a second or two before the collision. Both tractor and trailer were off the area of that portion of Highway 74 upon which the appellant was traveling. The defendant was traveling in a westerly direction on Highway 74. As she met and passed the Watson automobile, she attracted the attention of Mrs. Watson because she was driving fast. She was at that time and at the time she approached the point of collision traveling at a speed of 55 miles an hour or more. As the Austin car passed, Mrs. Watson looked in her rear view mirror and said to her husband, "That car hit the truck." The front of the Austin car collided with the right rear wheel of the tractor and spun the tractor around on its "5th" wheel. The Austin car pivoted around and stopped facing the tractor. The Austin car was completely demolished. Mrs. Austin's

mother and another passenger were killed in the collision. A young son was injured, but not seriously. The car collided with the tractor with sufficient force to knock the driver of the tractor unconscious and to produce a severe dislocation of the fourth vertebra of his spine.

On the other hand, the defendant's evidence tends to show these facts: Mrs. Austin had been driving an automobile approximately 25 years and was acquainted with U. S. Highway 74 from Lumberton to Charlotte, having traveled that highway at intervals from the time she was a student at Queens College up to the time of the collision. Mrs. Austin remembered the trip on the afternoon of 16 August, 1949, and that she never exceeded the speed limit. From Lumberton to Laurinburg it was not raining, so she traveled that distance at a speed of 40 to 45 miles per hour. After passing Laurinburg, she encountered a drizzle of rain and slowed her speed accordingly. She drove definitely on the right side of the road. She stated that it was hard to tell when she first saw or had any notice of the tractor-trailer, which collided with her car, because it was such a sudden thing and she was traveling at a moderate rate of speed because of the rain and because she had just passed over Browns Creek which was flooded. Her mother was very nervous and she was unusually careful not to frighten her in any way and for that reason and the fact that she was coming to the cross-roads on the east side of Polkton, she traveled very moderately. She slowed down even more because she knew country roads and that quite often traffic comes on through intersections. The first thing she remembers about the tractor-trailer was that a huge careening object appeared immediately in front of her and she jerked her steering wheel as hard and far to the right as she could. She did not remember anything after that. Mrs. Austin, as a witness for herself, in addition to her account of the facts leading up to and involved in the wreck itself, gave a detailed account of her own serious, painful and permanent injuries, which included a crushed pelvis, broken hip, broken arm and leg, broken jawbone, and multiple other injuries, and described the death of her mother and friend as a result of the collision. She recounted the excruciating physical and mental pain suffered by her even after narcotics had been administered.

At the conclusion of the plaintiffs' evidence, defendant moved for judgment as of nonsuit in both actions, which motion was denied and defendant excepted. At the close of the defendant's evidence, defendant renewed her motion for judgment as of nonsuit. This was again denied and defendant excepted.

It was stipulated that the issues submitted were in proper form. Defendant by proper exception challenged the submission of the first, second and third issues on the ground that there was lack of evidence to support these issues. However, no objection was made to the submission of the

issue of contributory negligence. The following issues were submitted to the jury: 1. Was the plaintiff J. C. McIntyre and the plaintiff Charles E. Adcox injured and damaged by the negligence of the defendant, Mrs. James H. Austin, as alleged in the complaint? 2. What amount, if any, is the plaintiff J. C. McIntyre entitled to recover for damage to his property? 3. What amount, if any, is the plaintiff Charles E. Adcox entitled to recover for his injuries? 4. Was the defendant, Mrs. James H. Austin, injured and her property damaged by the negligence of the plaintiffs, as alleged in the cross-actions? 5. Did the defendant, Mrs. James H. Austin, by her own negligence contribute to her injury and damage as alleged in the replies? 6. What amount, if any, is the defendant, Mrs. James H. Austin, entitled to recover of the plaintiffs?

Sometime after the jury retired for deliberation, it returned with the issues and propounded this question to the court: "If we answer number 1 and number 4 and number 5 yes, can that be right?" The court redelivered substantially the instructions previously given on the issues inquired about. The foreman then made this inquiry of the court: "Can we convict both sides of contributory negligence?" The trial judge then explained to the jury that they were not deciding a criminal case but a civil action and redefined their duties under the law with respect to the issues and the law applicable to each. The court concluded with this question: "Does that clarify what you are talking about?" To which the foreman replied: "Yes, and I thank you."

After further deliberation, the jury again came out with this question: "If we answer number 1 no, number 4 yes, and number 5 yes, is that complete and proper?" The judge again instructed the jury that it was its duty to answer the questions under the evidence and under the rule of law laid down by the court and that if the jury found the facts to be such under the evidence and the charge of the court, they had a right to answer the first issue no, the fourth issue yes, and the fifth issue yes, and that upon such a verdict, neither party could recover. To this the foreman replied: "That is our wish." The jury again retired and brought in their verdict, answering the first issue no, the fourth issue yes, and the fifth issue yes, with no answer to the other issues.

The defendant moved to set aside the verdict on the fifth issue and suggested that the jury be polled. Whereupon, the presiding judge requested each juror to stand, repeated the answer appearing on the verdict, and asked each juror: "Is that your verdict?", to which each answered: "Yes." Then the court put this additional question to each juror: "You still assent thereto?", to which each answered in the affirmative. The defendant then moved to set the verdict aside as to the fifth issue and as to the entire verdict as being against the greater weight of the evidence and for that there is no evidence to support the fifth issue. This motion

was denied and defendant excepted. Defendant then moved to set aside the verdict as being against the greater weight of the evidence. This motion was also denied and defendant excepted.

From the judgment upon the verdict the defendant excepted and appealed, assigning errors.

James W. Mason and Smathers & Carpenter for plaintiffs, appellees.

McKinnon & McKinnon, Banks D. Thomas, and Varser, McIntyre & Henry for defendant, appellant.

VALENTINE, J. This record reveals one of life's dark tragedies, in which the defendant's mother and friend were killed, her small son badly hurt and the defendant herself severely, painfully and permanently injured. The personal narrative of these events by the defendant must have made a tremendous emotional appeal to the presiding judge and the jury. However, these, as all other matters involved in litigation, must be stripped of all pathos and pity and decided upon the merits of the matter under the rules of law developed for the administration of justice. With this end in view, we have examined carefully the exceptions entered by the appellant and brought forward in her brief, and in them we find no reversible error to justify the awarding of a new trial.

In the testimony of Mrs. Watson she spoke of looking in her rear-view mirror shortly after the defendant passed then exclaiming to her husband, "That car hit the truck." This was a spontaneous exclamation and competent under the rule laid down in *S. v. Smith,* 225 N.C. 78, 33 S.E. 2d 472, and cases there cited. When asked if there was anything about the car that attracted her attention, she replied, "I noticed she was driving fast." Exception to this question and answer is without merit. The witness had testified that she watched the automobile even after it passed. It was competent for her to explain why she gave it more attention than usual. Furthermore she immediately gave her estimate of the speed as 55 miles per hour, to which there was no objection.

A large part of appellant's well-prepared brief is devoted to a forensic discussion of the evidence directed toward the negligence of the plaintiffs, the injuries and suffering of the defendant, and the damages involved in the collision, all of which is immaterial in view of the jury's findings that the plaintiffs were negligent and that the defendant was guilty of contributory negligence.

Nowhere are we referred to an authority in her brief, nor has our investigation disclosed any precedent, which was violated by the charge of the court. The only real question for determination upon this record is whether there was evidence worthy to be submitted to the jury upon

the question of the defendant's contributory negligence. We think that a jury question arose upon the evidence.

The evidence revealed that the road was wet and slick with rain still falling. The headlights were burning on the tractor-trailer. The tractor-trailer, traveling at 35 miles an hour, was jack-knifed by the application of brakes when the car in front of it slowed down at intersecting highways. The evidence also tended to show that the defendant was operating her automobile on a wet road under atmospheric conditions which made fast driving dangerous and that she failed to keep a proper lookout. The impact and destructive results of the collision itself could properly be regarded as tending to indicate excessive speed. "There are a few physical facts which speak louder than some of the witnesses." *Powers v. Sternberg,* 213 N.C. 41, 195 S.E. 88; *Yokeley v. Kearns,* 223 N.C. 196, 25 S.E. 2d 602.

There was evidence that the defendant's car struck the right rear tractor wheel with sufficient force to spin or shunt the tractor-trailer around, and almost demolish the Austin car. The force with which defendant's car struck the tractor and the attendant destruction, injury and death was appropriate evidence to be considered by the jury upon the question of contributory negligence of the defendant. *Baker v. R. R.,* 205 N.C. 329, 171 S.E. 342; *Hinnant v. R. R.,* 202 N.C. 489, 163 S.E. 555; *Herman v. R. R.,* 197 N.C. 718, 150 S.E. 361.

G.S. 20-141 lays down this statutory principle: "No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions then existing." The fact that the speed of a vehicle is less than the maximum allowed by law for such vehicle "shall not relieve the driver from the duty to decrease speed . . . when traveling upon any narrow . . . roadway, or when special hazard exists with respect to . . . other traffic, or by reason of weather or highway conditions"; and the statute further directs that "speed shall be decreased as may be necessary to avoid colliding with any person, vehicle, or other conveyance on . . . the highway in compliance with legal requirements and the duty of all persons to use due care." *Hoke v. Greyhound Corp.,* 227 N.C. 412, 42 S.E. 2d 593.

It is the duty of every driver of a motor vehicle to keep and maintain a proper lookout in the direction of travel and upon such driver is imposed the responsibility and duty of seeing that which he ought to have seen. *Wall v. Bain,* 222 N.C. 375, 23 S.E. 2d 330. Under our system of jurisprudence the taking of a case or a proper issue from the jury, while under proper circumstances is sometimes unavoidable, is always a delicate task and involves more than a strong feeling that a party should not recover. "The power of the court is limited to the ascertainment whether there is any evidence at all which has probative value in any or

all of the facts and circumstances offered in the guise of proof. . . . It is a matter of dropping the proffered proof into evenly poised balances to see whether it weighs against nothing. *Cox v. R. R.*, 123 N.C. 604, 31 S.E. 848, and cited cases. The result often brings a consequence not to be desired, sometimes not even consonant with our sense of justice, but when it is shocking to the conscience, the judges of the Superior Court have a remedy with which we are not entrusted." *Wall v. Bain, supra.*

Whether the outlook of the defendant satisfied the demands of prudence, or whether it was too casual or not sufficiently sustained, or whether the defendant's speed was excessive, are matters addressed to the jury under all the facts and circumstances disclosed by the evidence, and it was for the jury to say whether the defendant was guilty of contributory negligence. It appears that the case was well tried by the able judge who presided and that the jury was deeply concerned about the case and anxious to render a correct verdict upon the evidence. The poll of the jury revealed not only that it had answered the issues as shown by the verdict, but each juror in his own right still assented to the verdict in open court and in the presence of the defendant, whose facial disfiguration and other physical deformities still made an appeal to the sympathies of the jury. The verdict was not inconsistent when measured by the applicable principles of law. *Edwards v. Motor Co., ante*, 269.

The jury has spoken and we have no right upon this record to disturb the verdict.

No error.

BOARD OF MANAGERS OF THE JAMES WALKER MEMORIAL HOSPITAL OF THE CITY OF WILMINGTON, N. C., v. THE CITY OF WILMINGTON AND NEW HANOVER COUNTY.

(Filed 21 May, 1952.)

1. Mandamus § 1—

Mandamus is a writ issuing from a court of competent jurisdiction commanding an inferior tribunal, board, corporation, or person to perform a purely ministerial duty imposed by law. The party seeking such writ must have a clear legal right to demand it, and the party to be coerced must be under a present, clear, legal duty to perform the act.

2. Injunctions § 1—

A mandatory injunction to compel a board or public official to perform a duty imposed by law is identical in its function and purpose with that of a writ of *mandamus* and is governed by the rules applicable to *mandamus*.

3. Mandamus § 1—

Mandamus is not a preventive remedy to be used as a restraining order to preserve the *status quo*, but is a coercive writ which is final in its nature.

4. Same—

In an action by an eleemosynary corporation against a municipality and a county to ascertain defendants' statutory liabilities for contributions for indigent patients of the city and county treated at the hospital, it is error for the court to issue the mandatory writ of *mandamus* against defendants prior to the adjudication of the cause on its merits.

APPEAL by defendant, City of Wilmington, from *Burney, J.*, December Term, 1951, of NEW HANOVER.

This is a civil action instituted on 3 November, 1951, for the purpose of obtaining a declaratory judgment setting out the rights of the plaintiff to financial aid from the defendants, and particularly for the care of the indigent poor and afflicted persons who are sent to the James Walker Memorial Hospital from the City of Wilmington and New Hanover County.

The complaint sets out various resolutions adopted by the Board of Aldermen of the City of Wilmington as well as various acts passed by the General Assembly of North Carolina, authorizing the City of Wilmington and New Hanover County to maintain the hospital.

The James Walker Memorial Hospital of the City of Wilmington was incorporated by Chapter 12 of the Private Laws of 1901. The act provided that the institution should be operated by a Board of Managers consisting of nine members: three of them to be elected by the Board of Commissioners of New Hanover County, two by the Board of Aldermen of the City of Wilmington, and four members were to be selected by Mr. James Walker, who built the hospital on the property of the City of Wilmington and the County of New Hanover. Provisions were made in the act for the board to be self-perpetuating. The act also provided, "That for the purpose of providing the proper means for sustaining the said hospital, and for the maintenance and medical care of all such sick and infirm poor persons as may from time to time be placed therein by the authority of the said Board of Managers, the Board of Commissioners of New Hanover County shall annually provide and set apart the sum of four thousand eight hundred dollars, and the Board of Aldermen of the city of Wilmington shall annually provide and set apart the sum of three thousand two hundred dollars, which said funds shall be placed in the hands of the said Board of Managers, to be paid out and disbursed, under their direction, according to such rules, regulations and orders as they may from time to time adopt." The City of Wilmington and the County of New Hanover conveyed the hospital property to the above corporation by deed dated 19 July, 1901.

According to the plaintiff's pleadings, the City of Wilmington and the County of New Hanover made contributions annually for the support and maintenance of the James Walker Memorial Hospital until 1 July,

1951, pursuant to the provisions of the above act or the following acts: Private Laws of 1907, Chapter 38; Public-Local Laws of 1915, Chapter 66; Public-Local Laws of 1937, Chapter 8; and Public-Local Laws of 1939, Chapter 470.

Since 1 July, 1951, the City of Wilmington has failed and refused to make any contribution to the support and maintenance of the hospital, or for the treatment of the indigent sick and afflicted poor of the City of Wilmington and the County of New Hanover who have been certified to the hospital for treatment by the New Hanover County Welfare Department.

The rights of the respective parties involve the provisions of certain 1951 legislation. Section 1 of the 1951 Session Laws, Chapter 906, in pertinent part, reads as follows: "That the City of Wilmington and the County of New Hanover be and they hereby are authorized and directed to enter into a contract with the James Walker Memorial Hospital, making proper and adequate provision for the hospitalization, medical attention, and care of the indigent sick and afflicted poor of said city and county, respectively, said contract to be effective as of the first day of July, 1951, and from and after said first day of July, 1951, the City of Wilmington and the County of New Hanover, and each of them, is hereby authorized, directed and fully empowered to appropriate to the said James Walker Memorial Hospital for such purpose the sum of three and 75/100 ($3.75) dollars per day per patient for each day of care rendered to indigent in-patients hospitalized in said hospital, (the total combined appropriation being $7.50 per day per patient), and the sum of one ($1.00) dollar per visit per patient for each out-patient given professional care, drugs, bandages, dressings, and other medical care, (the total combined appropriation being $2.00 per visit per patient), when such in-patients and such out-patients have been certified to said hospital by the New Hanover County Welfare Department as being indigents; payment of the aforesaid appropriations shall not exceed the sum of forty thousand ($40,000) dollars each from the said city and said county during any one twelve months' period; . . ." Section 2 of the act purports to empower and direct the Board of Commissioners of New Hanover County and the Council of the City of Wilmington to levy and collect any additional taxes that may be necessary in order to meet the above appropriations.

A copy of the summons and complaint were served on the respective defendants on 5 November, 1951. Thereafter, on 15 November, 1951, the plaintiff filed an amended complaint setting out certain amounts it alleged to be due from the City of Wilmington for the months of July, August, September, and October, 1951, which said city had refused to pay, said sums being one-half of the cost of treatment for the indigent from the

City of Wilmington and New Hanover County for the months indicated, and prayed the court for a writ of *mandamus* requiring the defendant, City of Wilmington, to pay one-half of the maintenance and upkeep of the plaintiff hospital and of the indigent poor admitted thereto from the City of Wilmington and New Hanover County.

The plaintiff, on 21 November, 1951, gave notice to the defendants that it would move the court, on Tuesday, 4 December, 1951, in the Superior Court of New Hanover County, or as soon thereafter as plaintiff might be heard, for a *mandamus* requiring the City of Wilmington to make the contributions as prayed for.

Prior to the hearing of the motion for *mandamus,* or mandatory injunction, on 12 December, 1951, and before the expiration of time to answer, the defendant, City of Wilmington, filed its motion to strike portions of the original complaint as set forth in the motion to strike and at the same time filed its motion to strike portions of the amended complaint, said motions being on file at the time of the hearing on plaintiff's motion for *mandamus,* or mandatory injunction, and at the time of the entry of judgment appearing in the record.

The court below, upon motion of plaintiff for *mandamus,* or a mandatory injunction, found certain facts and concluded "that the plaintiff is a Trustee to operate said hospital for the defendants, City of Wilmington and New Hanover County, and that it is their duty and obligation to pay to the plaintiff for the treatment of the indigent poor admitted therein from the County of New Hanover and the City of Wilmington"; and entered the following judgment: "It is, thereupon on motion of counsel for plaintiff, ordered, considered and adjudged, that the defendant, City of Wilmington, its officers, (and) agents are hereby enjoined, directed and commanded forthwith to contribute and pay to the plaintiff monthly one-half of the cost of treating the indigent poor admitted to the said hospital from the City of Wilmington and the County of New Hanover, and treated therein."

The defendant, City of Wilmington, appeals from the above judgment and assigns error.

Isaac C. Wright for plaintiff, appellee.

William B. Campbell for defendant, appellant.

DENNY, J. *Mandamus* is a writ issuing from a court of competent jurisdiction commanding an inferior tribunal, board, corporation, or person to perform a purely ministerial duty imposed by law. The party seeking such writ must have a clear legal right to demand it, and the tribunal, board, corporation, or person must be under a present, clear, legal duty to perform the act sought to be enforced. *Hospital v. Joint*

Committee, 234 N.C. 673, 68 S.E. 2d 862; *Poole v. Bd. of Examiners,* 221 N.C. 199, 19 S.E. 2d 635; *Harris v. Bd. of Education,* 216 N.C. 147, 4 S.E. 2d 328; *Mears v. Bd. of Education,* 214 N.C. 89, 197 S.E. 752; *John v. Allen,* 207 N.C. 520, 177 S.E. 634; *Rollins v. Rogers,* 204 N.C. 308, 168 S.E. 206; 55 C.J.S., Mandamus, section 125, page 213.

A mandatory injunction, when issued to compel a board or public official to perform a duty imposed by law, is identical in its function and purpose with that of a writ of *mandamus.* And a writ of *mandamus* is final in its nature. As pointed out by *Johnson, J.,* in *Hospital v. Joint Committee, supra,* an interim or temporary writ of *mandamus* is unknown to the law. *Mandamus* is not a preventive remedy to be used as a restraining order to preserve the *status quo,* but it is essentially a coercive writ; one that commands performance, not desistance. 34 Am. Jur., Mandamus, section 2, page 809. Such writ will not be issued to enforce an alleged right which is in question. *Harris v. Bd. of Education, supra; Hayes v. Benton,* 193 N.C. 379, 137 S.E. 169. *Mandamus* lies only to enforce a clear legal right and will be issued only where there is no other legal remedy. *Harris v. Bd. of Education, supra; Cody v. Barrett,* 200 N.C. 43, 156 S.E. 146; *Umstead v. Bd. of Elections,* 192 N.C. 139, 134 S.E. 409. "The function of the writ is to compel the performance of a ministerial duty—not to establish a legal right, but to enforce one which has been established." *Wilkinson v. Bd. of Education,* 199 N.C. 669, 155 S.E. 562.

This action was instituted for the purpose of ascertaining the rights of the respective parties under the various legislative enactments referred to and made a part of the plaintiff's complaint. In the meantime, before the City of Wilmington's motion to strike certain portions of the complaint was heard, without an answer being filed by either of the defendants, or a demurrer interposed, the court, on motion of the plaintiff, issued a writ of *mandamus* to compel the City of Wilmington to make the very contributions the plaintiff seeks to ascertain, in this action, whether it has the legal right to compel the City of Wilmington to make. Furthermore, this writ may not be treated as a temporary injunction to preserve the *status quo* until the further order of the court as was done in the case of *Hospital v. Joint Committee, supra.* There, a writ denominated an "interim writ of *mandamus*" was applied for and obtained to prevent the removal of Hamlet Hospital & Training School for Nurses from the accredited list of such institutions until the further order of the court. We treated the writ, and properly so, as a temporary restraining order, but here affirmative action is ordered and directed before the pleadings have been filed, the issues joined and the clear legal right to a *mandamus* has been established. The writ was prematurely issued.

The question to be adjudicated in this action is of vital importance to the future maintenance and welfare of one of the State's finest eleemosynary institutions. The City of Wilmington and the County of New Hanover, prior to 1 July, 1951, have not only contributed annually for fifty years to the maintenance of this institution, but they have also contributed substantial sums of money for its enlargement. A final decision in this action should not be delayed by legal sparring. It ought to be a simple matter to agree upon the facts and obtain a prompt ruling thereon. The outstanding services rendered by this institution to the citizens of the City of Wilmington and the County of New Hanover, for more than half a century, merit the prompt and effective co-operation to this end by all parties concerned.

The judgment below will be set aside and the cause remanded to the end that the rights of the parties may be determined after the issues have been joined, or the defendants have failed to answer or otherwise pleaded. In any event, a writ of *mandamus* should not be issued against the defendants, or either of them, until the cause is finally adjudicated on its merits.

Error and remanded.

MRS. JUANITA THOMASON, WIDOW; JAMES R. THOMASON, JR.; ROBERT GLENN THOMASON; PEGGY JOE THOMASON, MINOR CHILDREN OF JAMES REESE THOMASON, DECEASED, v. RED BIRD CAB COMPANY, INC., ST. PAUL MERCURY & INDEMNITY COMPANY.

(Filed 21 May, 1952.)

1. Master and Servant § 45—

The Industrial Commission has exclusive original jurisdiction of all Workmen's Compensation proceedings and is the sole fact finding agency in such cases. G.S. 97-84.

2. Master and Servant § 55d—

The Superior Court has appellate jurisdiction to review an award of the Industrial Commission only for errors of law, and the findings of fact of the Industrial Commission are conclusive upon it when supported by evidence, G.S. 97-86, and may be reviewed solely to determine whether there was any competent evidence before the Commission to support them and whether the findings justify the Commission's legal conclusions and decision.

3. Same: Master and Servant § 52—

The findings of fact of the Industrial Commission must be sufficiently positive and specific to enable the court on appeal to determine whether they are supported by the evidence and whether the law has been properly applied to them, and when the commission fails to find the determinative facts, the cause is properly remanded.

4. Same—Cause held properly remanded to the Industrial Commission for specific findings of the determinative facts.

Where there is evidence that the deceased employee turned aside from his employment for the purpose of going on a drunken frolic with another, and that the accident causing his death was due to the negligence of such other who was driving the cab in violation of a rule of the employer, general findings or conclusions that the accident was not occasioned by the employee's intoxication and that the employee died as a result of an accident arising out of and in the course of his employment, without any specific findings from the evidence as to the crucial facts upon which the claim depends, are insufficient to enable the court properly to review the award for error of law, and the cause is properly remanded for specific findings of the determinative facts.

APPEAL by plaintiffs from *Pless, J.,* at February Term, 1952, of DAVIDSON.

Proceeding under the North Carolina Workmen's Compensation Act in which the plaintiffs, as the widow and children of James Reese Thomason, a deceased employee, seek death benefits from an employer, Red Bird Cab Company, Inc., and its insurance carrier, St. Paul Mercury and Indemnity Company, for a death allegedly resulting from an injury by accident arising out of and in the course of his employment.

The deceased was employed to drive a taxicab owned by the defendant, the Red Bird Cab Company. He and a companion, Coley Story, met instant deaths about daybreak on 15 August, 1950, at a point on United States Highway No. 29 nine miles south of Lexington, North Carolina, when the taxicab, which was proceeding northward, collided with a southbound tractor-trailer combination owned by the McLean Trucking Company.

The defendants denied liability for the benefits sought by the plaintiffs on the ground that the death of the deceased did not result from an injury by accident arising out of and in the course of his employment. In addition to denying the validity of the plaintiffs' claim, they pleaded as an affirmative defense that the death of Thomason was occasioned by his own intoxication. G.S. 97-12.

The testimony presented by the parties before the Hearing Commissioner had a strong tendency to establish these propositions: That the deceased turned aside from his employment at 3:15 o'clock on the morning of 15 August, 1950, for the purpose of going on a drunken frolic with Coley Story, and did not bring himself back into the line of his employment at any time before his tragic death, which happened two hours later. That the deceased and Story became intoxicated shortly after the former's departure from his employment, and continued in that state until the fatal collision. That despite a rule of his employer prohibiting such action, the deceased entrusted the operation of the taxicab to Story. That

as the northbound taxicab and the southbound tractor-trailer combination were about to meet and pass, Story suddenly and drunkenly swerved the taxicab onto his left side of the highway and into the pathway of the oncoming tractor-trailer combination, thus causing the fatal collision.

The defendants asked the Hearing Commissioner to make definite and detailed findings of fact in respect to these propositions. Instead of complying with this request, the Hearing Commissioner made these general findings on this phase of the case: (1) That "we have no way of knowing what transpired . . . between 3:15 A.M. . . . and approximately 5:00 o'clock A.M., when the fatal wreck occurred." (2) That "the cause of the collision remains unexplained." (3) That "the death of James Reese Thomason was the direct . . . result of an injury by accident arising out of and in the course of his employment by the defendant employer." (4) That "the death of James Reese Thomason was not occasioned by . . . (his) . . . intoxication." The Hearing Commissioner concluded as a matter of law on the basis of these general findings that the plaintiffs are entitled to the death benefits sought by them, and made an award accordingly.

The defendants appealed this award to the Full Commission. A majority of the members of that body rendered a judgment over the dissent of their chairman whereby they adopted as their own "the findings of fact and conclusions of law of the Hearing Commissioner" and affirmed the award made by him. The defendants thereupon appealed from the Full Commission to the Superior Court.

When the proceeding came on for hearing in the Superior Court, Judge Pless entered an order upon motion of the defendants remanding the cause to the Full Commission with directions that it make a specific finding of fact as to who was driving the taxicab at the time of the collision, and that it clarify its findings of fact and conclusions of law in certain other respects. The plaintiffs thereupon appealed to the Supreme Court, assigning the order of remand as error.

Philip R. Craver for plaintiffs, appellants.

Don A. Walser for defendants, appellees.

ERVIN, J. The North Carolina Workmen's Compensation Act clearly demarcates the respective functions of the Industrial Commission and the courts in proceedings coming within the purview of the act.

The Industrial Commission has exclusive original jurisdiction of all workmen's compensation proceedings. *Cooke v. Gillis,* 218 N.C. 726, 12 S.E. 2d 250; *Hedgepeth v. Casualty Co.,* 209 N.C. 45, 182 S.E. 704; *Francis v. Wood Turning Co.,* 204 N.C. 701, 169 S.E. 654. It hears the evidence of the parties, and determines the questions at issue between

them. It is required to embody its determination in a written award containing a statement of its findings of fact, its rulings of law, and all other matters pertinent to the questions at issue. G.S. 97-84. The findings of fact of the Industrial Commission are conclusive and binding upon the courts if they are supported by competent evidence. G.S. 97-86; *Withers v. Black,* 230 N.C. 428, 53 S.E. 2d 668.

The Superior Court has appellate jurisdiction to review an award of the Industrial Commission for errors of law when a party to the proceeding in which the award is made appeals to it. G.S. 97-86; *Smith v. Paper Co.,* 226 N.C. 47, 36 S.E. 2d 730; *Fox v. Mills, Inc.,* 225 N.C. 580, 35 S.E. 2d 869; *Winslow v. Carolina Conference Association,* 211 N.C. 571, 191 S.E. 408; *Byrd v. Lumber Co.,* 207 N.C. 253, 176 S.E. 572. An appeal lies to the Supreme Court from the judgment entered by the Superior Court on its review of the award of the Industrial Commission.

In passing upon an appeal from an award of the Industrial Commission in a proceeding coming within the purview of the act, the Superior Court is limited in its inquiry to these two questions of law: (1) Whether or not there was any competent evidence before the commission to support its findings of fact; and (2) whether or not the findings of fact of the commission justify its legal conclusions and decision. *Henry v. Leather Co.,* 231 N.C. 477, 57 S.E. 2d 760. The Superior Court cannot consider the evidence in the proceeding in any event for the purpose of finding the facts for itself. *Reed v. Lavender Bros.,* 206 N.C. 898, 172 S.E. 877; *Ussery v. Cotton Mills,* 201 N.C. 688, 161 S.E. 307. If the findings of fact of the Industrial Commission are supported by competent evidence and are determinative of all the questions at issue in the proceeding, the court must accept such findings as final truth, and merely determine whether or not they justify the legal conclusions and decision of the commission. *Blevins v. Teer,* 220 N.C. 135, 16 S.E. 2d 659; *Rankin v. Mfg. Co.,* 212 N.C. 357, 193 S.E. 389. But if the findings of fact of the Industrial Commission are insufficient to enable the court to determine the rights of the parties upon the matters in controversy, the proceeding must be remanded to the commission for proper findings. *Young v. Whitehall Co.,* 229 N.C. 360, 49 S.E. 2d 797; *Cook v. Lumber Co.,* 217 N.C. 161, 7 S.E. 2d 378; *Farmer v. Lumber Co.,* 217 N.C. 158, 7 S.E. 2d 376; *Gowens v. Alamance County,* 214 N.C. 18, 197 S.E. 538; *Singleton v. Laundry Co.,* 213 N.C. 32, 195 S.E. 34.

It is impossible to exaggerate how essential the proper exercise of the fact-finding authority of the Industrial Commission is to the due administration of the Workmen's Compensation Act. The findings of fact of the Industrial Commission should tell the full story of the event giving rise to the claim for compensation. They must be sufficiently positive and specific to enable the court on appeal to determine whether they are

supported by the evidence and whether the law has been properly applied to them. It is obvious that the court cannot ascertain whether the findings of fact are supported by the evidence unless the Industrial Commission reveals with at least a fair degree of positiveness what facts it finds. It is likewise plain that the court cannot decide whether the conclusions of law and the decision of the Industrial Commission rightly recognize and effectively enforce the rights of the parties upon the matters in controversy if the Industrial Commission fails to make specific findings as to each material fact upon which those rights depend.

When the record before us is laid alongside these rules, it is manifest that the supposed findings of fact in the instant proceeding are not sufficiently positive and specific to enable the court to judge the propriety of the award. They consist in large measure of recitals of evidence, and argumentative comment thereon. They contain no definite determination as to what the deceased was doing at the time of his fatal injury, or as to any of the other crucial facts upon which the claim to death benefits and the defense to such claim depend. A factual basis for the award under review is not supplied by the general findings that "the death of James Reese Thomason was not occasioned by his intoxication," and that "the death of James Reese Thomason was the direct result of an injury by accident arising out of and in the course of his employment by the defendant employer." *Gowens v. Alamance County, supra.* Under the evidence in this proceeding, these indefinite findings constituted mere conclusions, and not findings of fact. *Singleton v. Laundry Co., supra.* In addition, the conclusion that "the death of James Reese Thomason was not occasioned by his intoxication" is destroyed by the antagonistic finding that "the cause of the collision remains unexplained," and the conclusion that "the death of James Reese Thomason was the direct result of an injury by accident arising out of and in the course of his employment by the defendant employer" is nullified by the contradictory finding that "we have no way of knowing what transpired between 3:15 A.M. . . . and approximately 5:00 o'clock A.M., when the fatal wreck occurred."

For the reasons given, the proceeding was rightly remanded to the Industrial Commission. The order of remand is

Affirmed.

ETHEL SOWERS, ADMINISTRATRIX OF JAMES D. SOWERS, v. HOWARD J. MARLEY.

(Filed 21 May, 1952.)

1. Negligence § 17—

Plaintiff in an action based on negligence has the burden of producing evidence, either direct or circumstantial, sufficient to establish negligence on the part of defendant and that such negligence proximately caused the injury.

2. Negligence § 19b (1)—

In order for circumstantial evidence to be sufficient to be submitted to the jury in an action for negligence, the facts presented must reasonably warrant the inference that the injury was the result of actionable negligence on the part of defendant, and such inference must rest upon facts in evidence and cannot rest on conjecture or surmise from the evidential facts.

3. Automobiles § 8a—

The driver of a motor vehicle is under duty to maintain a proper lookout, to keep his vehicle under reasonable control, and not to drive it at an unlawful speed.

4. Automobiles § 12a—

It is not only unlawful to operate a motor vehicle in excess of the statutory maximum, but it is also unlawful to operate a motor vehicle at a speed greater than is reasonable and prudent under the existing conditions because of special hazards with respect to pedestrians or other traffic, even though less than the statutory maximum. G.S. 20-141.

5. Evidence § 17—

Plaintiff, by offering in evidence an uncontradicted extra-judicial declaration of defendant, is bound thereby.

6. Automobiles § 18h (2)—Circumstantial evidence held insufficient predicate for inference of negligence.

Plaintiff introduced evidence that some five or six minutes before the collision, intestate was seen at some undesignated distance west of the place of collision leading his horse eastward along the northern half of the highway, and introduced the extra-judicial statement of defendant that intestate and his horse suddenly and unexpectedly emerged from the darkness north of the highway and dashed onto the highway in the path of his vehicle. *Held:* The evidence is insufficient to support the inference that intestate was in plain view leading his horse along the highway and that defendant could have seen him in time to have avoided the collision, since the inference that intestate was leading his horse eastward along the northern half of the highway is not predicated upon facts in evidence but an inference from other facts, and the contention that defendant could have seen intestate in time to have avoided injuring him is in conflict with the only testimony upon this question.

APPEAL by plaintiff from *Pless, J.*, at February Term, 1952, of DAVIDSON.

Civil action by administratrix to recover damages for the death of her intestate who was struck and killed by an automobile while he was on foot in the traveled portion of a highway.

United States Highway No. 64, which runs east and west, crosses State Highway No. 109, which runs north and south, in the eastern section of Davidson County. It is paved to a width of twenty feet, has a dirt shoulder three feet wide on each side, and is virtually level and straight for a distance of twelve hundred feet east of the intersection with State Highway No. 109. There are no obstructions to view along State Highway No. 64 or its shoulders anywhere in this space.

The night of 1 May, 1951, was dry, and "very dark." At sometime after nine o'clock on that night, the plaintiff's intestate, James D. Sowers, who was on foot in the paved portion of United States Highway No. 64 five hundred feet east of its intersection with State Highway No. 109, was instantly killed when he was struck on his left side by the front of a westbound passenger carrying Plymouth automobile driven by the defendant, Howard J. Marley, who was en route to Lexington. The place of collision was not in a business or residential district. The intestate, who was wearing "dark-colored clothes," was not carrying a lantern or any other light. His body, which was much broken and crushed, came to rest in the middle of the highway at an undesignated distance west of the point of impact. Although its brakes were not applied, the Plymouth car was brought to a standstill thirty-five feet west of the body. The defendant stayed at the scene until the body was removed, and peace officers finished their investigation.

The only evidence at the trial was that offered by the plaintiff, which had a strong tendency to establish the matters stated in the two preceding paragraphs. None of the persons testifying in her behalf actually saw the collision. As a consequence, she undertook to show legal culpability on the part of the defendant by these circumstances:

1. The plaintiff's intestate had an unshod horse, whose color is not revealed by the evidence. About five or six minutes before the collision, the plaintiff's witness Grady Hughes saw the intestate at some undesignated distance west of the place of collision "leading his horse . . . east . . . on Highway 64" by a bridle or halter.

2. The defendant made these statements after the collision: As he drove his Plymouth car westward on the highway at a speed of "forty to fifty miles an hour," an automobile approached from the west. He dimmed his headlights, and the driver of the oncoming automobile did likewise. After he met and passed the eastbound automobile, he turned his headlights to normal. A "split second later," he saw the intestate and his horse "having a struggle" on the northern shoulder of the highway,

and in another "split second they came" onto the pavement "in front of him and he hit them. He stopped as quick as he could."

3. The horse suffered no injury except "a bare scratch which merely showed the blood." After the accident, nine tracks made by an unshod horse were plainly visible on the dirt shoulders of the highway immediately adjacent to the place of the collision. Four of them were on the northern shoulder, and five of them were on the southern shoulder. Those south of the highway "were pretty far apart" and indicated that "the horse was jumping or running."

When the plaintiff had introduced her evidence and rested her case, the trial judge allowed the motion of the defendant for an involuntary nonsuit, and entered judgment accordingly. The plaintiff appealed, assigning the compulsory nonsuit as error.

Phillips & Bower for plaintiff, appellant.
Don A. Walser for defendant, appellee.

ERVIN, J. This case is bottomed on negligence. In an action for death by wrongful act based on negligence, the burden rests on the plaintiff to produce evidence, either direct or circumstantial, sufficient to establish the two essential elements of actionable negligence, namely: (1) That the defendant was guilty of a negligent act or omission; and (2) that such act or omission proximately caused the death of the decedent. *Tysinger v. Dairy Products,* 225 N.C. 717, 36 S.E. 2d 246; *Mitchell v. Melts,* 220 N.C. 793, 18 S.E. 2d 406; *White v. Chappell,* 219 N.C. 652, 14 S.E. 2d 843; *Beach v. Patton,* 208 N.C. 134, 179 S.E. 446.

To carry this burden by circumstantial evidence, the plaintiff must present facts which reasonably warrant the inference that the decedent was killed by the actionable negligence of the defendant. *Wyrick v. Ballard Co., Inc.,* 224 N.C. 301, 29 S.E. 2d 900; *Corum v. Tobacco Co.,* 205 N.C. 213, 171 S.E. 78; *Lynch v. Telephone Co.,* 204 N.C. 252, 167 S.E. 847. An inference of negligence cannot rest on conjecture or surmise. *Smith v. Duke University,* 219 N.C. 628, 14 S.E. 2d 643; *Mills v. Moore,* 219 N.C. 25, 12 S.E. 2d 661; *Ham v. Fuel Co.,* 204 N.C. 614, 169 S.E. 180; *Grimes v. Coach Co.,* 203 N.C. 605, 166 S.E. 599; *Rountree v. Fountain,* 203 N.C. 381, 166 S.E. 329. This is necessarily so because an inference is a permissible conclusion drawn by reason from a premise established by proof. *Cogdell v. Railroad Co.,* 132 N.C. 852, 44 S.E. 618; *Wollard v. Peterson,* 143 Kan. 566, 56 P. 2d 476.

The plaintiff undertakes to prove the legal culpability of the defendant in the case at bar by circumstantial evidence. As a consequence, the appeal raises the question whether the facts produced by the plaintiff at the trial reasonably warrant the inference that her intestate was killed by the actionable negligence of the defendant.

The law imposes upon the operator of a motor vehicle the duty to maintain a proper lookout, the duty to keep his vehicle under reasonable control, and the duty to drive at a lawful speed. *Register v. Gibbs,* 233 N.C. 456, 64 S.E. 2d 280. The tragic event producing this litigation happened on a highway outside a business or residential district. Under the statute prescribing speed restrictions, it is unlawful to operate a passenger car on a highway in such a place in excess of fifty-five miles per hour. The defendant did not exceed this definite statutory limit. The speed of a motor vehicle may be unlawful, however, under the circumstances of a particular case, even though such speed is less than the definite statutory limit prescribed for the vehicle in the place where it is being driven. The statute expressly provides that "the fact that the speed of a vehicle is lower than the foregoing limits shall not relieve the driver from the duty to decrease speed . . . when special hazard exists with respect to pedestrians or other traffic," and that "no person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions then existing." G.S. 20-141 as rewritten by Section 17 of Chapter 1067 of the 1947 Session Laws; *Rollison v. Hicks,* 233 N.C. 99, 63 S.E. 2d 190.

The plaintiff insists that the evidence reasonably warrants the inference that the defendant was negligent in that he violated one or more of the three duties enumerated in the preceding paragraph, and that such negligence proximately caused the death of the intestate.

The plaintiff advances this argument to support her position: The intestate was in plain view leading his horse eastward along the northern half of the highway as the defendant approached the place of collision, and in consequence the defendant could have seen him in time to have avoided any injury to him by stopping the Plymouth, or by decreasing its speed, or by changing its course. Despite this, the defendant ran the intestate down, inflicting immediate death upon him. Hence, it is permissible to infer that the defendant negligently killed the intestate by failing to maintain a proper lookout, or by failing to keep the Plymouth under reasonable control, or by driving at a speed greater than was reasonable and prudent under the circumstances.

In the very nature of things, it is not permissible to draw an inference of actionable negligence on the part of the defendant from the plaintiff's twofold premise that "the intestate was in plain view leading his horse eastward along the northern half of the highway as the defendant approached the place of collision and in consequence the defendant could have seen him in time to have avoided any injury to him" unless the premise is supported by the evidence.

There is not a scintilla of evidence as to the route or whereabouts of the plaintiff's intestate and his horse between the time they were seen by

the witness Grady Hughes at some undesignated distance west of the place of the collision and the time they were glimpsed by the defendant for a "split second" on the dirt shoulder north of the highway immediately adjacent to the point of impact. The testimony leaves this crucial matter to conjecture and surmise. This being true, there is no evidence of the existence of the supposed fact that "the intestate was in plain view leading his horse eastward along the northern half of the highway as the defendant approached the place of collision."

In reaching this conclusion, we do not overlook the plaintiff's contention that this supposed fact ought to be inferred from the evidence that shortly before the tragic accident the witness Grady Hughes saw the intestate at some undesignated distance west of the place of collision "leading his horse . . . east . . . on Highway 64." This contention conflicts with the accepted and sound rule of law and logic that the facts from which an inference of negligence may be drawn must be proved, and cannot themselves be inferred or presumed from other facts which merely raise a conjecture or possibility of their existence. 20 Am. Jur., Evidence, section 165. See, also, in this connection the North Carolina cases heretofore cited, and these additional authorities: *Evansville Metal Bed Co. v. Loge,* 42 Ind. App. 461, 85 N.E. 979; *Hall v. Ferro Concrete Const. Co.*, 71 Ohio App. 545, 50 N.E. 2d 556; 65 C.J.S., Negligence, section 243.

An even stronger consideration negatives the existence of the second supposed fact embodied in the plaintiff's premise, *i.e.,* that the defendant could have seen the intestate in time to have avoided injuring him. The plaintiff did not adduce a single independent fact disclosing how far the Plymouth car was from the place of collision when the intestate and his horse became visible to the defendant. But she did offer in evidence a relevant extra-judicial statement of the defendant, which is not contradicted by other testimony and by reason thereof must be deemed to be true. According to this statement, the intestate and his horse suddenly and unexpectedly emerged from the darkness north of the highway and dashed onto the highway and into the path of the oncoming automobile when the vehicle was almost alongside them, rendering the fatal collision inevitable.

The involuntary judgment of nonsuit is

Affirmed.

STATE OF NORTH CAROLINA v. JACK M. SIMMINGTON.

(Filed 21 May, 1952.)

1. Criminal Law § 62f—

Defendant may now appeal from an order executing a suspended sentence for condition broken. G.S. 15-200.1.

2. Criminal Law § 76a—

Certiorari lies only to review judicial or *quasi*-judicial action to correct errors of law, and cannot be used to present new matter.

3. Criminal Law § 78b—

Judgment entered upon the hearing on a writ of *certiorari* will be reviewed solely on the grounds set forth in the lower court.

4. Criminal Law § 62f—

A court has the inherent power to suspend judgment or stay execution of a sentence in a criminal case, which power was not withdrawn by the probation statute. The statute provides a cumulative and concurrent rather than an exclusive procedure. G.S., Ch. 15, Art. 20.

5. Same—

While a court may not compel defendant to pay the damages inflicted by his unlawful act on penalty of imprisonment, it may suspend execution of sentence on condition defendant compensate those whom he has injured.

6. Same—

Upon conviction of defendant for reckless driving, sentence was suspended on condition that he pay certain sums periodically for the benefit of those injured by his wrongful act. Defendant complied with a part of the conditions and then obtained *certiorari* on the ground that the court, in suspending the judgment pronounced, did not follow the procedure prescribed in the probation statute and that he was required to pay a certain sum on the date of his trial or go to jail. *Held:* The writ of *certiorari* was properly dismissed. Further, his imprisonment is for breach of the criminal law and not for failure to pay damages.

APPEAL by defendant from *Sharp, Special Judge,* October Civil Term, 1951, GUILFORD. Affirmed.

On 21 August 1951, defendant was tried in the municipal-county court of Guilford County on a charge of reckless driving. There was a verdict of guilty. The court pronounced judgment that the defendant be confined in jail for a term of six months, to be assigned to work the roads under the supervision and control of the State Highway and Public Works Commission. Execution was suspended for a term of three years upon condition that he pay into the court the sum of $711.50 for the use of named persons, said sum to be paid $60 cash and the balance at the rate of $20 per month, and that he pay the costs.

Defendant paid the costs and $60 on the day of trial. On 5 October 1951 he appeared and moved the court that he be discharged from custody and further appearance. The grounds for the motion as set out in his affidavit filed are (1) the court failed to follow the procedure prescribed by the probation statute as to investigation and the like, and (2) he was required by the judgment to pay $60 on the day of his trial "or go to jail, and was not free to exercise his own judgment in the matter." The court denied the motion and ordered the defendant into custody for failure to comply with the conditions upon which execution of the sentence imposed was suspended.

Thereafter, on application of defendant, Hatch, Special Judge, issued a writ of *certiorari*. When the cause came on for hearing on the writ, the trial judge found the facts and concluded that the conditions of the suspended judgment are valid. The writ was thereupon dismissed and the cause remanded for the enforcement of the judgment. Defendant excepted and appealed.

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

Stanley & Caveness for defendant appellant.

BARNHILL, J. When the judge of the municipal-county court adjudged that defendant had breached the conditions upon which execution was suspended, his remedy as now provided by G.S. 15-200.1, was by appeal.

But he contends that his complaint is not directed to the order placing him in custody and hence this statute is not applicable. He moved to vacate the conditions imposed, and it is from the order denying this motion that he seeks relief. The only method available to him for seeking a review of that order was by petition for writ of *certiorari*. So he asserts.

We may concede the correctness of his position in this respect. Even then, the record leaves him in no position to challenge the correctness of the ruling of the court below.

A writ of *certiorari* as here used is an extraordinary remedial writ to correct errors of law. It issues from a Superior Court to an inferior court, and it lies only to review judicial or *quasi*-judicial action. *Pue v. Hood*, 222 N.C. 310, 22 S.E. 2d 896, and cases cited. Hence the only function of the court below was to determine whether the judge of the municipal-county court had committed error in denying defendant's motion for a discharge on the grounds assigned in that court. The trial judge was without jurisdiction to hear new matter or consider an attack upon the conditions imposed on any grounds other than those set out in defendant's affidavit and motion.

In his affidavit and motion, the defendant asserts as grounds for his discharge that the judge, in suspending the judgment pronounced, did not follow the procedure prescribed when a prisoner is placed on probation, and that he was required to pay $60 on the day of his trial or "go to jail, and was not free to exercise his own judgment in the matter." So far as this record discloses, he did not assail the validity of the conditions on the ground that the judgment was in effect a sentence "to pay damages or go to jail," and that his imprisonment thereunder will amount to imprisonment for debt. Hence the question he seeks to debate here was not properly before the court below and is not presented to us for decision.

A court has the inherent power to suspend a judgment or stay execution of a sentence in a criminal case. *S. v. Miller,* 225 N.C. 213, 34 S.E. 2d 143, and cases cited; *S. v. Jackson,* 226 N.C. 66, 36 S.E. 2d 706; *S. v. Smith,* 233 N.C. 68, 62 S.E. 2d 495. The probation statute, General Statutes, Ch. 15, Art. 20, adopted in 1937, did not withdraw this authority from the courts. That Act provides a procedure which is cumulative and concurrent rather than exclusive.

While the court was without jurisdiction to compel defendant to pay the damages inflicted on penalty of imprisonment, this does not mean that it might not suspend the execution of the sentence of imprisonment on condition the defendant compensate those whom he had injured. Such disposition of the case merely gave him the option to serve his sentence or accept the conditions imposed. *S. v. Smith, supra.* If he was not content, he had the right either to reject the conditions or to appeal. *S. v. Miller, supra.*

Not having appealed, he was relegated to his right to contest the execution of the sentence for that there was no evidence to support a finding that the conditions imposed have been breached or the conditions are unreasonable and unenforceable or for an unreasonable length of time. *S. v. Miller, supra.* He elected to challenge the conditions on the grounds set forth in his affidavit. He has not made good his attack. Indeed he has abandoned his original foray and sought another "soft spot" as the point of assault. His change of tactics came too late. *Leggett v. College,* 234 N.C. 595, and cases cited.

Myers v. Barnhardt, 202 N.C. 49, 161 S.E. 715, is clearly distinguishable. There it appeared that the judgment in a criminal case had been suspended on condition the defendant give a bond guaranteeing the payment of damages to the injured party. The plaintiff was suing to recover on the bond. The court said—and rightly so—that the sentence could not be invoked to compel the payment of the bond. The condition on which the sentence was suspended was the execution of the bond. When the bond was executed, approved, and filed, the condition imposed was met

and the power of the court in the criminal cause terminated. Thereafter plaintiff was relegated to his right to recover on the bond.

In the final analysis defendant stood convicted of reckless driving. Apparently his unlawful use of an automobile inflicted injury upon a number of persons. The court afforded him an opportunity to escape the service of the sentence pronounced by observing the conditions imposed. He accepted. He now belatedly withdraws his acceptance and rejects the conditions. He thus furnishes the grounds for invoking the original sentence. When he is imprisoned, he will be imprisoned for his breach of the criminal law and not for the failure to pay damages.

The judgment of the court below is

Affirmed.

GRAHAM SMITH, BY HIS NEXT FRIEND, MRS. HORACE KIRBY, v. S. H. HEWETT AND H. P. HEWETT

and

PRINCE O'BRIEN, ADMINISTRATOR OF W. C. SMITH, DECEASED, v. S. H. HEWETT AND H. P. HEWETT.

(Filed 21 May, 1952.)

1. Parent and Child § 3c—

Ordinarily the father is entitled to the earnings of his child during the child's minority, and is liable for necessary medical treatment for his child, and his right to recover these elements of damages against a third person who has negligently injured the child cannot be defeated by the bringing of an action in the name of the child by his mother as next friend, even though all damages are sought in such action, and therefore it is error for the court, in the child's action instituted by its mother, to permit the jury to consider such elements of damage, the father having instituted action to recover same.

2. Same—

Upon the death of the father, the father's administrator is entitled to continue the father's action against a tort-feasor who has negligently injured his child to recover for loss of services of the child up to the date of the father's death.

3. Appeal and Error § 48—

Where error is committed in respect to some of the issues, and it is apparent that the rights of the parties may be more satisfactorily and properly adjudicated by a general new trial, it will be so ordered.

APPEAL by defendants in the first case, and by plaintiff O'Brien in the second case, from *Bone, J.*, October Term, 1951, of PENDER. New trial.

These actions were instituted to recover damages resulting from a personal injury to Graham Smith, alleged to have been caused by the negligence of the defendants, and were consolidated for trial.

In the first action recovery for his injury was sought by Graham Smith, an unemancipated minor, appearing by his mother and next friend, Mrs. Horace Kirby. In the other action, W. C. Smith, father of Graham Smith, sought recovery for medical expenses incurred in the treatment of Graham Smith and for loss of his services consequent upon the injury set forth in the complaint.

It was alleged that 6 March, 1949, Graham Smith while riding on a motor-scooter was struck by a truck negligently driven by defendant H. P. Hewett, and for which S. H. Hewett, father of his codefendant, was responsible, and that serious and permanent injuries to Graham Smith resulted. W. C. Smith died 31 May, 1951, and Prince O'Brien, administrator, continued the prosecution of the action for his estate.

Issues were submitted and answered by the jury as follows:

"1. Was the plaintiff injured and damaged by the negligence of the defendant H. P. Hewett, as alleged in the complaint? Answer: Yes.

"2. If so, is the defendant S. H. Hewett responsible for and chargeable with such negligence? Answer: Yes.

"3. Did the plaintiff by his own negligence contribute to his injury and damage, as alleged in the answer? Answer: No.

"4. What damage, if any, is the plaintiff (Graham Smith) entitled to recover? Answer: $15,000.00.

"5. What amount, if any, is the plaintiff Prince O'Brien, administrator of the estate of W. C. Smith, entitled to recover of the defendants on account of medical expenses paid by plaintiff's intestate? Answer: $50.00."

The court charged the jury if they believed the evidence and found the facts to be as the plaintiff's evidence tended to show, to answer the first issue "Yes." On the second issue the court instructed the jury that he was of opinion the plaintiff's evidence if believed by the jury would not be sufficient to make S. H. Hewett chargeable with negligence, and charged them to answer the second issue "No." On the third issue the court instructed the jury that after considering the evidence he was of opinion there was no evidence to show plaintiff (Graham Smith) guilty of contributory negligence and directed them to answer the third issue "No."

On the fifth issue as to the claim of Prince O'Brien, administrator of W. C. Smith, the court charged the jury that W. C. Smith's estate was not entitled to recover anything on account of loss of earnings of Graham Smith, nor for any medical expenses incurred in his treatment except the sum of $50.

Upon the coming in of the verdict the court in his discretion set aside the verdict on the second issue as to S. H. Hewett (the answer being contrary to the court's instruction) and awarded a new trial on that issue. S. H. Hewett excepted on the ground that under the court's directed verdict on this issue he was entitled to judgment of dismissal rather than a new trial.

Judgment was rendered that plaintiff Graham Smith recover $15,000 of H. P. Hewett, and that the administrator of W. C. Smith recover of H. P. Hewett $50.

The defendants H. P. Hewett and S. H. Hewett excepted and appealed.

The plaintiff Prince O'Brien also appealed from the judgment on the fifth issue limiting his recovery to $50.

Moore & Corbett, Isaac C. Wright, and Frink & Herring for plaintiffs.

James & James for defendants.

DEVIN, C. J. It was chiefly urged for error by the defendants that under the court's instruction on the issue of damages (the fourth issue) the jury was permitted to consider as elements of damage in the case of Graham Smith, an unemancipated minor, hospital, medical and nursing expenses incurred, and also loss of earnings and diminished earning capacity during his minority.

The general rule is that an unemancipated minor cannot recover as an element of damage in an action for personal injury for loss of earnings or diminished earning capacity during his minority, but that the father is primarily entitled to his services and earnings as long as the minor is legally in his custody or under his control. *Shipp v. Stage Lines,* 192 N.C. 475 (479), 135 S.E. 339; *Toler v. Savage,* 226 N.C. 208, 37 S.E. 2d 485. The father is under the legal duty to support his child during minority, and he has the right of action to recover for loss of earnings and for expenses incurred for medical care in treating an injury to his child caused by the wrongful act of another. He would have right to maintain an action to recover the amounts he had paid thereon, and also for those for which he is legally liable. *Williams v. Stores Co., Inc.,* 209 N.C. 591 (601-2), 184 S.E. 496; *White v. Commissioners,* 217 N.C. 329, 7 S.E. 2d 825.

Conceding these principles of law, the plaintiff contends they are not applicable here under the facts disclosed by the record.

The plaintiff Graham Smith at the time of the injury was 17 years of age. His parents had been divorced several years before, but no order was made as to his custody. His mother testified, "We were both to have him together." His father lived in Brunswick County and his mother

in Pender, but he lived part of the time with his grandmother in Brunswick and part of the time with his mother. After his injury both father and mother took him to a hospital in Wilmington, and later to a hospital in Charlotte. Several physicians treated him. All of the bills are unpaid except $50 paid by the father. The bills were made out in the name of W. C. Smith, the father. No question was presented as to liens on the recovery in favor of those rendering treatment as provided by G.S. 44-49.

Under authority of *Pascal v. Transit Co.*, 229 N.C. 435 (441), 50 S.E. 2d 534, the mother, who appeared in the action and conducted it as next friend, would be estopped to maintain claim for loss of services or for medical expenses incurred. But this rule does not apply to the father, who instituted an independent action to recover for loss of services of his son and for medical expenses incurred in his treatment for which the father was primarily chargeable. He is not estopped, and, notwithstanding the divorce, is in law liable for medical and hospital expenses incurred in the treatment and care of his minor son. *Wells v. Wells*, 227 N.C. 614, 44 S.E. 2d 31. Hence, his asserted right to recover therefor from the wrongdoer cannot be ignored. Though the father is now dead, he was entitled to the services of his son for the two years he survived after the injury and to maintain an action to recover as against the tort-feasor. His administrator is entitled to continue the action instituted for that purpose.

It is apparent that there was error in charging the jury to take into consideration without qualification these elements in determining the amount of damages to be awarded Graham Smith and to add thereto the cost of all necessary medical and hospital expenses incurred, plus loss of earnings and earning capacity. *Williams v. Stores Co., Inc.*, 209 N.C. 591, 184 S.E. 496.

On the appeal of Prince O'Brien, administrator of W. C. Smith, from the ruling of the court in limiting his recovery to $50, the appellees admit error in the court's instruction, but do not concede that all the bills which were offered were properly admitted in evidence.

The court in the exercise of its discretion set aside the verdict on the second issue as to the liability of S. H. Hewett, as being contrary to instructions, and awarded a new trial on that issue.

The plaintiff O'Brien, administrator, appealed from the judgment on the fifth issue limiting his recovery to $50, and in that case the defendant appellees concede error.

On defendants' appeal in the Graham Smith case, as hereinbefore set out, we are of opinion there was error in the court's instructions to the jury on the issue of damages, the fourth issue.

Under these conditions we think the rights of the parties could be more satisfactorily and properly adjudicated by a general new trial of all the issues raised in the two cases which were consolidated for trial.

This disposition of the appeals renders it unnecessary to decide the question debated on the argument as to the effect of the directed verdict on the second issue in the light of the jury's response thereto. As the case will be heard *de novo,* we express no opinion as to the correctness of the court's instructions on the first and third issues.

New trial.

LUMBERTON COACH COMPANY v. H. W. STONE, TRADING AND DOING BUSINESS AS PETROLEUM TRANSIT COMPANY.

(Filed 21 May, 1952.)

1. Judgments §§ 32, 33b—

A judgment is conclusive upon the parties and their privies as to all rights, questions, and facts in issue in the action, whenever such matters are in issue between them in a subsequent action, regardless of whether the subject matter is the same, and regardless of whether the prior judgment was by consent or based on the verdict of a jury.

2. Same: Pleadings § 31—

A bus and a tractor truck were in a collision. In an action by the administrator of a bus passenger against the bus company and the owner of the tractor truck, upon allegations of concurring negligence on the part of both defendants, consent judgment was entered that plaintiff recover of both defendants a stipulated sum. In a subsequent action by the bus company against the owner of the tractor truck to recover for damages to the bus, *held* defendant was entitled to set up the prior judgment as a bar, and plaintiff's demurrer and motion to strike such defense were properly denied.

APPEAL by plaintiff from *Parker, J.,* October Term, 1951, of ROBESON. Affirmed.

This was an action to recover damages for destruction of plaintiff's motorbus alleged to have been caused by the negligence of the defendant.

Plaintiff alleged that the destruction of its bus resulted from a collision on the highway between plaintiff's bus and the negligently driven tractor and trailer tank of the defendant 29 November, 1945. Defendant denied negligence on his part, and as a further defense pleaded as *res judicata* judgments in suits by Grady Britt, Administrator, Lindell Martin and others against the present plaintiff and the defendant. The judgment rolls in those cases were attached to the answer.

From these judgment rolls it appears that growing out of the collision referred to numerous damage suits were instituted against the Lumberton

Coach Company and H. W. Stone by and on behalf of passengers in the bus who were injured or killed. As typical, in the complaint of Grady Britt, Administrator, it was alleged the injury and death of his intestate was due to the concurring negligence of both the Coach Company and Stone in the operation of their respective motor vehicles on the highway on the occasion alleged. In addition it was alleged the Coach Company was negligent in failing to provide adequate exits from the bus. The Coach Company denied negligence on its part and alleged the negligence of Stone as the sole proximate cause of the injury. Likewise defendant Stone denied negligence on his part, and alleged the negligence of the Coach Company as the sole proximate cause of the injury. Thereafter, at June Term, 1946, a settlement was agreed upon, and judgment was rendered that Grady Britt, Administrator, recover of the Coach Company and defendant Stone $4,500 in satisfaction of all claims on account of the matters and things alleged in the complaint.

The plaintiff Lumberton Coach Company demurred to the further answer and defense of defendant Stone, and moved to strike from the answer the allegations set out as basis for plea of *res judicata.*

The court overruled the demurrer and denied the motion to strike, ruling that the judgment in the case of Britt against the Lumberton Coach Company and defendant Stone constituted a bar and estoppel to the prosecution of the present action.

Plaintiff excepted and appealed.

McKinnon & McKinnon for plaintiff, appellant.

F. D. Hackett for defendant, appellee.

DEVIN, C. J. On 29 November, 1945, there was a disastrous collision on the highway between the passenger bus of the Lumberton Coach Company and the tractor truck and tank trailer of defendant Stone, resulting in injury and death to passengers, the destruction of the bus, and the wreckage and demolition of the truck.

Both the Coach Company and Stone were sued by the administrator of a passenger whose death resulted from the collision, upon allegations of concurring negligence on the part of both as contributing to the injury and death of the intestate. Each defendant answered, denying his own negligence and alleging that the negligence of the other was the sole proximate cause of the injury. There were no allegations raising the question of primary and secondary liability. Thereafter consent judgment was rendered that the plaintiff in that suit recover of the Coach Company and defendant Stone $4,500 in satisfaction of all claims on account of the matters and things alleged in the complaint.

The Lumberton Coach Company has now sued Stone to recover for the loss of its bus, alleging that this was due proximately and solely to the negligence of defendant Stone. The defendant Stone pleaded the judgment in the prior suit as a bar to plaintiff Coach Company's action. Plaintiff's demurrer and motion to strike this plea from the answer were overruled by the court below, and plaintiff's exception and appeal brings the question here for review.

Unquestionably the judgment pleaded, as between the parties, would constitute *res judicata* and be regarded as conclusive as to all rights, questions and facts in issue in that action (*Bryant v. Shields,* 220 N.C. 628 (634), 18 S.E. 2d 157), and would be determinative in a subsequent action as to all matters well pleaded which were directly in question and material to the adjudication. This would be true whether the judgment was by consent of the parties or based on the findings and verdict of a jury. *Snyder v. Oil Co., ante,* 119, 68 S.E. 2d 805; *Herring v. Coach Co.,* 234 N.C. 51, 65 S.E. 2d 505; 30 A.J. 908; *Law v. Cleveland,* 213 N.C. 289, 195 S.E. 809.

"There is no doubt that a final judgment or decree necessarily affirming the existence of any fact is conclusive upon the parties or their privies, whenever the existence of that fact is again in issue between them, not only when the subject matter is the same, but when the point comes incidentally in question in relation to a different matter, in the same or any other court." 2 Freeman on Judgments, sec. 670; *Cannon v. Cannon,* 223 N.C. 664, 28 S.E. 2d 240; *Current v. Webb,* 220 N.C. 425, 17 S.E. 2d 614; *Harshaw v. Harshaw,* 220 N.C. 145, 16 S.E. 2d 666; *Hospital v. Guilford County,* 221 N.C. 308, 20 S.E. 2d 332.

It follows that the judgment pleaded by the defendant fixed the plaintiff with negligence in the operation of its bus as a proximate contributing cause to the collision and consequent destruction of its bus. The fact of its negligence was judicially determined. The allegation of the Coach Company in the original action that the negligence of defendant Stone was the sole proximate cause of the collision was negatived by the judgment consented to by the Coach Company that the plaintiff in that action recover of both for their joint and concurrent negligence. The plaintiff's present suit, based upon allegations that "the said collision and destruction of said bus were due proximately and solely to the negligence" of defendant Stone, would seem to be barred by the judgment pleaded. The "rights, questions and facts" determined in the prior action may not now be relitigated.

The view that the judgment in the former suit constitutes a bar to the present action is supported by the decisions of this Court in *Tarkington v. Printing Co.,* 230 N.C. 354, 53 S.E. 2d 269; *Herring v. Coach Co.,* 234 N.C. 51, 65 S.E. 2d 505; *Snyder v. Oil Co., ante,* 119, 68 S.E. 2d 805.

In the *Tarkington case,* the plaintiff, passenger in an automobile driven by R. O. Tarkington, was injured as result of a collision with the Printing Company's truck. The Printing Company had R. O. Tarkington made party defendant for the purpose of enforcing contribution. R. O. Tarkington pleaded in bar of the cross-action that in a former suit in which he was plaintiff and the Printing Company defendant, on issues of negligence and contributory negligence, there was verdict and judgment in his favor. The plea of *res judicata* on the question of R. O. Tarkington's negligence was upheld, the court saying: "The prior suit as between the then parties litigant determined the question whether the driver of the automobile (R. O. Tarkington) was contributorily negligent."

In the *Herring case,* plaintiff Herring sued to recover for injuries sustained while a passenger in the Coach Company's bus as result of collision of the bus with the automobile of Paul Spivey. Defendant Coach Company alleged Paul Spivey was negligent and had his administratrix made party defendant to obtain contribution. The administratrix pleaded in bar of the cross-action that she had sued the Coach Company for the wrongful death of Paul Spivey, that the Coach Company had pleaded Paul Spivey's contributory negligence, that the suit had resulted in consent judgment that she as administratrix recover $4,000. The plea was held good and the judgment a bar to the Coach Company's cross-action for contribution. The Court said: "There were no reservations in the judgment, and, nothing else appearing, this judgment constitutes a final determination of the issues raised by the pleadings."

In *Snyder v. Oil Co., supra,* the plaintiff sued the Oil Company for injury resulting from collision of an automobile, in which she was a passenger, with defendant's truck. The driver of the automobile, Mary Dixon, was made party and the Oil Company filed cross-action against her for contribution as joint tort-feasor. She answered pleading in bar a settlement by the Oil Company with her for personal injury and property damage sustained as result of the collision. The plea was held good. The Court said: "The adjustment of said claim by the payment of the amount agreed constituted acknowledgment, as between the parties, of liability of the Oil Company and the nonliability, or at least a waiver of the liability, of defendant Dixon. Neither party thereafter had any right to pursue the other in respect to any liability arising out of any alleged negligence proximately causing the collision which is the subject of the suit."

On the facts shown by the record in this case and upon the authorities cited, we conclude that the judge below has ruled correctly, and that the judgment must be

Affirmed.

STATE v. CHARLES F. SEARS.

(Filed 21 May, 1952.)

1. **Criminal Law § 52a (1)—**

On motion to nonsuit in a criminal action, defendant's evidence, except so much as may tend to explain or clarify the State's evidence, is not to be considered. G.S. 15-173.

2. **Criminal Law § 52a (2)—**

Where the State's evidence is sufficient to establish each element of the offense and that defendant was the perpetrator thereof, defendant's motion to nonsuit upon his evidence of alibi is correctly denied.

3. **Criminal Law § 81b—**

Where the only part of the charge set out in the record is that portion in which the court stated the contentions of defendant upon his evidence of alibi, and the statement of such contentions is correct and is not repugnant to a correct instruction upon the burden of proof, it will be assumed that the court gave full and correct instructions upon the point and an exception cannot be sustained. G.S. 1-180.

4. **Criminal Law § 54c—**

In this prosecution for rape, the solicitor announced that the State would not seek conviction for the offense charged but only of assault with intent to commit rape. The jury rendered a verdict of "guilty as charged." *Held:* The court properly explained to the jury that the capital crime was not in issue and properly inquired of the jury if they intended as their verdict guilty of assault with intent to commit rape, and upon their assent, judgment was properly entered upon the verdict.

APPEAL by defendant from *Grady, Emergency Judge,* at December Special Criminal Term, 1951, of CUMBERLAND.

Criminal prosecution upon bill of indictment charging that Charles F. Sears, a male person, late of the county of Cumberland, above the age of eighteen years, on 9th day of November, 1951 with force and arms, at and in the county aforesaid, did unlawfully, willfully and feloniously rape, ravish and carnally know Isabell Melvin, a female person, violently and against her will, against the form of the statute, etc.

Defendant, upon arraignment, pleaded not guilty.

Upon the calling of the case the Solicitor announced in open court that defendant would not be tried for life, but that the State would seek a conviction on a charge of assault with intent to commit rape.

The case on appeal shows that the State offered as a witness Isabell Melvin, 16 years old, whose testimony tends to show the essential elements of the crime of rape upon her, about nine o'clock on 9 November, 1951, and that defendant was the perpetrator of such crime, a recital of details of which will serve no useful purpose. Hence it is omitted. And the

State offered in corroboration of the prosecuting witness the testimony of other witnesses.

On the other hand, defendant, as witness in behalf of himself, denied that he was the perpetrator of the crime charged, and pleaded an alibi, that is, that he was elsewhere all of the night of 9 November, 1951, from 4:45 o'clock p.m., until around 4 o'clock the next morning. Defendant offered many witnesses whose testimony tended to corroborate him in his plea of alibi.

The State offered testimony in rebuttal.

At the close of all the evidence defendant made motion for judgment as of nonsuit pursuant to G.S. 15-173, as rewritten in Chap. 1086 of 1951 Session Laws of North Carolina, and the motion was denied. "Exception No. 1."

Verdict: Guilty of assault with intent to commit rape.

Judgment: Ten years confinement in State Prison.

Defendant excepts thereto and appeals to Supreme Court, and assigns error.

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

Samuel S. Mitchell and Herman L. Taylor for defendant, appellant.

WINBORNE, J. While appellant, the defendant, makes six assignments of error, only three need be given express consideration.

First: It is contended and argued by appellant that the trial court erred in overruling his motion for judgment as of nonsuit made at the close of all the evidence, G.S. 15-173, as rewritten in Chap. 1086 of 1951 Session Laws of North Carolina.

Such a motion made under the provisions of G.S. 15-173, formerly C.S. 4643, and as so rewritten, serves, and is intended to serve, the same purpose in criminal prosecutions as is accomplished by G.S. 1-183, as rewritten in Chapter 1081 of 1951 Session Laws of North Carolina, formerly C.S. 567, in civil actions. *S. v. Fulcher,* 184 N.C. 663, 113 S.E. 769.

Thus, in considering such motion in a criminal prosecution, the defendant's evidence, unless favorable to the State, is not to be taken into consideration, except when not in conflict with the State's evidence, it may be used to explain or make clear that which has been offered by the State. See *Rice v. Lumberton, ante,* 227, where the decisions of this Court in support of the above rule of procedure are assembled. See also *S. v. Bryant, ante,* 420.

Therefore, taking the evidence offered by the State and so much of defendant's evidence as is favorable to the State, or tends to explain and

make clear that which has been offered by the State, in the light most favorable to the State, this Court is of opinion, and holds that there is sufficient evidence to take the case to the jury on the question of the guilt or innocence of defendant on the charge of rape set out in the bill of indictment, or on the lesser charge for which the solicitor of the State elected to put him upon trial. As set out above in statement of the case, the testimony of the prosecutrix tends to show the essential elements of the crime of rape upon her on the night of 9 November, 1951, and that the defendant was the perpetrator of the crime. And other evidence offered by the State as set out in the case on appeal, tends to corroborate the testimony of the prosecutrix.

On the other hand, the evidence offered by defendant is in conflict with the State's evidence. Hence the evidence of defendant may not be taken into consideration in passing upon the motion of defendant for judgment as of nonsuit at the close of the evidence under provisions of G.S. 15-173, as so rewritten. The evidence offered makes an issue of fact which the jury alone may determine, *S. v. Wood, post,* 636, under proper instructions from the court upon applicable principles of law. And the assignment of error is not sustained.

Second: Exception is taken to an excerpt from the charge of the court to the jury. The record shows that "During the course of the charge, the court, after having fully stated the contentions of the State, said to the jury: 'The court does not understand from the argument of counsel that there is any serious contention about the fact that there was an attack upon the prosecuting witness; however, the defendant contends that while there may have been an attack upon her by some person, he contends that he could not have been the attacker as he was some thirty miles away at the time in question, in the Town of Lillington, in the County of Harnett.'"

The charge of the court to the jury is not contained in the record of case on appeal. The above is the only portion of it shown.

When the judge's charge is not shown in the record of case on appeal, it will be presumed that the court correctly instructed the jury on every principle of law applicable to the facts in evidence. *Growers Exchange v. Hartman,* 220 N.C. 30, 16 S.E. 2d 398; *Cato v. Hospital Care Asso.,* 220 N.C. 479, 17 S.E. 2d 671; *S. v. Wooten & Ward,* 228 N.C. 628, 46 S.E. 2d 868; *S. v. Sullivan,* 229 N.C. 251, 49 S.E. 2d 458; *S. v. White,* 232 N.C. 385, 61 S.E. 2d 84. See also *Hornthal v. R. R.,* 167 N.C. 627, 82 S.E. 830; *S. v. Jones,* 182 N.C. 781, 108 S.E. 376; *Dry v. Bottling Co.,* 204 N.C. 222, 167 S.E. 801; *Miller v. Wood,* 210 N.C. 520, 187 S.E. 765; *Maynard v. Holder,* 219 N.C. 470, 14 S.E. 2d 415.

In the light of this well settled rule in this State, since the whole charge is not contained in the record of case on appeal, it will be presumed that

the court correctly instructed the jury that the burden is upon the State to prove beyond a reasonable doubt that the offense charged was committed. The excerpt from the charge, to which exception is taken, does not contradict this presumption. Indeed, in view of the defense set up by defendant, it would seem that this excerpt is the statement of a contention, and is not violative of the provisions of G.S. 1-180, as rewritten by Chap. 107 of 1949 Session Laws of North Carolina. Compare *S. v. Jackson,* 199 N.C. 321, 154 S.E. 402; *S. v. Vick,* 213 N.C. 235, 195 S.E. 779.

Third: Exception is taken to the manner in which the verdict of the jury was received.

The record shows that: "The jury retired and subsequently returned into the court and when asked by the Clerk how they found, the answer was 'Guilty as charged'; whereupon the court stated to the jury that the charge in the bill of indictment was that of rape, which is the capital felony, and that, as explained in his charge to the jury, the Solicitor was not asking for a verdict of 'Guilty of Rape' but for a verdict of 'Guilty of Assault with Intent to Commit Rape'; and the court inquired of the jury if that was the verdict which they intended to render, that is to say, 'guilty of assault with intent to commit rape,' whereupon the jurors all nodded their heads in acquiescence and the foreman stated, 'That is our verdict, guilty of assault with intent to commit rape.' The verdict was accepted by the court and enrolled upon the Minutes of the Court of the Term."

We hold that the manner of receiving the verdict is unobjectionable. This Court so held in *S. v. Wilson,* 218 N.C. 556, 11 S.E. 2d 567, where verdict on the second count was received in similar manner.

The Court said: "We are of opinion that no irregularity or defect of procedure attended the rendering of the verdict on the second issue, and that a judgment based thereupon is valid. The jury attempted to return a verdict upon this issue, it is true, but it was not responsive to the indictment, and since it was a verdict they could not in law render, it was the duty of the judge to require that they continue their deliberations until a proper verdict should be reached. His instructions as to the verdict they might render on this count are consistent with the law."

Such is the situation in hand. What transpired simply spelled out what the jury had agreed upon as its verdict.

The remaining assignments relate (4 and 5) to denial of defendant's motions to set aside the verdict, and for a new trial, and (6) to the signing of judgment. These, in the light of decision on other assignments of error, are formal—and abide the decision as to them.

It is noted that in brief of counsel for defendant much is said about constitutional rights of defendant. But we fail to see that any constitutional question is presented. The points arose in a State court in the

regular course of a judicial (criminal) proceeding. Only questions of evidence and criminal procedure are presented.

In the judgment from which appeal is taken, we find

No error.

STATE v. JOHN ANDREW ROMAN.

(Filed 21 May, 1952.)

1. Criminal Law § 79—

Exceptions in support of which no reason or argument is stated or authority cited in the brief will be taken as abandoned, Rule of Practice in the Supreme Court No. 28, but where defendant is convicted of a capital felony, the Supreme Court will nevertheless examine the matters to which such exceptions relate in its search for prejudicial error.

2. Homicide § 25: Criminal Law § 52a (3)—

Circumstantial evidence of defendant's guilt of murder in the first degree *held* to exclude any reasonable hypothesis of innocence, and sufficient to take the case to the jury and support a verdict of guilty of the offense charged.

3. Criminal Law § 53f—

In this prosecution in which defendant offered no evidence, the charge of the court *is held* not subject to the criticism that it gave the State's evidence in too great detail so as to amount to a statement of the State's contentions. G.S. 1-180.

4. Homicide § 27c: Criminal Law § 53c—

The evidence tended to show that defendant raped his victim and also inflicted stab wounds and abrasions causing death. *Held:* In a prosecution for first degree murder the court was not required to define rape. G.S. 14-17.

APPEAL by defendant from *Pless, J.*, at January Criminal Term, 1952, of DAVIDSON.

Criminal prosecution upon a bill of indictment charging that "John Andrew Roman, late of the county of Davidson, on the 12th day of August, A.D. 1951, with force and arms, at and in the county aforesaid, unlawfully, wilfully, feloniously and of his malice aforethought, did kill and murder Mrs. Beulah Miller Hinshaw against the form of the statute in such case made and provided and against the peace and dignity of the State."

The record and case on appeal discloses these facts:

Defendant, upon arraignment, pleaded not guilty.

Defendant moved that the court in his discretion, order a special venire of jurors to be summoned from some other county than Davidson County

as provided by law. The motion was allowed, and it was agreed by attorneys for defendant and by the solicitor for the State that a special venire be ordered from Guilford County. And defendant requested that the proper proportion of Negroes be included in the venire and suggested that this should be from 25 to 33 per cent, and this suggestion was accepted by the court.

The names of the 50 special venire jurors from Guilford County were placed in the hat by the clerk and child under ten years of age drew their names from the hat in accordance with law. The following named jurors were selected and sworn and impaneled as jurors in the trial of this case: C. R. Johnson, and eleven others, naming them, four of whom were members of the Negro race. And in like manner an alternate juror was selected, sworn and impaneled, and thereupon the jury was again impaneled.

Upon the trial in Superior Court, the State offered evidence tending to show this narrative: Mrs. Beulah Miller Hinshaw, a widow, 65 years of age, residing alone in her home on South Main Street in the city of Lexington, North Carolina, came to her death at some time on Sunday night, 12 August, 1951, after the hour of 9 o'clock. Her body, practically nude, and battered, bruised and cut, was found about 8 o'clock on the morning of 13 August, 1951, in the back hall of her home, lying on papers, books, and other contents emptied from nearby trunks, and covered with a counterpane or bedspread. Blades of grass and trash were on a garment upon which her body rested. Autopsy revealed, and medical expert expressed opinion, in summary, that the primary cause of her death was traumatic shock from trauma consisting of numerous abrasions and contusions on the body, larceration of the left side of neck, stab wound of left chest wall, four fractured ribs over left side, and stab wound of left lung with hemorrhage,—that all contributed to and caused her death. There were wounds and abrasions indicating, in opinion of medical expert, that "her vagina had been entered by some means."

The screen door at the back porch of her home had been cut, at a point where the inside latch could be reached, and the back door was unfastened. Her ear-bobs were found on the back steps. In the northwest corner of her backyard the grass was trampled down. At this place her glasses, in broken parts, were found. So were torn pieces of her under garments. A left foot boot, with top cut off, was found between a little building, just back of her back door, and the north corner of the yard.

Inside the house and in one of the opened trunks in the back hall, there was a small metal box, which bore indications of fingerprints. Dresser drawers were opened and contents strewn about. A purse of money was not missing.

Mrs. Hinshaw owned a wrist watch. She also had her deceased husband's watch and pistol.

Defendant worked for an ice company. His duties were pulling ice and tending the platform after the plant closed in the evening until the next morning. He wore boots—with tops cut off. On Sunday night, 12 August, 1951, about 8:30 o'clock, he left the ice plant in one of the plant trucks, saying that he was going to carry his wife to the hospital. He was wearing cut off boots. After 9:30 o'clock his wife was at home and he was not there. He returned to the plant around 11:30 o'clock that night. He was barefooted. Later his right foot boot, with top cut, was found at the plant.

The fingerprints of the metal box, found in the opened trunk of Mrs. Hinshaw were, in opinion of expert, his fingerprints. The left boot, found back of Mrs. Hinshaw's house, in opinion of expert, matched the right foot boot of defendant found at the plant.

The watches and the pistol, above referred to, were found a day or so later in a pack house across the street from the ice plant,—to which pack house defendant alone at the time had a key.

And there was evidence of other circumstances.

Defendant did not testify, nor did he offer evidence upon the trial. But officers testified that he proclaimed his innocence.

Verdict: That the defendant, John Andrew Roman, is guilty of the felony of murder in the first degree as charged in the bill of indictment.

Judgment: Death by inhalation of lethal gas as required by law.

Defendant excepted thereto, and appeals to Supreme Court, and assigns error.

Attorney-General McMullan and Assistant Attorney-General Claude L. Love for the State.

Hosea V. Price for defendant, appellant.

WINBORNE, J. The record of case on appeal discloses that defendant groups his exceptions under eleven assignments of error. In his brief here he states four questions as being involved on the appeal. But he confines his argument exclusively to the assignment of error based upon exceptions to failure of the trial court to charge the jury in accordance with provisions of G.S. 1-180, as amended by Chap. 107 of 1949 Session Laws of North Carolina.

Hence, those exceptions, in support of which no reason or argument is stated or authority cited, will be taken as abandoned by him in accordance with provisions of Rule 28 of the Rules of Practice in the Supreme Court—221 N.C. 544, at pages 562-3. Nevertheless, since this is a capital felony, we have examined the matters to which those exceptions relate, and find in them no merit.

Indeed, the incriminating circumstances, revealed by the evidence offered by the State are "of such nature and so connected or related as to point unerringly to the defendant's guilt and to exclude any other reasonable hypothesis." *S. v. Stiwinter,* 211 N.C. 278, 189 S.E. 868. See also *S. v. Fulk,* 232 N.C. 118, 59 S.E. 2d 617. Such evidence is legally sufficient to take the case to the jury, and to support a verdict of guilty on the charge under which defendant stands indicted.

And in respect of the exception presented, and argued by defendant, we turn to the provisions of the statute—G.S. 1-180, as so amended. It reads: "No judge, in giving a charge to the petit jury, either in a civil or criminal action, shall give an opinion whether a fact is fully or sufficiently proven, that being the true office and province of the jury, but he shall declare and explain the law arising on the evidence given in the case. He shall not be required to state such evidence except to the extent necessary to explain the application of the law thereto; provided, the judge shall give equal stress to the contentions of the plaintiff and defendant in a civil action, and to the State and defendant in a criminal action."

It is contended that the court stated the evidence in too much detail, and too great length,—so much so that it amounted to a statement of the State's contentions, rather than of the evidence,—that this is true, particularly in view of the fact that the defendant introduced no evidence.

However, from a careful reading of the charge, as given, in the light of the provisions of this statute, and of the situation in hand, it does not appear that the trial judge transgressed either the letter or the spirit of the statute.

It is also contended that the trial court, in charging the jury, erred in not defining the crime of rape, in connection with definition of murder in the first degree—G.S. 14-17. In the light of the testimony offered by the State as to the cause of the death of decedent, it would seem unnecessary for the court to define rape. The court charged thoroughly and clearly as to the element of premeditation and deliberation. And the bill of indictment is in compliance with the form prescribed by statute, G.S. 15-144. See also *S. v. Kirksey,* 227 N.C. 445, 42 S.E. 2d 613.

Finally, we say, and hold that error is not made to appear in the record and case on appeal in the case in hand.

No error.

PIEDMONT SUPPLY COMPANY, INC., v. FRED ROZZELL, NOLEN ROZZELL AND BERLEY H. CROUCH, DOING BUSINESS UNDER THE TRADE NAME OF CATAWBA PUMP COMPANY.

(Filed 21 May, 1952.)

1. Partnership § 6b—

Where there is evidence that a firm of the same name did business in two separate cities and that defendant partner appeared to be interested in the business at both places, his motion to nonsuit in an action on an account due by the firm at either place is properly denied.

2. Same—

Where defendant partner alleges and offers evidence that there were two separate firms doing business in separate cities and that he was a partner in only one of them, it is reversible error for the court to charge that he admitted partnership in the firm and that the same concern was doing business in both cities.

3. Appeal and Error § 6c (6)—

While ordinarily a misstatement of a fact in evidence must be called to the trial court's attention in apt time, where the misstatement is of material fact not shown in evidence it constitutes reversible error.

APPEAL by defendant Berley H. Crouch from *Phillips, J.*, and a jury, September 1951 Term, CATAWBA.

Civil action to recover upon two accounts.

The plaintiff brought this action against the defendants, Fred Rozzell, Nolen Rozzell and Berley H. Crouch, alleging that said defendants were partners trading as Catawba Pump Company. To the complaint was attached two accounts marked exhibit "A," one in the name of Catawba Pump Company, Hickory, N. C., which showed a balance due of $2,100.56, and the other in the name of Catawba Pump Company, Newton, N. C., which showed a balance due of $405.84. The plaintiff sought to recover of all the defendants the balance due upon both of said accounts. Only the defendant Berley H. Crouch filed an answer. His further answer and defense admits, "That there have been, for more than a year, two firms engaged in the plumbing business in Catawba County known as 'Catawba Pump Company,' one being situated in the city of Newton and one being situated in the city of Hickory; that the two said firms are in every way completely separate from each other, have different owners, are and always have been operated separately, and are in nowise connected with each other." Appellant in his further answer and defense also concedes "that he is a partner in the firm of Catawba Pump Company of Newton, and that this said firm does owe the plaintiff some money, . . ." He denies all other material allegations of the complaint.

As the first item of evidence, the plaintiff offered as an admission from appellant's answer the following: "That there have been, for more than

a year, two firms engaged in business in Catawba County, known as 'Catawba Pump Company,' one in Hickory, one in Newton;" and "That the defendant admits that he is a partner in the Catawba Pump Company of Newton, and that this said firm does owe to the plaintiff some money."

Plaintiff offered other evidence tending to establish the relationship of appellant as a partner in the Catawba Pump Company and that the partnership did business both in Newton and in Hickory. Plaintiff concluded its evidence with the introduction of an itemized statement showing a balance of $2,100.56 on the account charged to Catawba Pump Company, Hickory, N. C., and a balance of $405.84 on the account charged to the Catawba Pump Company, Newton, N. C.

Appellant testified that he was not a partner in the firm known as Catawba Pump Company at Hickory. He asserted that his only connection with the Hickory firm was to work as a plumber on some jobs at $1.50 an hour, plus 10% of the profit after payment of material used on each job. He admitted in his testimony that he had purchased a one-fourth interest in the Newton Pump Company and in payment therefor executed his note for $800.00, but that he had nothing to do with the change of the name to Catawba Pump Company.

At the conclusion of the plaintiff's evidence and again at the conclusion of all the evidence, appellant demurred to the evidence and moved for judgment as of nonsuit. To the action of the court in overruling these motions, the defendant excepted.

Appellant excepts and assigns as error certain portions of the charge, among which are the following: "Now, the defendant Berley H. Crouch contends here that he withdrew from the partnership in October 1949. He says he was a member of the partnership in Newton under the same name, doing business in Newton, and that the same concern was doing business in Hickory, and that he withdrew from the partnership in October 1949." . . . "The court instructs you that if you believe the evidence offered by the plaintiff and the defendant on the first issue, and find the evidence to be true on the issue which is—Was the defendant Berley H. Crouch a member of the partnership and doing business as the Catawba Pump Company?—then the court instructs you that you will answer issue #1 yes." . . . "The defendant Berley H. Crouch admits that he bought a one-fourth interest and paid $800.00 for it and was a member of the firm. Whether the firm had one or more places of business is immaterial because the defendant had the right to show that he was a partner only in the Newton branch, only one-fourth interest in the Newton branch and only responsible for that amount, and then the public would have known if they had had notice that his was only a one-fourth interest in the Newton branch and had nothing to do with the Hickory branch, otherwise the public had the right to deal with them as one concern in two

branches, each being responsible for both places. If you believe the evidence in this case as testified to by the witnesses you will answer the first issue yes."

From an adverse verdict and judgment, the defendant Berley H. Crouch excepted and appealed, assigning errors.

Willis & Geitner for plaintiff, appellee.

E. Murray Tate, Jr., and Theodore F. Cummings for defendant, appellant.

VALENTINE, J. The appellant assigns as errors, (1) the action of the trial judge in overruling his demurrer and denying his motion for judgment as of nonsuit; and (2) certain portions of the charge on the ground (a) that the trial judge included in his charge statements of fact neither admitted nor shown by the evidence, and (b) that the charge amounted to a peremptory instruction for the plaintiff on the first issue, although the evidence of plaintiff and defendant was in sharp conflict.

Under our decisions, there was sufficient evidence to repel the motion for judgment as in case of nonsuit and to require the submission of the case to the jury upon appropriate issues and a proper charge. *Graham v. Gas. Co.*, 231 N.C. 680, 58 S.E. 2d 757; *Donlop v. Snyder*, 234 N.C. 627; *Powell v. Lloyd*, 234 N.C. 481.

There is, however, reversible error in the charge. When his Honor in referring to appellant's testimony stated to the jury, "He says he was a member of the partnership in Newton under the same name, doing business in Newton, and that the same concern was doing business in Hickory," he was in error. Nowhere in the evidence does it appear that the appellant ever admitted that he was a partner in the Catawba Pump Company at Hickory. His evidence all tends to show that the two businesses were separate firms, that he was a partner owning a one-fourth interest in the Catawba Pump Company at Newton, but not a partner in the firm of the same name at Hickory. Indeed, the first item of plaintiff's evidence asserts that there were two partnerships by the same name, one located in Hickory and the other in Newton.

The applicable rule of law is, while an inaccurate statement of facts contained in the evidence should be called to the attention of the court in order that the error might be corrected, a statement of a material fact not shown in the evidence constitutes reversible error. *Steelman v. Benfield*, 228 N.C. 651, 46 S.E. 2d 829; *S. v. Wyont*, 218 N.C. 505, 11 S.E. 2d 473; *S. v. Love*, 187 N.C. 32, 121 S.E. 20; *Smith v. Hosiery Mill*, 212 N.C. 661, 194 S.E. 83; *Curlee v. Scales*, 223 N.C. 788, 28 S.E. 2d 576.

There was some evidence that the appellant was a partner in the Catawba Pump Company and that this firm did business both in Hickory

and in Newton, but this was denied by the appellant and upon such conflicting evidence a peremptory instruction in favor of the plaintiff was erroneous. *Boutten v. R. R.*, 128 N.C. 337, 38 S.E. 920; *R. R. v. Lumber Co.*, 185 N.C. 227, 117 S.E. 50; *Porter v. Construction Co.*, 195 N.C. 328, 142 S.E. 27; *Kearney v. Thomas*, 225 N.C. 156, 33 S.E. 2d 871; *Perry v. Trust Co.*, 226 N.C. 667, 40 S.E. 2d 116; *Morris v. Tate*, 230 N.C. 29, 51 S.E. 2d 892; *Stallings v. Insurance Co.*, 231 N.C. 732, 58 S.E. 2d 716.

For the errors pointed out, there must be a new trial, and it is so ordered.

New trial.

J. WATTS FARTHING AND ESTHER T. FARTHING, PETITIONERS, v. ESTHER CONSTANCE FARTHING AND J. WATTS FARTHING, JR., MINORS, BY THEIR GUARDIAN, J. C. WESSELL, JR., MAUDE H. FARTHING, ZEB V. FARTHING, CHARLES CLAUDE FARTHING, EDWARD GREY FARTHING, DONALD DEWITT FARTHING, MINNIE WATSON, HENRY GRADY FARTHING, RALPH JURNEY, AND HOWARD JURNEY, RESPONDENTS.

(Filed 21 May, 1952.)

1. Declaratory Judgment Act § 1: Wills §§ 17, 39—

The Declaratory Judgment Act cannot be used for the purpose of having a part of a probated writing declared void under the guise of construction, and judgment avoiding a part of the instrument on the ground that it was a codicil not executed as required by law, must be set aside.

2. Wills § 39—

Where, in an action to construe a will, the codicil, which was attacked on the ground of invalidity, is ambiguous, the court should construe such codicil notwithstanding its want of jurisdiction to declare it void.

APPEAL by defendant guardian *ad litem* from *Burgwyn, Special Judge*, February Term, 1952, NEW HANOVER. Error and remanded.

Petition for a declaratory judgment (1) construing the last will and testament of Logan E. Farthing, and (2) declaring Sheet No. 3 thereof null and void for that it is in effect a codicil not executed in the manner required by statute.

On 12 March 1938, Logan E. Farthing executed his last will and testament which is or purports to be composed of three sheets, but Sheet No. 3 is inserted between Sheet No. 1 and Sheet No. 2. In article IV thereof on Sheet No. 1, he devises to his son, J. Watts Farthing, petitioner, in fee, a house and lot on Wrightsville Beach and a farm near Boone, N. C. Article IX on Sheet No. 3 reads in part as follows:

"IX—As to Article IV I wish to change so as to read as follows:" He then devises the same property to his said son but uses language which limits the estate devised.

The "in testimony" clause followed by the signatures of the testator and the subscribing witnesses is on Sheet No. 2 immediately following article VIII. Sheet No. 3 (which is page two as they are attached together) contains only article IX.

On 31 March 1938, the testator died, and on 6 April 1938, his said will, including Sheet No. 3 as a part of the original, was admitted to probate in common form. So far as the record discloses, there has been no caveat proceeding filed.

The plaintiffs instituted this action to have the court construe the paper writing and declare and decree the rights of the respective parties thereunder. They allege that Sheet No. 3 is obviously a codicil, not executed as required by law, and is void. They pray the court to construe said paper writing and declare Sheet No. 3 thereof void and of no effect.

When the cause came on to be heard in the court below, the trial judge adjudged that: "article IX of the Will of Logan E. Farthing, deceased, written on the third page of said Will and denominated 'Sheet No. 3,' is void and of no effect, and that article IV remains in full force and effect, unchanged and unqualified by the void provisions of article IX . . . and that J. Watts Farthing is the owner in fee simple" of the property described in article IV. Defendants excepted and appealed. They demur *ore tenus* in this Court.

Rountree & Rountree for plaintiff appellees.

J. C. Wessell, Jr., for respondent appellants.

BARNHILL, J. The court below was without original jurisdiction to entertain this action to nullify any part of the duly probated will which is the subject matter of this action. Hence the judgment entered must be vacated on authority of *In re Will of Puett,* 229 N.C. 8, 47 S.E. 2d 488; *Brissie v. Craig,* 232 N.C. 701, 62 S.E. 2d 330; *Anderson v. Atkinson,* 234 N.C. 271; *Anderson v. Atkinson, ante,* 300.

The Declaratory Judgment Act, G.S. Ch. 1, Art. 26, is designed to provide an expeditious method of procuring a judicial decree construing wills, contracts, and other written instruments and declaring the rights and liabilities of parties thereunder. It is not a vehicle for the nullification of such instruments. Nor is it a substitute or alternate method of contesting the validity of wills.

It does not follow, however, that the demurrer entered in this Court must be sustained. Plaintiffs' action does not fall *in toto* for want of jurisdiction of the trial court. In article IV plaintiff J. Watts Farthing is devised the beach property and the farm in fee simple. In article IX he is devised the same property subject to certain conditions and provisions which limit the estate devised. Do these provisions limit the estate

conveyed both as to the beach property and the farm or only as to the farm? The language used is sufficiently ambiguous to require judicial construction and the petition is sufficient to entitle plaintiffs to a judicial decree definitely determining the nature and extent of his title to each parcel of property so devised to him.

To the end that the judgment entered may be vacated and the parties may be heard on the question properly presented by the pleadings, the cause is remanded.

Error and remanded.

STATE v. HANNIBAL WOOD.

(Filed 21 May, 1952.)

1. Incest § 1—

A father is guilty of incest if he has sexual intercourse, either habitual or in a single instance, with a woman or girl whom he knows to be his daughter in fact, regardless of whether she is his legitimate or his illegitimate child.

2. Incest § 2—

It is not required that the testimony of the daughter be corroborated in a prosecution for incest, and her testimony alone will take the case to the jury if it establishes each element of the offense and defendant's guilt thereof.

3. Criminal Law § 52a (2)—

Testimony that prosecutrix had made contradictory exculpatory statements out of court is insufficient ground for nonsuit, even in a prosecution based solely upon her testimony, since whether a witness has been successfully impeached is a matter for the jury alone, and the court, in passing upon the motion, must consider only the evidence favorable to the State and assume it to be true.

4. Criminal Law § 53b—

An instruction that a reasonable doubt may arise out of the evidence or the insufficiency of the evidence in the case is without error.

APPEAL by defendant from *Bone, J.*, and a jury, at January Term, 1952, of CUMBERLAND.

Criminal prosecution of a father for incest with his daughter.

The State made out this case by the testimony of the prosecutrix:

The prosecutrix is the daughter of the defendant by his marriage to her mother, who died before the day named in the indictment. On that day the defendant compelled the prosecutrix, who was then a fifteen year old inmate of his home, to engage in sexual intercourse with him. Shortly

thereafter the prosecutrix related the sordid details of the affair to her maternal grandmother and a deputy sheriff.

The prosecutrix admitted on cross-examination that while the case was awaiting trial she made both oral and written statements out of court to witnesses for the defense indicating that she had falsely charged the accused with incest because she "thought it would break him from drinking."

The jury found the defendant guilty of the crime alleged, and the court sentenced him to imprisonment in the State prison. The defendant excepted and appealed.

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

J. H. Cook and H. H. Clark for the defendant, appellant.

ERVIN, J. The defendant makes these assertions by his 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 instructing the jury that a reasonable doubt may arise "out of the evidence or the insufficiency of the evidence in the case."

A father violates G.S. 14-178 and by reason thereof is guilty of the statutory felony of incest if he has sexual intercourse, either habitual or in a single instance, with a woman or girl whom he knows to be his daughter in fact, regardless of whether she is his legitimate or his illegitimate child. *S. v. Sauls,* 190 N.C. 810, 130 S.E. 848; *Strider v. Lewey,* 176 N.C. 448, 97 S.E. 398; *S. v. Laurence,* 95 N.C. 659; *Baumer v. State,* 49 Ind. 544, 19 Am. Rep. 691; *State v. Alexander,* 216 La. 932, 45 So. 2d 83; *State v. Ellis,* 74 Mo. 385, 41 Am. Rep. 321.

There is no statute providing that the testimony of the prosecutrix must be corroborated by the evidence of others in a prosecution for incest. In consequence, a conviction for incest may be had against a father upon the uncorroborated testimony of the daughter if such testimony suffices to establish all of the elements of the offense beyond a reasonable doubt. 42 C.J.S., Incest, section 17. This being true, the court rightly adjudged that the evidence of the State in the case at bar made the defendant's guilt a question for the jury.

In reaching this conclusion, we have not ignored the interesting contention of the defendant that the contradictory statements made by the prosecutrix out of court proved her to be wholly unworthy of belief and completely nullified the probative force of her sworn testimony at the trial, and that for this reason, if no other, the prosecution ought to have

been involuntarily nonsuited. This contention runs counter to the well established rule that whether a witness has been successfully impeached by evidence showing that he made prior contradictory statements out of court is a matter for the jury alone. What was said in *S. v. Bowman,* 232 N.C. 374, 61 S.E. 2d 107, is germane here. "This argument misconceives the office of the statutory motion for a judgment of nonsuit in a criminal action. In ruling on such motion, the court does not pass upon the credibility of the witnesses for the prosecution, or take into account any evidence contradicting them offered by the defense. The court merely considers the testimony favorable to the State, assumes it to be true, and determines its legal sufficiency to sustain the allegations of the indictment. Whether the testimony is true or false, and what it proves if it be true are matters for the jury."

The court did not err in charging that a reasonable doubt may arise "out of the evidence or the insufficiency of the evidence in the case." This instruction is in substantial accord with the accepted rule that "it is proper to charge . . . that a reasonable doubt may arise either from the evidence or from a want of evidence, and that the absence of sufficient satisfying evidence may be a ground for a reasonable doubt of guilt." 23 C.J.S., Criminal Law, section 1283. See, also, in this connection: *S. v. Braxton,* 230 N.C. 312, 52 S.E. 2d 895.

According to the verdict of the jury, the defendant has sinned grievously against his motherless child. This tragic case calls to mind the execration of the Man of Galilee. "It were better for him that a millstone were hanged about his neck, and he were cast into the sea, than that he should offend one of these little ones." Luke 17:2.

No error.

BRANSON REDDING, BY HIS NEXT FRIEND, RUTH REDDING, v. CLIFFORD REDDING.

(Filed 21 May, 1952.)

Parent and Child § 3b: Common Law—

Under the common law in force in this State a child may not maintain an action to recover for negligent injury against its parents or either of them. G.S. 4-1.

APPEAL by plaintiff from *Patton, Special Judge,* January Term, 1952, of GUILFORD (High Point Division).

This is a civil action for the recovery of damages for personal injuries sustained by the minor plaintiff as a result of the alleged negligence of the defendant. The evidence discloses that Branson Redding, the minor

plaintiff, is the eight year old child of the defendant, living in the home of the defendant and supported by him at the time of the automobile accident which caused personal injuries to him. The next friend of the minor plaintiff is his mother, the wife of the defendant.

For the purposes of this appeal, the defendant concedes that there was sufficient evidence of actionable negligence on his part to establish a *prima facie* case.

The trial judge sustained the defendant's demurrer to the evidence which was interposed at the conclusion of the plaintiff's evidence, and entered a judgment as of nonsuit. The plaintiff appeals and assigns error.

Haworth & Haworth for plaintiff, appellant.
Jordan & Wright for defendant, appellee.

DENNY, J. The common law does not recognize the right of an unemancipated minor child, living in the household of its parents, to maintain an action in tort against its parents or either of them. The common law in this respect was enunciated and adhered to in *Small v. Morrison,* 185 N.C. 577, 118 S.E. 12, 31 A.L.R. 1135.

It is not contended by the appellant that there is any difference in the factual situation in the present appeal and that presented and adjudicated in *Small v. Morrison, supra.* It is contended, however, that the time has come when the harshness of the common law, as enunciated in that case, should be modified or rejected altogether.

It is provided by G.S. 4-1, that so much of the common law "as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this state, . . . not abrogated, repealed, or become obsolete," shall remain in full force and effect in this jurisdiction. *Speight v. Speight,* 208 N.C. 132, 179 S.E. 461; *S. v. Hampton,* 210 N.C. 283, 186 S.E. 251; *S. v. Batson,* 220 N.C. 411, 17 S.E. 2d 511, 139 A.L.R. 614; *Moche v. Leno,* 227 N.C. 159, 41 S.E. 2d 369; *Scholtens v. Scholtens,* 230 N.C. 149, 52 S.E. 2d 350.

The common law as enunciated by this Court in the case of *Small v. Morrison, supra,* has not been abrogated or changed by statute. On the other hand, that case has been cited as controlling in *Goldsmith v. Samet,* 201 N.C. 574, 160 S.E. 835; and with approval in *Green v. Green,* 210 N.C. 147, 185 S.E. 651, and *Henson v. Thomas,* 231 N.C. 173, 56 S.E. 2d 432.

The appellant takes the position that we avoided the harshness of the common law, as applied in the *Small case,* in the cases of *Wright v. Wright,* 229 N.C. 503, 50 S.E. 2d 540, and *Foy v. Foy Electric Co.,* 231 N.C. 161, 56 S.E. 2d 418. We do not so construe those decisions. In our opinion, the facts involved in those cases excluded them from the common law rule laid down in the *Small case.*

We know of no jurisdiction in this country that has abrogated the common law rule under consideration, by statute or otherwise, except in cases involving willful or malicious torts. See Anno. 122 A.L.R. 1352.

The judgment of the court below is

Affirmed.

EVELYN JONES v. ATLANTIC COAST LINE RAILROAD.

(Filed 21 May, 1952.)

Railroads § 4—In car passenger's action for negligent injury in crossing accident, driver held guilty of insulating negligence.

The driver of the car stopped some twenty feet from the easternmost rail where his vision in one direction was obstructed by tall corn growing on defendant's right of way. Seeing no train approaching, he thereupon drove upon the crossing without again looking in either direction, and the car was struck by a train on the second track, a distance of some twenty-seven feet. The evidence disclosed that a driver could get an unobstructed vision of the track in both directions by stopping at a point nearer the first track. *Held:* Conceding the railroad company was negligent in permitting the tall corn to grow on its right of way and in failing to give warning of its approaching train by whistle or bell, the negligence of the driver constituted intervening negligence insulating the negligence of the railroad and requiring nonsuit in an action by a passenger in the car against the railroad company.

APPEAL by plaintiff from *Parker, J.*, October Term, 1951, of ROBESON.

Civil action to recover damages for personal injuries sustained in an automobile-train collision at a grade crossing.

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

Johnson & Johnson for plaintiff, appellant.

McLean & Stacy for defendant, appellee.

JOHNSON, J. The collision occurred about five o'clock on the afternoon of 21 June, 1949, when the automobile in which the plaintiff was riding was struck by the defendant's southbound passenger train near Pembroke, North Carolina. The plaintiff was riding with her husband, Zeb Jones, in his car, returning along a country road to their home. At a point about a mile and a quarter from their house, the road over which they were traveling crosses the main north-south double line tracks of the defendant railroad about half a mile south of Pembroke. The plaintiff's husband had crossed the tracks at this point many times, was familiar

with the crossing and surrounding conditions, and knew that trains passed frequently.

The car in which the plaintiff was riding was traveling west. To the right of this road, looking toward the west, the defendant had permitted hybrid corn to be planted on its right of way. The corn was extremely tall and thick, and obstructed the view of one traveling west until within about 15 feet of the easternmost railroad track. There was evidence tending to show that no warning of the approach of the train to the crossing was given by whistle or bell.

It further appears from the plaintiff's evidence that her husband saw the stop sign side of the road before reaching the crossing. He slowed down and stopped about 20 feet from the easternmost track where his vision to the right was obstructed by the hybrid corn. From this point, where he could see to his left but not to his right, Zeb Jones then drove, without looking again, out beyond the corn, across both a railroad fill and the near northbound tracks, and onto the southbound tracks on the far side, where he was hit by a southbound train.

Zeb Jones testified that between the corn and the southbound track there was a distance of 27 feet in which there was no obstruction. Other witnesses placed the distance at from 27 to 30 feet. Jones further stated that "After I stopped and started, I didn't look again and the next thing I knew I was hit by the train."

This evidence, when tested by settled principles of law, explained and applied in many decisions of this Court, fails to make out a case for the jury. *Jeffries v. Powell,* 221 N.C. 415, 20 S.E. 2d 561, and cases there cited. See also *Beaver v. China Grove,* 222 N.C. 234, 22 S.E. 2d 434.

In the instant case, if it be conceded that the defendant was negligent in allowing the corn to grow upon the edge of its right of way and in failing to give warning signal of the approach of its train to the crossing, nevertheless, it is clear that the active negligence of the driver of the automobile, subsequently operating, was the real, efficient cause of the injury to the plaintiff. It is manifest that the negligence of the husband in driving without looking through an area of some 27 to 30 feet in which his vision was unobstructed intervened and insulated the prior negligence of the defendant and became the sole proximate cause of the plaintiff's injury. *Jeffries v. Powell, supra.*

It follows, then, that the court below properly held that this negligence of the driver was the sole proximate cause of the plaintiff's injury. The judgment of nonsuit entered below is

Affirmed.

IN THE MATTER OF J. M. LEDBETTER, JR., ADMINISTRATOR C. T. A. OF THE ESTATE OF ROBERT L. STEELE III, DECEASED.

(Filed 21 May, 1952.)

1. Executors and Administrators § 29—

In the absence of testamentary provision, the right of the personal representative to compensation is controlled by G.S. 28-170.

2. Same—

Where a claim against an estate is reduced by the amount of credits or offsets existing in favor of the estate against claimant, the administrator is not entitled to commissions on the credits and offsets so deducted, since he neither received nor actually expended same.

APPEAL by J. M. Ledbetter, Jr., administrator *c. t. a.* of the estate of Robert L. Steele III, from *Phillips, J.*, in Chambers at Rockingham, North Carolina, 9 February, 1952, in proceeding in the Superior Court of RICHMOND County.

Application by an administrator with the will annexed for an allowance of commissions.

These are the facts:

1. During his lifetime, Robert L. Steele III, a resident of Richmond County, North Carolina, executed a deed of trust conveying land in Bladen County, North Carolina, to a trustee to secure his indebtedness to two banks, to wit, the Farmers' Bank and Trust Company of Rockingham, N. C., and the Federal Reserve Bank of Richmond, Virginia.

2. Robert L. Steele III died testate on 25 April, 1941, and the Clerk of the Superior Court of Richmond County thereupon granted letters of administration with the will annexed to J. M. Ledbetter, Jr., who is hereinafter called the administrator.

3. Shortly thereafter the two banks and the trustee sued the administrator in the Superior Court of Bladen County to foreclose the deed of trust. A consent judgment was entered in the cause in April, 1943, adjudging that the indebtedness of the estate of the testate to the banks totaled $43,000.00, declaring that this indebtedness was justly subject to deductions amounting to $8,000.00 for credits or offsets existing in favor of the estate of the testate and against the banks, and ordering the foreclosure of the deed of trust for the satisfaction of the difference between the indebtedness and the deductions. The present record does not disclose either the nature or origin of the credits or offsets.

4. On 14 January, 1952, the administrator made application to the Clerk of the Superior Court of Richmond County for an award of commissions on the amount of the deductions allowed the estate of the testate by the consent judgment. The clerk denied the application "as a matter

of law," and the administrator appealed to Judge Phillips, who affirmed the clerk's ruling. The administrator excepted and appealed, assigning the order of affirmance as error.

G. S. Steele for J. M. Ledbetter, Jr., Administrator c. t. a. of Robert L. Steele III, appellant.

ERVIN, J. In the absence of an effective testamentary provision on the subject, the right of the personal representative of a decedent to compensation is controlled by the statute now codified as G.S. 28-170.

Under this statute, the clerk of the Superior Court having jurisdiction in the particular case has the discretionary power of allowing an executor or administrator commissions not exceeding five per cent upon the amount of his "receipts . . . and . . . expenditures." The terms "receipts" and "expenditures," as used in the statute, refer to the actual receipts and the actual expenditures of the personal representative. The administrator in the instant case has no lawful claim to commissions on the credits or offsets deducted by the consent judgment from the indebtedness of his testate to the banks. This is necessarily so for the very simple reason that the deductions were neither actually received nor actually expended by the administrator. *Walton v. Avery,* 22 N.C. 405; 34 C.J.S., Executors and Administrators, section 865 (b).

The order of Judge Phillips is

Affirmed.

ELIZABETH PAGE ERICKSON AND HELEN PAGE GAITHER v. H. C. STARLING, EARLE JONES, AND RUTH I. PAGE, INDIVIDUALLY AND AS TRUSTEES; RUTH I. PAGE, EXECUTRIX OF THE ESTATE OF B. F. PAGE, DECEASED; W. H. KING DRUG COMPANY; PEABODY DRUG COMPANY; CAROLINA SURGICAL COMPANY; AND MRS. H. E. CRAVEN, FRED T. CRAVEN, WILLIAM M. CRAVEN, HENRY E. CRAVEN, JR., MRS. J. D. KASE, AND J. BEN COPPEDGE, MINORITY STOCKHOLDERS OF W. H. KING DRUG COMPANY.

(Filed 11 June, 1952.)

1. Trial § 5—

A trial is the examination before a competent tribunal, according to the law of the land, of the issues between the parties in a cause, whether they be issues of law or of fact, for the purpose of determining such issues. G.S. 1-170.

2. Trial § 18—

Issues of law must be tried by the judge; issues of fact, even though they involve matters in equity, must be tried by a jury unless trial by jury is waived. G.S. 1-172.

3. Judgments § 17b—

Where issues of fact are raised by the pleadings and trial by jury is not waived, the court is without power to enter a final judgment until the issues of fact are determined by the verdict of the jury.

4. Pleadings § 15—

A demurrer admits the truth of the well-pleaded factual allegations in the pleading of the adverse party solely for the purpose of testing the sufficiency of such allegations to state a cause of action or a defense, and therefore such admission forthwith ends if the demurrer is overruled.

5. Same—

While plaintiff may demur to any one or more of several defenses set up in the answer, he may not divide a single affirmative defense into its several constituent paragraphs or sentences, and demur separately to such several paragraphs or sentences segregated from their respective contexts. G.S. 1-141.

6. Appeal and Error § 2—

A decision upon a written demurrer is appealable by either party. G.S. 1-130.

7. Pleadings § 28—

A court of record has inherent power to render judgment on the pleadings where the facts shown and admitted on the pleadings entitle a party to such judgment.

8. Same—

A motion for judgment on the pleadings admits solely for its purposes the truth of all well-pleaded facts in the adversary's pleading together with all fair inferences to be drawn therefrom, and also the untruth of movant's allegations in so far as they are controverted by the adversary's pleading, and therefore if the motion is denied, movant is not precluded from having the action regularly tried upon all issues raised by the pleadings.

9. Same—

A motion for judgment on the pleadings is allowable only where the pleading of the opposite party is so fatally deficient in substance as to present no material issue of fact.

10. Same—

Upon motion for judgment on the pleadings the court is confined to determining whether any material issue of fact has been joined between the parties, and he may not hear extrinsic evidence or make findings of fact.

11. Same—

If the pleadings raise an issue of fact on any single material proposition, motion for judgment on the pleadings must be denied, and the court may not enter a partial judgment on the pleadings for a part of a litigant's claim, but must submit the issues of fact for the determination of the jury so that a single judgment which will completely and finally determine all the rights of the parties may be entered. G.S. 1-208.

12. Appeal and Error § 2—

An appeal lies from the granting of a motion for judgment on the pleadings, but if the motion is refused movant must note exception, proceed with the trial, and have the matter reviewed on appeal from final judgment.

13. Trusts § 24—

In this action for the removal of trustees and to recover against them for maladministration of the trust, the answers denying certain material allegations of the complaint and also drawing opposing inferences from admitted matters, as well as pleading new matter constituting extenuating circumstances in the nature of a single affirmative defense against the cause for the removal of the trustees, *is held* to require the overruling of plaintiffs' demurrers to the answers and the denial of plaintiffs' motions for judgment on the pleadings, and judgment of the lower court adjudicating the rights of the parties without a determination of the issues of fact by a jury is error.

14. Attorney and Client § 10—

It is error for the court to order corporate parties to pay specified fees to their attorneys, the corporations being at liberty to contract in respect to this matter for themselves.

APPEAL by plaintiffs from *Morris, J.*, at November Term, 1951, of WAKE.

Civil action by beneficiaries of trust to remove trustees, and to compel them to redress supposed breaches of trust.

This cause was before us at the Spring Term, 1951. *Erickson v. Starling,* 233 N.C. 539, 64 S.E. 2d 832.

For convenience of narration, Elizabeth Page Erickson and Helen Page Gaither are called the plaintiffs; H. C. Starling, Earle Jones, and Ruth I. Page, who are sued as individuals and also as trustees, are characterized as defendants; Ruth I. Page, who is likewise sued in her capacity as executrix of B. F. Page, is denominated the executrix; Mrs. H. E. Craven, Fred T. Craven, William M. Craven, Henry E. Craven, Jr., Mrs. J. D. Kase, and J. Ben Coppedge, who are minority stockholders of the W. H. King Drug Company, are designated as the minority stockholders; and the W. H. King Drug Company, the Peabody Drug Company, and the Carolina Surgical Supply Company, are given their respective corporate names.

The plaintiffs are the daughters of B. F. Page, who died testate on or about 22 July, 1949. During his lifetime, to wit, on 18 June, 1942, B. F. Page, who was the guiding spirit and principal stockholder of the W. H. King Drug Company, conveyed 400 shares of the common stock of the W. H. King Drug Company to H. C. Starling, Earle Jones, and Bessie F. Coffin, as trustees for a period of twenty-five years ending on 18 June, 1967. The trust instrument provides that the trustees are to hold the 400 shares of common stock during the continuance of the trust, and are

to vote it at all meetings of the stockholders of the W. H. King Drug Company "without proxy from the beneficiaries . . . as fully as if said trustees were the absolute owners of said stock;" that the trustees are to receive all dividends paid on the 400 shares of common stock during the existence of the trust, and are to pay half of such dividends to each plaintiff, if she be alive, or to her next of kin as defined by the North Carolina statute of distribution, if she be dead; and that upon the termination of the trust, *i.e.*, on 18 June, 1967, the trustees are to transfer 200 of the 400 shares of the common stock to each plaintiff, if she be alive, or to her next of kin as defined by the North Carolina statute of distribution, if she be dead.

The trust instrument sets forth the reasons which prompted B. F. Page to create the trust and to appoint H. C. Starling, Earle Jones, and Bessie F. Coffin as trustees in these words: "I have named as trustees . . . persons connected with or familiar with the policies of W. H. King Drug Company, and it is my desire that the business of W. H. King Drug Company continue to be conducted in accordance with the same policies, in so far as conditions will permit, the said W. H. King Drug Company having been organized and its business developed and conducted so far in accordance with said policies and having met with a fair degree of success. I am creating this trust because I believe it is in the best interest of my . . . daughters and others who may become beneficiaries under this trust, and with the realization that my . . . daughters and others who may become beneficiaries hereunder have little knowledge of and experience in business matters and are not or may not be familiar with the policies under which the business of W. H. King Drug Company has been conducted. Having full and complete confidence in the persons named herein as trustees . . ., and desiring to avoid all unnecessary expenses and red tape, I do not require that said trustees or those who may succeed to the position of trustee give any bond in connection with their duties as trustees hereunder." The trust instrument does not describe in any way "the policies under which the business of W. H. King Drug Company has been conducted."

At the time of the creation of the trust the W. H. King Drug Company was, and still is, a well established North Carolina corporation doing business as a wholesaler of drugs at Raleigh, North Carolina, and having 649 shares of voting common stock and 535 shares of non-voting preferred stock outstanding. It has always held all of the capital stock of the Peabody Drug Company, another North Carolina corporation doing business as a wholesaler of drugs at Durham, North Carolina. During 1948, the W. H. King Drug Company and its subsidiary, the Peabody Drug Company, acquired, and still own, all of the capital stock of the King Drug Company, a corporation engaged in wholesaling drugs in

South Carolina. Moreover, the W. H. King Drug Company owned 115 of the 215 shares of the capital stock of the Carolina Surgical Supply Company, a North Carolina corporation dealing in surgical supplies at Raleigh, North Carolina, until 31 December, 1947.

H. C. Starling and Earle Jones have been acting as trustees of the B. F. Page trust since its creation. Their original co-trustee, Bessie F. Coffin, resigned her trust on 23 December, 1946, and was succeeded by their present co-trustee, Ruth I. Page. As holders of the title to the 400 shares of common stock, the trustees have had power to control the affairs of the W. H. King Drug Company since 18 June, 1942.

Under its charter, the W. H. King Drug Company is governed by a board of five directors. H. C. Starling became director and treasurer before the execution of the trust instrument, and continued in those capacities until the death of B. F. Page on or about 22 July, 1949. Since that event he has served as director and president. Earle Jones, who was an experienced employee of the company at the creation of the trust, has been director and vice-president since 21 January, 1943. Bessie F. Coffin became director and secretary prior to the execution of the trust instrument, and filled those posts until she relinquished her trust. Her successor, Ruth I. Page, has been director since January, 1949, and secretary-treasurer since August, 1949. According to the allegations of the answers, B. F. Page was the president and managing head of the company until his death.

About eighteen months after that event, to wit, on 24 January, 1951, the plaintiffs brought this action, alleging that the trustees had misused their control of the W. H. King Drug Company and its subsidiaries in specified ways. The plaintiffs pray that the defendants be removed as trustees, and that they, the executrix, and the Carolina Surgical Supply Company be compelled to redress certain supposed breaches of trust.

The original pleadings consist of a complaint comprising 80 paragraphs, and six answers containing 404 paragraphs. The allegations of the complaint and the corresponding paragraphs of the answers are summarized in the numbered paragraphs set out below.

1. The complaint alleges and the answers admit that on 31 December, 1947, the W. H. King Drug Company sold and transferred "50 shares of the common stock of Carolina Surgical Supply Company to H. C. Starling, individually, and 50 shares of said stock to B. F. Page . . . at a price of $100.00 per share." The complaint asserts that this stock had a book value exceeding $300.00 per share at the time of the sale, whereas the answers aver that its market value "was . . . not in excess of $100.00 per share" at that time. The answers state that the sale of the common stock of the Carolina Surgical Supply Company was made at the suggestion of B. F. Page, the creator of the trust; that both he and Starling

acted in the utmost good faith in the acquisition of the stock; that no dividends have been declared or paid on the stock; and that consequently the transaction has not yet caused any financial loss to the W. H. King Drug Company or the plaintiffs. The answers declare that Starling is willing to transfer his 50 shares of the common stock of the Carolina Surgical Supply Company to the W. H. King Drug Company "for the same amount he paid therefor," and that Ruth I. Page, as executrix and legatee of B. F. Page, "will abide by such order as the court may deem proper with respect" to the 50 shares of such stock bought by her testator.

2. The complaint alleges and the answers admit that on 16 May, 1944, the Peabody Drug Company loaned $30,000.00 "to one of its officers," and that such sum was fully repaid to it in installments before 1 July, 1947. The answers assert in express terms that the loan was made to B. F. Page, "the father of the plaintiffs, who was amply solvent, . . . for the purpose of enabling him to pay the gift tax . . . of $39,825.00 levied by the United States upon the gift of stock which was placed in trust by Mr. Page for the benefit of his daughters and others"; that "said gift tax would have become an obligation of plaintiffs if . . . B. F. Page had not . . . paid it"; and that "consequently the loan now complained of by the plaintiffs was for their benefit." The complaint contains the additional allegations that the Peabody Drug Company borrowed the $30,000.00 "at an interest rate of two per cent per annum," and loaned the same "to one of its officers . . . without any interest whatsoever." The answers take different positions in respect to these additional averments. The three defendants say they are "denied," while the executrix declares that the "Peabody Drug Company paid interest in the sum of $1,625.00 to the bank from which said money was borrowed, and said amount is recognized and allowed as a valid claim against the estate of . . . (B. F. Page) and will be paid by said estate."

3. The complaint alleges and the answers admit that during the existence of the trust the W. H. King Drug Company "erected a new brick building three stories in height along the east side of South Wilmington Street in the City of Raleigh" at a cost of approximately $95,000.00 for both land and building, and leased a portion of the structure to the Carolina Surgical Supply Company for a monthly rent never exceeding $300.00. The complaint contains the additional allegation that the portion of the building leased to the Carolina Surgical Supply Company "has had . . . at all times . . . a rental value of not less than $450.00 per month." The answers deny this additional averment. Indeed, the answer of the Carolina Surgical Supply Company declares in specific terms that "the return to W. H. King Drug Company from the occupancy of said space by this defendant was fair, reasonable, and fully compensatory."

4. The complaint sets forth these allegations in paragraph 28: That "certain employees of W. H. King Drug Company, whose salaries were paid entirely by said corporation, have rendered regular and substantial services . . . in the field of bookkeeping and accounting to . . . the Carolina Surgical Supply Company without any compensation or reimbursement from Carolina Surgical Supply Company to said employees or to W. H. King Drug Company." The answer of the three defendants makes this response: "Employees of the W. H. King Drug Company have rendered minor services in the nature of posting book entries periodically for the benefit of Carolina Surgical Supply Company without any compensation or reimbursement in actual money, before August 1, 1949, but said services were negligible in value and the W. H. King Drug Company suffered no loss whatever by reason of such accommodations. Except as herein stated, the allegations of paragraph 28 are denied." The answer of the Carolina Surgical Supply Company makes virtually the same response plus the additional averment that "the W. H. King Drug Company received compensating advantages for the same."

5. The complaint alleges and the answers admit that on 22 September, 1948, the Peabody Drug Company loaned $12,500.00 to H. C. Starling, who was then serving as one of its officers, and that such sum was fully repaid to it on 2 February, 1950. The complaint contains the further allegation that the loan resulted in financial loss to the Peabody Drug Company. The answers deny this additional averment, and assert that Starling paid the Peabody Drug Company interest on the loan at the prevailing interest rate. Moreover, the answer of the three defendants states that Starling borrowed the $12,500.00 from the Peabody Drug Company "at a time when the W. H. King Drug Company, the parent corporation, owed him money in excess of said sum which it was not then convenient for the company to pay."

6. The complaint alleges that between 31 December, 1941, and the date of the summons H. C. Starling made nine separate loans aggregating $140,500.00 to the W. H. King Drug Company, and received from it as interest on these loans sums totaling $6,429.84. The answers make this response to these averments: "Both before and during the existence of said trust, the W. H. King Drug Company has from time to time been indebted to the defendant H. C. Starling. Said debts have been evidenced by promissory notes . . . in the amounts . . . set forth in paragraph 37. However, . . . these debts did not represent borrowing or loans in the usual sense. It usually happened that at the end of a year the company's funds were all in use or needed for inventory and other working capital purposes and were not immediately available for paying officers' salaries and bonuses. In such instances, the company frequently gave the defendant Starling a note for the amount due him, bearing interest at the rate

of six per cent and, after interest rates in general had dropped substantially, at the rate of four per cent. When the W. H. King Drug Company retained the money it owed the defendant Starling, it was understood and agreed that the company might use the money as long as needed and could repay it when it was convenient to do so, whereas bank loans would ordinarily have been payable in sixty or ninety days, at the end of which time the company would have been obliged to repay the loan or make new arrangements with the bank. In the judgment of the directors of the W. H. King Drug Company it was in the best interests of the company to delay compensation payments to Starling and the other officers under the conditions just stated, rather than to borrow too frequently at the bank and thereby run the risk of jeopardizing its credit standing. This same procedure was followed with Mr. B. F. Page and . . . as to Miss Bessie F. Coffin, aunt of the plaintiffs . . . There are now no outstanding debts from the W. H. King Drug Company to H. C. Starling." The complaint contains the further allegation that Starling received interest from the W. H. King Drug Company on the nine loans at rates exceeding those currently charged by banks on like loans. The answers deny this additional averment.

7. The complaint alleges and the answers admit that on 1 January, 1950, the W. H. King Drug Company had a surplus of approximately $817,206.65. The complaint contains the additional allegations that this surplus was available for the payment of dividends on the common stock, and that the three defendants, who were then serving as directors, breached their trust by failing to declare the surplus as dividends to the holders of the common stock of the W. H. King Drug Company. The answers deny these additional averments. Moreover, they expressly assert that the surplus had accumulated over the preceding 25 or 30 years; that it was "largely, wisely, and properly invested in real estate, inventory, subsidiaries, accounts receivable, furniture and fixtures, machinery and equipment, and other business assets"; and that the use of such surplus for the payment of dividends on the common stock of the W. H. King Drug Company would compel the virtual liquidation of the company and defeat the purpose of B. F. Page in creating the trust.

8. The complaint alleges that the net earnings of the W. H. King Drug Company "after the payment of taxes and . . . dividends to the holders of preferred stock" totaled $513,146.38 during the period beginning 1 January, 1942, and ending 31 December, 1949; that only $53,867.00 of these earnings were paid out as dividends on the common stock of the company; and that only $32,000.00 of these dividends accrued to the plaintiffs as beneficiaries of the B. F. Page trust. The answers admit these allegations. They further aver, however, that the dividend policy pursued by the W. H. King Drug Company during this period was recom-

mended by B. F. Page and was in harmony with the wise policy established by him "many years ago . . . whereby a large part of net earnings was used for working capital and . . . expansion rather than for immediate payment of dividends"; that the policy has resulted "in marked expansion, growth, increased business, and in large financial gains to the company, all of which . . . inure to the direct benefit of the plaintiffs and the contingent beneficiaries designated in . . . (the) trust indenture"; and that as a consequence of such policy "the volume of business has more than trebled and the net profits have much more than quadrupled . . . in a little over eight years." The answers further declare that the net earnings of the W. H. King Drug Company amounted to $159,201.48 during 1950; that the W. H. King Drug Company has made payments totaling $65,333.34 to the plaintiffs from its net earnings during the period beginning on 22 July, 1949, the date of B. F. Page's death, and 30 June, 1951; and that "in 1951 the W. H. King Drug Company inaugurated a policy of paying monthly instead of semi-annual dividends and has in every month of 1951 declared and paid a dividend . . . of $1,000.00 a month to each of the plaintiffs."

9. The complaint alleges and the answers admit that the three defendants were paid the following sums as salaries and bonuses by the W. H. King Drug Company and its subsidiary, the Peabody Drug Company, between 1 January, 1942, and 30 September, 1950: H. C. Starling, $224,093.58; Earle Jones, $98,371.80; and Mrs. Ruth I. Page, $461.60. The complaint contains the additional allegations that such payments were excessive and illegal, and that the W. H. King Drug Company and the Peabody Drug Company are entitled to judgment against the three defendants for the amounts of the same. The answers deny these further averments, and make these allegations of new matter: That B. F. Page clearly contemplated that the trustees were to work for the W. H. King Drug Company and its subsidiary corporations and were to receive reasonable compensation for so doing; that the salaries and bonuses paid H. C. Starling and Earle Jones were reasonable and were fixed in conformity with "an established practice of the W. H. King Drug Company and other companies in the wholesale drug field to pay compensation to executive officers on a basis of both fixed monthly or semi-monthly salary payments and incentive or bonus payments based on results accomplished and services rendered"; and that during the period beginning on 1 January, 1942, and ending on 31 December, 1950, the W. H. King Drug Company and its two wholly owned subsidiaries, the Peabody Drug Company and King Drug Company, made gross sales aggregating $42,337,761.38, had net earnings before payment of income taxes totaling $2,040,198.33, and had net earnings after payment of income taxes amounting to $1,033,842.85.

10. The complaint alleges that all of the acts described in it were done with the knowledge and consent of the trustees; that such acts constituted breaches of trust on the part of the trustees; that by reason thereof the three defendants ought to be removed from their posts and some "proper person . . . or persons" should be appointed by the court to administer the trust; and that the three defendants, the executrix, and the Carolina Surgical Supply Company ought to be required to redress the several breaches of trust in which they participated. The answers deny these allegations. The three defendants make these further assertions in their further answer and defense: "These defendants have at all times endeavored in the utmost good faith to carry out their full duties as trustees. They have paid to the plaintiffs all dividends received by them on the stock in trust, except expenses in the sum of $2.42 incurred for bank charges. They have voted the stock in trust for the election as directors of the W. H. King Drug Company of the persons they considered best equipped and qualified to continue to conduct the business of the company in accordance with the same policies the company had theretofore followed. They voted said stock to continue Mr. Page, the father of the plaintiffs, in office as director, president and chief executive of the company, because of his long experience with the company and because of their confidence in his business judgment, ability, and integrity. From the time the trust was set up in 1942 to the time of his last illness, in 1949, Mr. Page was in full accord with and approved the manner in which the W. H. King Drug Company and its subsidiaries were conducted. The record of the company and its subsidiaries . . . shows that the directors so elected have managed the business affairs of the said company in accordance with the policies previously followed by the company and that under their management the company and its subsidiaries have achieved remarkable success."

After the original pleadings were filed, the plaintiffs adopted the theory that the six answers admit every material averment in the complaint and fail to set up any defense or new matter sufficient in law to defeat their claims or any of them. They thereupon demurred in writing to each of the answers, and at the same time moved for judgment on the pleadings establishing their alleged cause of action against all of the parties defendant. The demurrers segregate scores of paragraphs and sentences from their respective contexts in the several answers, and challenge the legal sufficiency of each of such paragraphs or sentences on the ground that it does "not constitute any defense, excuse or justification for the breaches of duty and maladministration by the trustees alleged in the complaint."

Although nothing was presented to him for decision except the demurrers and the motions for judgment on the pleadings, the presiding judge in the court below made voluminous "findings of fact . . . upon the

pleadings" wherein he found in substance that the truth relating to the matters mentioned in numbered paragraphs 1, 2, 3, and 6 appears in the complaint and that the truth respecting the matters stated in numbered paragraphs 4, 5, 7, 8, and 9 is to be found in the answers. He then made extensive conclusions of law on the facts thus found, and entered a decree which is final in some respects and interlocutory in others. The decree incorporates these various adjudications: (1) That "the defendant Starling shall forthwith transfer to the defendant W. H. King Drug Company certificate . . . representing 50 shares of stock in the Carolina Surgical Supply Company purchased by said defendant December 31, 1947, upon the payment to him by said W. H. King Drug Company of the sum of $5,000.00." (2) That "the defendant Ruth I. Page, executrix of the estate of B. F. Page is ordered and directed forthwith to transfer certificate . . . representing 50 shares of the capital stock of Carolina Surgical Supply Company to W. H. King Drug Company upon the payment into said estate by said W. H. King Drug Company of the sum of $5,000.00." (3) That "the defendant Ruth I. Page, executrix of the estate of B. F. Page is ordered and directed forthwith to reimburse Peabody Drug Company with respect to the interest paid by said corporation in connection with the . . . loan of $30,000.00 made by said corporate defendant to B. F. Page." (4) That "the defendant Carolina Surgical Supply Company is ordered . . . to account to the defendant W. H. King Drug Company for the difference between the rent paid from the date of occupancy of its space and the reasonable rental value thereof to be determined according to law." (5) That the Carolina Surgical Supply Company is under no obligation to reimburse the W. H. King Drug Company for the bookkeeping services rendered to it by the employees of the W. H. King Drug Company because "said services were negligible in value and the W. H. King Drug Company suffered no loss whatever by reason of such accommodations." (6) That the loan of $12,500.00 made by the Peabody Drug Company to the defendant Starling occasioned the lender no financial loss; (7) That "the defendant Starling is ordered . . . to account to the corporate defendants for all interest on loans by him to said corporations in excess of the lowest rate of interest at which current loans were obtained by said corporations from commercial banks." (8) That the dividend-paying policy of the W. H. King Drug Company was "consonant with the intentions of the creator of the trust, the best interest of the corporate properties which they managed and the welfare of the beneficiaries of the trust." (9) That the defendants H. C. Starling, Earle Jones, and Ruth I. Page are not liable to the W. H. King Drug Company or any of its subsidiaries for any salaries or bonuses received by them because their compensation bears a reasonable relation to the earnings of the corporation and the services rendered by them. (10)

That the three defendants shall continue in their offices as trustees. (11) That the costs of the proceeding are taxed against the corporate defendants. (12) That the cause is retained on the docket so that full supervision of the trust may continue.

The presiding judge also entered orders directing the W. H. King Drug Company and the Peabody Drug Company and Carolina Surgical Supply Company to pay specified fees to their respective attorneys.

The plaintiffs excepted to the decree and the orders "to the extent that said decree and orders are adverse to them" and appealed to this court, assigning various findings, conclusions, and rulings as error.

Lassiter, Leager & Walker for the plaintiffs, appellants.

Smith, Leach & Anderson and Douglass & McMillan for the defendants, H. C. Starling, Earle Jones, and Ruth I. Page, individually and as trustees, and Ruth I. Page, executrix of the estate of B. F. Page, appellees.

Brassfield & Maupin for the defendants, W. H. King Drug Company, Peabody Drug Company, Mrs. H. E. Craven, Fred T. Craven, William M. Craven, Henry E. Craven, Jr., Mrs. J. D. Kase, and J. Ben Coppedge, appellees.

Ehringhaus & Ehringhaus for the defendant, Carolina Surgical Supply Company, appellee.

ERVIN, J. Courts are created to try causes. A trial is the examination before a competent tribunal, according to the law of the land, of the issues between the parties in a cause, whether they be issues of law or of fact, for the purpose of determining such issues. G.S. 1-170; *Cooney v. Cooney,* 25 Cal. 2d 202, 153 P. 2d 334; *Finn v. Spagnoli,* 67 Cal. 330, 7 P. 746; *Tregambo v. Comanche Mill & Mining Co.,* 57 Cal. 501; *Breed v. Hobart,* 187 Mo. 140, 86 S.W. 108; *State ex rel. Carleton v. District Court of Lewis and Clark County,* 33 Mont. 138, 82 P. 789, 8 Ann. Cas. 752; *Kromer v. Kear,* 86 Ohio App. 309, 90 N.E. 2d 422; *Cherniak v. Prudential Ins. Co. of America,* 339 Pa. 73, 14 A. 2d 334.

Issues of law must be tried by the judge; but issues of fact must be tried by a jury, unless trial by jury is waived. G.S. 1-172; *Sparks v. Sparks,* 232 N.C. 492, 61 S.E. 2d 356. This is true even though the issues of fact are raised by pleadings in actions for the enforcement of equitable rights. *Comrs. v. George,* 182 N.C. 414, 109 S.E. 77; *Boles v. Caudle,* 133 N.C. 528, 45 S.E. 835; *Ely v. Early,* 94 N.C. 1; *Worthy v. Shields,* 90 N.C. 192; *Chasteen v. Martin,* 81 N.C. 51.

Where issues of fact are raised by the pleadings in a cause and trial by jury is not waived, the verdict of a jury determining the issues of fact is an indispensable step in the trial of the cause, and the court is without

power to enter a final judgment in the absence of such verdict. *Miller v. Dunn,* 188 N.C. 397, 124 S.E. 746.

A demurrer and a motion for judgment on the pleadings are somewhat related procedural devices. Each denies the legal sufficiency of the pleading of an adversary and raises an issue of law upon the facts stated in such pleading. The scope of a motion for judgment on the pleadings surpasses that of a demurrer, however, in that the former is an application for an immediate judgment in the movant's favor. 71 C.J.S., Pleading, section 425. Whether the tendency of motions for judgment on the pleadings to nullify the statutes permitting amendments to pleadings in cases where demurrers are sustained renders these procedural devices incompatible when they are simultaneously invoked is an interesting question which need not be answered on the present record. *Ray v. Hill,* 194 Wash. 321, 77 P. 2d 1009.

A demurrer admits the truth of all well-pleaded factual allegations in the pleading to which objection is taken, and asserts as a legal proposition that those allegations do not state a cause of action or a defense, and submits that issue of law, and that issue of law alone, to the judge for decision. The admission inherent in a demurrer is not absolute. A demurrer admits the truth of the well-pleaded factual allegations in the pleading of the other side for the purpose, and only for the purpose, of enabling the judge to pass on the sufficiency in law of such pleading. In consequence, the conditional admission made by a demurrer forthwith ends if the demurrer is overruled. *Kemp v. Funderburk,* 224 N.C. 353, 30 S.E. 2d 155; *Insurance Co. v. Stadiem,* 223 N.C. 49, 25 S.E. 2d 202; *Mallard v. Housing Authority,* 221 N.C. 334, 20 S.E. 2d 281; *Bowen v. Mewborn,* 218 N.C. 423, 11 S.E. 2d 372; *Leonard v. Maxwell,* 216 N.C. 89, 3 S.E. 2d 316; *Vincent v. Powell,* 215 N.C. 336, 1 S.E. 2d 826; *Toler v. French,* 213 N.C. 360, 196 S.E. 312; McIntosh: North Carolina Practice and Procedure in Civil Cases, section 445.

The statute authorizing demurrers to answers is couched in these words: "The plaintiff may in all cases demur to an answer containing new matter, where, upon its face, it does not constitute a counterclaim or defense; and he may demur to one or more of such defenses or counterclaims, and reply to the residue. Such demurrer shall be heard and determined as provided for demurrers to the complaint." G.S. 1-141.

This statute makes it plain that where an answer contains either in form or in substance a denial of essential allegations of the complaint, the whole answer is not demurrable. It specifies, however, that a demurrer is the proper method by which to determine the sufficiency of an affirmative defense set out in an answer. *Smith v. Smith,* 225 N.C. 189, 34 S.E. 2d 148, 160 A.L.R. 460; *Leary v. Land Bank,* 215 N.C. 501, 2 S.E. 2d 570; *Insurance Co. v. McCraw,* 215 N.C. 105, 1 S.E. 2d 369;

Toler v. French, supra; Long v. Oxford, 108 N.C. 280, 13 S.E. 112; *Foy v. Haughton,* 83 N.C. 467; *Lee v. Beaman,* 73 N.C. 410; *Blackwell v. Willard,* 65 N.C. 555, 6 Am. Rep. 749. Indeed, it provides in express terms that where an answer contains several separate affirmative defenses, the plaintiff "may demur to one or more of such defenses . . . and reply to the residue." But nothing in the statute authorizes a plaintiff to dissect a single affirmative defense into its several constituent paragraphs or sentences, and to demur separately to such paragraphs or sentences segregated from their respective contexts in the affirmative defense. *Schneider v. Journal-Times Co.,* 247 Wis. 391, 20 N.W. 2d 572.

Under the code of civil procedure, a decision upon a written demurrer is appealable by either party. G.S. 1-130.

A court of record has inherent power to render judgment on the pleadings where the facts shown and admitted by the pleadings entitle a party to such judgment. *Raleigh v. Fisher,* 232 N.C. 629, 61 S.E. 2d 897; 71 C.J.S., Pleading, section 424.

A motion for judgment on the pleadings is in the nature of a demurrer. *Mitchell v. Strickland,* 207 N.C. 141, 176 S.E. 468; *Pridgen v. Pridgen,* 190 N.C. 102, 129 S.E. 419; *Alston v. Hill,* 165 N.C. 255, 81 S.E. 291. Its function is to raise this issue of law: Whether the matters set up in the pleading of an opposing party are sufficient in law to constitute a cause of action or a defense. *Raleigh v. Fisher, supra; Adams v. Cleve,* 218 N.C. 302, 10 S.E. 2d 911.

When a party moves for judgment on the pleadings, he admits these two things for the purpose of his motion, namely: (1) The truth of all well-pleaded facts in the pleading of his adversary, together with all fair inferences to be drawn from such facts; and (2) the untruth of his own allegations in so far as they are controverted by the pleading of his adversary. *Raleigh v. Fisher, supra; Ingle v. Board of Elections,* 226 N.C. 454, 38 S.E. 2d 566; *Adams v. Cleve, supra; Oldham v. Ross,* 214 N.C. 696, 200 S.E. 393; *Crutchfield v. Foster,* 214 N.C. 551, 200 S.E. 395; *Churchwell v. Trust Co.,* 181 N.C. 21, 105 S.E. 889; *Alston v. Hill, supra; Helms v. Holton,* 152 N.C. 587, 67 S.E. 1061. These admissions are made only for the purpose of procuring a judgment in the movant's favor. *Hale v. Gardiner,* 186 Cal. 661, 200 P. 598. Consequently, the movant is not precluded from having the action regularly tried upon any issues raised by the pleadings if his motion for judgment on the pleadings is denied. *Minneapolis St. Ry. Co. v. City of Minneapolis,* 229 Minn. 502, 40 N.W. 2d 353; *Vaughn v. Omaha Wimsett System,* 143 Neb. 470, 9 N.W. 2d 792; *Southern Surety Co. v. Williams,* 83 Okl. 171, 201 P. 244.

A motion for judgment on the pleadings is allowable only where the pleading of the opposite party is so fatally deficient in substance as to

present no material issue of fact. *Finance Co. v. Luck,* 231 N.C. 110, 56 S.E. 2d 1; *Jones v. McBee,* 222 N.C. 153, 22 S.E. 2d 226; *Dunn v. Tew,* 219 N.C. 286, 13 S.E. 2d 536. A complaint is fatally deficient in substance, and subject to a motion by the defendant for judgment on the pleadings if it fails to state a good cause of action for plaintiff and against defendant. *Raleigh v. Fisher, supra.* An answer is fatally deficient in substance and subject to a motion by the plaintiff for judgment on the pleadings if it admits every material averment in the complaint and fails to set up any defense or new matter sufficient in law to avoid or defeat the plaintiff's claim. *Hoover v. Crotts,* 232 N.C. 617, 61 S.E. 2d 705; *Wike v. Guaranty Co.,* 229 N.C. 370, 49 S.E. 2d 740; *Carroll v. Brown,* 228 N.C. 636, 46 S.E. 2d 715; *Smith v. Smith,* 225 N.C. 189, 34 S.E. 2d 148, 160 A.L.R. 460; *Oldham v. Ross, supra; Churchwell v. Trust Co., supra.*

On a motion for judgment on the pleadings, the presiding judge should consider the pleadings, and nothing else. *Johnson v. Insurance Co.,* 219 N.C. 445, 14 S.E. 2d 405. He should not hear extrinsic evidence, or make findings of fact. 71 C.J.S., Pleading, section 508 (2). If he concludes on his consideration of the pleadings that a material issue of fact has been joined between the parties, he should deny the motion in its entirety, and have the issue of fact tried and determined in the way appointed by law before undertaking to adjudicate the rights of the parties. The law does not authorize the entry of a judgment on the pleadings in any case where the pleadings raise an issue of fact on any single material proposition. *Hoover v. Crotts, supra; Credit Corp. v. Roberts,* 230 N.C. 654, 55 S.E. 2d 85; *Brown v. Moore,* 229 N.C. 406, 50 S.E. 2d 5; *Wike v. Guaranty Co., supra; Carroll v. Brown, supra; Metros v. Likas,* 227 N.C. 703, 42 S.E. 2d 601; *Insurance Co. v. Wells,* 225 N.C. 547, 35 S.E. 2d 631; *Lockhart v. Lockhart,* 223 N.C. 123, 25 S.E. 2d 465; *Adams v. Cleve, supra; Redmond v. Farthing,* 217 N.C. 678, 9 S.E. 2d 405; *LaVecchia v. Land Bank,* 216 N.C. 28, 3 S.E. 2d 276; *Oldham v. Ross, supra; Allen v. Allen,* 213 N.C. 264, 195 S.E. 801; *O'Briant v. Lee,* 212 N.C. 793, 195 S.E. 15; *Smith v. Turnage-Winslow Co.,* 212 N.C. 310, 193 S.E. 685; *Petty v. Insurance Co.,* 210 N.C. 500, 187 S.E. 816; *Mitchell v. Strickland, supra; Bessire & Co. v. Ward,* 206 N.C. 858, 175 S.E. 208; *Hafleigh v. Crossingham,* 206 N.C. 333, 173 S.E. 619; *Trust Co. v. Wilder,* 206 N.C. 124, 172 S.E. 884; *Bank v. Vance,* 205 N.C. 103, 170 S.E. 119; *Foster v. Moore,* 204 N.C. 9, 167 S.E. 383; *Commissioner of Banks v. Johnson,* 202 N.C. 387, 162 S.E. 895; *Keys v. Tuten,* 199 N.C. 368, 154 S.E. 631; *Harvey v. Oettinger,* 194 N.C. 483, 140 S.E. 86; *Barnes v. Trust Co.,* 194 N.C. 371, 139 S.E. 689; *Brinson v. Morris,* 192 N.C. 214, 134 S.E. 453; *Pridgen v. Pridgen, supra; Sanders v. Mayo,* 186 N.C. 108, 118 S.E. 910; *Public Service Co. v. Power Co.,* 181 N.C. 356, 107 S.E. 226; *Churchwell v. Trust Co., supra; Willis v. Williams,* 174 N.C.

769, 94 S.E. 513; *Barbee v. Penny,* 174 N.C. 571, 94 S.E. 295; *Moore v. Bank,* 173 N.C. 180, 91 S.E. 793; *Alston v. Hill, supra; Newsome v. Bank,* 165 N.C. 91, 80 S.E. 1062; *Williams v. Hutton,* 164 N.C. 216, 80 S.E. 257; *Cotton Mills v. Hosiery Mills,* 154 N.C. 462, 70 S.E. 910; *Helms v. Holton, supra; Penny v. Ludwick,* 152 N.C. 375, 67 S.E. 919; *Lewis v. Foard,* 112 N.C. 402, 17 S.E. 9; 71 C.J.S., Pleading, section 429.

As a consequence, it is not proper to enter a partial judgment on the pleadings for a part of a litigant's claim, leaving controverted issues of fact relating to other parts of such claim open for subsequent trial. The law requires a lawsuit to be tried as a whole and not as fractions. Moreover, it contemplates the entry of a single judgment which will completely and finally determine all the rights of the parties. G.S. 1-208; *Raleigh v. Edwards,* 234 N.C. 528, 67 S.E. 2d 669.

An appeal lies when the court grants a motion for judgment on the pleadings and enters judgment accordingly. *Murray v. Southerland,* 125 N.C. 175, 34 S.E. 270; 4 C.J.S., Appeal and Error, section 116 (8). But the refusal of a motion for judgment on the pleadings is not appealable. The proper practice in such event is for the movant to note an exception to the ruling denying his motion and proceed with the trial. The ruling will then be reviewed on appeal from the final judgment. *Rodgers v. Todd,* 225 N.C. 689, 36 S.E. 2d 230; *Ornoff v. Durham,* 221 N.C. 457, 20 S.E. 2d 380; *Cody v. Hovey,* 216 N.C. 391, 5 S.E. 2d 165; *Hafleigh v. Crossingham, supra; Shelton v. Hodges,* 197 N.C. 221, 148 S.E. 25; *Gilliam v. Jones,* 191 N.C. 621, 132 S.E. 566; *Pender v. Taylor,* 187 N.C. 250, 121 S.E. 444; *Duffy v. Hartsfield,* 180 N.C. 151, 104 S.E. 139; *Barbee v. Penny, supra; Duffy v. Meadows,* 131 N.C. 31, 42 S.E. 460; *Cameron v. Bennett,* 110 N.C. 277, 14 S.E. 779; *Walker v. Scott,* 106 N.C. 56, 11 S.E. 364.

The task of applying these rules of the adjective law to the instant case must now be performed.

The answers expressly deny material allegations of the complaint, and in that way directly raise issues of fact. Moreover, the complaint and the answers draw opposing inferences from admitted matters, and in that way indirectly raise other issues of fact. *Alston v. Hill, supra.* Furthermore, the answer of the three defendants pleads additionally extenuating circumstances in the nature of a single affirmative defense, which are well calculated to induce a judge in the exercise of a reasonable discretion to retain them in their posts as trustees despite any of the supposed breaches of trust on their part. *Ward v. Dortch,* 69 N.C. 277; 65 C.J., Trusts, section 447; American Law Institute's Restatement of the Law of Trusts, section 107 (a).

These things being true, the presiding judge should have overruled the demurrers, denied the motions for judgment on the pleadings in their entirety, and ordered the several issues of fact raised by the pleadings tried in the way appointed by law, *i.e.,* by a jury.

He did not pursue this course. As a result, we have an anomaly in law—a judgment declaring the rights of the parties in an action which has not yet been tried.

The record indicates that the presiding judge gave profound thought to the substantive law arising in this cause and entered a judgment in substantial accord with the findings of fact made by him. But these considerations cannot obviate the indisputable proposition that his findings of fact are based in large measure upon allegations of the complaint denied by the answers and upon averments of the answers not admitted by the plaintiffs, and that he was wholly without power in law to make them. The judgment cannot be sustained in part as a partial judgment on the pleadings for the very simple reason that the lower court had no legal authority to enter such a judgment.

For the reasons given, the judgment is set aside, and the cause is remanded for a new trial to the end that the material issues of fact raised by the pleadings may be submitted to a jury for decision. *Sparks v. Sparks, supra; Hershey Corp. v. R. R.,* 207 N.C. 122, 176 S.E. 265.

The orders directing the W. H. King Drug Company and the Peabody Drug Company and Carolina Surgical Supply Company to pay specified fees to their attorneys are likewise vacated. These corporations are at liberty to contract in respect to this matter for themselves.

The unfortunate turn taken by this case in the court below calls to mind a bit of advice received by the writer of this opinion from his father, who was a member of the North Carolina bar for sixty-five years. When the writer embarked on the practice of law, his father gave him this admonition: "Always salt down the facts first; the law will keep." The trial bench and bar would do well to heed this counsel. In the very nature of things, it is impossible for a court to enter a valid judgment declaring the rights of parties to litigation until the facts on which those rights depend have been "salted down" in a manner sanctioned by law.

Error.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION v. ED FLEMING T/A FLEMING BUS COMPANY.

(Filed 11 June, 1952.)

1. Carriers § 5—Permit for both charter and contract carrier business should be issued upon proper showing under grandfather clause of Bus Act.

The purpose of the grandfather clause in the Bus Act of 1949 is to preserve the *bona fide* rights existing at the time of the passage of the Act, and where an applicant shows that he had carried on substantially and regularly the business of contract carrier and also that of a charter carrier for a number of years prior to and at the time of the passage of the Act, that he had continued to render such service since its passage, that he has the necessary equipment, and is financially responsible and otherwise qualified to perform the services on a continuing basis, *held:* such applicant is entitled to permits to continue his business both as a contract carrier and charter carrier (G.S. 62-121.52 (9)) upon his application timely filed under the provisions of G.S. 62-121.50, notwithstanding he is not a common carrier as defined by G.S. 62-121.46 (5). The provisions of G.S. 62-121.46 (6) (d) relating to charter operations are prospective in effect; to make its definitive and regulatory provisions retroactive in effect so as to limit the rights of an applicant under the grandfather clause would be in contravention of constitutional rights and contrary to due process of law. Constitution of North Carolina, Art. I, sec. 17; Fifth and Fourteenth Amendments to the Constitution of the United States.

2. Utilities Commission § 8—

G.S. 62-121.52 (5) relates to an amendment by a petitioning carrier which would enlarge or in any manner extend the scope of its operations, and has no application to an amendment which merely clarifies a carrier's petition under the grandfather clause to continue the same business operations the carrier had been engaged in prior to the passage of the Bus Act of 1949.

3. Same—

Where a carrier files an application under the grandfather clause of the Bus Act of 1949 for "Contract Carrier Permit" and it is clearly understood by the Commission and all the parties that the application was for the purpose of obtaining permits for the carrier to continue all business operations he was then and had been engaged in, which included both contract and charter bus operations, the admission by the Commission of evidence of previous charter operations will not be held for error notwithstanding that the Commission had denied the carrier's motion to amend.

4. Carriers § 5—

An applicant seeking to preserve rights confirmed to him by the grandfather clause of the Bus Act of 1949 is required to show neither public convenience and necessity nor public need.

5. Same—

Rates filed and published by a contract carrier under the provisions of G.S. 62-121.66 (1) are "tariffs" within the meaning of G.S. 62-121.65, so

as to form the basis for the granting of a permit to such applicant as a charter carrier.

APPEAL by applicant from *Burney, J.*, February Term, 1952, of PITT.

The applicant, Ed Fleming trading as Fleming Bus Company, hereinafter called appellant, filed with the North Carolina Utilities Commission his duly verified "Grandfather Application for Contract Carrier Permit," under the provisions of section 8 of The Bus Act of 1949 (G.S. 62-121.50).

On the basis of the information required to be submitted with the above application, the Commission, on 14 October, 1949, issued to the appellant a temporary permit to operate as a contract carrier by motor vehicle pending a hearing to determine his grandfather rights under the provisions of G.S. 62-121.50, of The Bus Act of 1949 (Article 6C, G.S. 62-121.32 through G.S. 62-121.79). This permit as revised on 7 April, 1950, expressly authorized the holder thereof to transport passengers under written contract with particular passengers or groups of passengers between the following points:

"From Greenville, N. C., Cox's Mill, N. C., Calico, N. C., Vanceboro, N. C., and New Bern, N. C., to Cherry Point, N. C., and return. From Greenville, N. C., Winterville, N. C., Ayden, N. C., Grifton, N. C., Kinston, N. C., and Richlands, N. C., to Camp Lejeune, N. C., and return."

Within the time required by subsection (5) of G.S. 62-121.52, protests and motions to intervene were filed with the Commission by Atlantic Greyhound Corporation, Carolina Coach Company, Queen City Coach Company, and Seashore Transportation Company.

The appellant—a colored man, testified that he began his bus operations in 1925, with one bus; that he started hauling people from Greenville and different places to the beach. Later on he began making trips for schools, lodges, churches, Sunday Schools, 4-H Clubs, and others; that he carried groups to conventions, church meetings, to the Lost Colony, to Raleigh, Greensboro, High Point, and Elizabeth City as well as to Negro swimming places in the eastern part of the State, one being at Washington, one near Oriental, and the other at Sea Breeze near Wilmington; that he transported Negro passengers only and that during the year 1949 he made between four and five hundred such trips. The charter service has been rendered on the basis of a fixed fee of 35c per mile for a twenty-five passenger bus, and 50c a mile for a bus with a capacity of more than twenty-five passengers.

In addition to the charter bus business built up by the appellant during the period of twenty-four years, prior to the enactment of The Bus Act of 1949, he began a contract carrier business in 1940, which developed to a point where, during World War II, he was transporting from three to four hundred men per day from various places to and from Cherry Point,

Camp Davis, and Camp Lejeune. During this period the Rationing Board granted him tires and gas and other necessary equipment to carry on his bus operations; that he was engaged in such contract carrier business on 1 October, 1948. On 1 October, 1949, the appellant owned ten buses. Two of these at the time of the hearing were being used in the appellant's business as a contract carrier to transport passengers from the points enumerated above to Cherry Point and return and to Camp Lejeune and return. The others were being used in his charter bus business.

The equipment of the appellant is regularly inspected by a representative of the Utilities Commission.

The appellant, in support of his financial ability to maintain his equipment and to render adequate charter and carrier service, filed with the Commission a financial statement as of 31 December, 1949, showing assets of $95,333.26 and no liabilities.

The appellant also offered three witnesses who corroborated him in general with respect to the character of service he had been rendering for many years. Twenty-five other witnesses were tendered and offered to corroborate the testimony of the appellant and his three other witnesses.

During the course of the hearing, the protestants objected to the introduction of any evidence on the part of the appellant with respect to his charter operations; the objections were overruled and exceptions noted. Thereupon, counsel for the Carolina Coach Company and the Queen City Coach Company stated that their clients did not protest the granting of a permit to the appellant provided such permit did not carry with it any incidental rights to handle charter trips or any other service beyond the scope of a contract carrier permit as defined in The Bus Act of 1949. Whereupon, the appellant moved to amend his application so as to include the right to continue all the services he had been rendering theretofore. This motion was denied and the appellant excepted.

The order of the Commission contains a statement to the effect that as a matter of common knowledge, the appellant herein and others, in addition to contract carrier operations, have been for some years engaged in transporting charter parties on numerous occasions and to various points and places throughout the State, and that this appellant and others made inquiry of the Commission as to whether or not they were entitled to continue their charter operations after the passage of The Bus Act of 1949; that the Commission being in doubt as to whether or not the law authorized such operations by a contract carrier, advised the appellant and other contract carriers that no effort would be made to prevent contract carriers from transporting charter parties pending the time when the Commission should reach a decision on the question of law involved. The order of the Commission further states, "This was the situation at the

time of the hearing in the instant proceeding and it was, therefore, correctly understood by the appellant that he had continued to do charter work at least with the acquiescence of the Commission."

The Commission found as a fact from the evidence, that the application was filed before 1 October, 1949 as required by The Bus Act of 1949; that the appellant was operating as a contract carrier as defined in the Act, on 1 October, 1949, and has continuously so operated since that time; that he has the necessary equipment; is financially responsible and is otherwise qualified to perform the contract carrier service applied for on a continuing basis, and granted the appellant a contract carrier permit and directed that such permit be issued.

The Commission further found, "that the applicant has furnished a charter bus service over a period of years continuously and is now doing so, in addition to the contract carrier service, as defined in the Act. As to the said charter service, the Commission is of the opinion that as a matter of law it has no power to authorize or permit the applicant to continue in the performance of charter service as incidental to his operating rights as a contract carrier under provisions of the 1949 Bus Act. . . . The applicant is a CONTRACT carrier, as defined in the Act, and there is nowhere any provision for this class of carriers doing charter work as common carriers are permitted by the Act to do. This would appear to preclude such authority from being granted or exercised as incidental to contract carrier authority. The Commission has heretofore decided that as a matter of law it has no power under the Bus Act of 1949 or any other law to entertain an independent application for or to grant by permit or certificate authority to operate as a charter party carrier on the basis of public necessity and convenience.

"The Commission is not unaware of the fact that the applicant has considerable investment in equipment and has built up over a period of years a charter service business which he is most reluctant to give up and which may very well be answering a public need and convenience among the colored population in that general area. To these matters, however, the Commission is not in a position to give consideration in the instant proceeding nor under the present law according to the best interpretation the Commission can put on it."

Thereupon, the Commission directed that the "applicant immediately cease and desist from performing any and all charter bus service and to confine his operations strictly to those of a contract carrier, as defined in the Act, and in accordance with the particular rights hereby granted, unless and until otherwise lawfully authorized."

Petition for rehearing was filed in apt time and denied. The appellant appealed to the Superior Court, assigning error.

The cause came on for hearing in the Superior Court and the order of the Utilities Commission which was entered as of 24 October, 1950, was, in all respects, affirmed. The appellant appealed to the Supreme Court, assigning error.

Dink James, Kenneth C. Hite, Ruark & Ruark, and Joseph C. Moore for appellant.

Attorney-General McMullan and John Hill Paylor, Assistant Attorney-General, for Utilities Commission.

Fuller, Reade, Umstead & Fuller and J. Ruffin Bailey for Atlantic Greyhound Corporation.

Arch T. Allen for Carolina Coach Company.

Shearon Harris and Vaughan S. Winborne for Queen City Coach Company.

Ward & Tucker for Seashore Transportation Company.

DENNY, J. The Bus Act of 1949, being Chapter 1132 of the 1949 Session Laws of North Carolina, in section 2 thereof, codified as G.S. 62-121.44, contains a declaration of policy which reads as follows: "Upon investigation, it has been determined that the transportation of passengers by motor carriers for compensation over the public highways of the State is a business affected with a public interest, and is hereby declared to be the policy of the State of North Carolina, among other things, to provide fair and impartial regulation of motor carriers of passengers in the use of the public highways in such a manner as to promote, in the interest of the public, the inherent advantages of highway transportation; to promote adequate economical and efficient service to all of the communities of the State by motor carriers engaged in the transportation of passengers over the public highways for compensation; to encourage the establishment and maintenance of reasonable charges for transportation services without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to encourage and promote harmony among motor carriers of passengers, between such carriers and carriers of passengers by rail or water, and between all carriers of passengers and the traveling public; to foster a coordinated State-wide motor carrier service; to conform with the national transportation policy and the Federal Motor Carrier Act in so far as the same may be found practical and adequate for application to intrastate commerce; and to cooperate with other states and with the federal government in promoting and coordinating intrastate and interstate commerce by motor carriers."

Section 3 of the Act, codified as G.S. 62-121.45, vests in the North Carolina Utilities Commission authority to administer and enforce the

provisions of The Bus Act of 1949, and to make and enforce reasonable and necessary rules and regulations to that end.

In light of the declaration of policy contained in The Bus Act of 1949, and the grandfather clause contained therein, we must determine whether the appellant is entitled to charter party rights as a contract carrier.

We think it is essential to a clear understanding of the question involved in this appeal to set out certain definitions and provisions contained in The Bus Act of 1949, and to point out wherein they differ from the Federal Motor Carrier Act.

A common carrier is defined in The Bus Act of 1949 as "any person which holds itself out to the general public to engage in the transportation by motor vehicle in intrastate commerce of passengers for compensation over regular routes and between fixed termini." G.S. 62-121.46 (5).

A common carrier is defined in pertinent part in the Federal Motor Carrier Act as, "any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes." U.S.C.A. Title 49, section 303 (14).

A contract carrier is defined under our Act as, "any person not included in the definition of 'common carrier by motor vehicle' which, under individual contracts or agreements, engages in the transportation by motor vehicle of passengers in intrastate commerce for compensation. Such contracts (a) must be in writing, (b) must provide for the transportation of particular persons or group of persons, (c) must be bilateral and impose specific obligations upon both the carrier and the other contracting parties, (d) must cover a series of trips in contrast to a single trip, and (e) a copy of which must be preserved by the carrier until terminated by its terms and at least one year thereafter." G.S. 62-121.46 (6).

A contract carrier under the Federal Act is defined as, "any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph (14) of this section and the exception therein) by motor vehicle of passengers or property in interstate or foreign commerce for compensation." U.S.C.A. Title 49, section 303 (15).

It will be noted that under the Federal Act, a common carrier by motor vehicle is not limited to those engaged in transportation of passengers and property between fixed termini. Therefore, it is clear that if the appellant herein had been operating in interstate commerce instead of intrastate commerce, there could be no question about his being a common carrier with respect to his charter operations. *Crescent Express Lines v. United States*, 320 U.S. 401, 88 L. Ed. 127; *Alton R. Co. v. United*

States, 315 U.S. 15, 86 L. Ed. 586. However, under the definition of a common carrier by motor vehicle in our Act, no common carrier by motor vehicle would be authorized to render charter service were it not for the permissive privilege to render such service contained in G.S. 62-121.52 (9), which reads as follows: "Common carriers by motor vehicle transporting passengers under a certificate issued by the Commission may operate to any place in this State, pursuant to charter party or parties, trips originating on such common carrier's authorized routes or in the territory served by its routes under such reasonable rules and regulations as the Commission may prescribe."

The North Carolina Utilities Commission adopted certain rules and regulations pursuant to the authority contained in The Bus Act of 1949, effective from and after 1 October, 1950, among them being Rule 27, pertaining to charter service. The pertinent parts of Rule 27 read as follows: "The right of a common carrier to transport passengers by motor vehicle in intrastate commerce includes the right, unless restricted by its certificate or by an order of the Commission, to engage in charter service under the following conditions: (a) The service shall be limited to the transportation of a charter party as defined by Section 4 (3) of the Bus Act, and at a fixed charge for the use of its vehicle or vehicles as set out in its published tariff. . . . (c) A common carrier may originate charter service at any point on its regular route, and at any point not served by another common carrier within five miles of its regular route. Points more than five (5) miles from the regular route of any common carrier shall be deemed open territory for the purpose of originating charter service, and any common carrier may originate charter service at any such point. (d) If for good cause, a carrier cannot transport a charter party when requested to do so, it shall so notify the charter party, or its representative, in writing, and shall mail the Commission a copy of such notice, in which case the Commission may arrange for such service by some other common carrier. . . ."

A "charter party," referred to in the above rule, is defined in G.S. 62-121.46 (3) as, "a group of persons who, prsuant to a common purpose and under a single contract, and at a fixed charge for the vehicle in accordance with the carrier's tariff, lawfully on file with the Commission, have acquired the exclusive use of a passenger carrying motor vehicle to travel together as a group from a point of origin to a specified destination or for a particular itinerary, either agreed upon in advance or modified by the chartering group after having left the place of origin."

As a matter of fact, a common carrier by motor vehicle was not expressly authorized by statute to render charter service, in this State, prior to the enactment of The Bus Act of 1949. And prior to such time, contract carriers were not regulated by nor under the control of the North

Carolina Utilities Commission. Even so, prior to the enactment of The Bus Act of 1949, contract carriers and common carriers engaged extensively in rendering such service.

Consequently, it is not contended by the appellees that the appellant, prior to the passage of The Bus Act of 1949, was required to obtain either a franchise certificate or a contract carrier permit from the Utilities Commission in order to engage in charter service or as a contract carrier of passengers. In view of this fact, it becomes necessary to consider what rights the appellant is entitled to under the grandfather clause contained in The Bus Act of 1949. Since the appellant did not hold a franchise certificate as a common carrier to operate over designated highways and between fixed termini, as provided in G.S. 62, sections 105 and 106, now repealed but in effect at the time of the passage of the 1949 Act, he is not entitled to a certificate of public convenience and necessity under the terms of the grandfather clause granted in G.S. 62-121.49.

On the other hand, he is entitled, as a matter of law, to a permit under the grandfather clause with respect to contract carriers (G.S. 62-121.50) that will permit him to continue operating his business as a charter and contract carrier if he was engaged in *bona fide* operations rendering such service prior to the passage of The Bus Act of 1949 and is continuing to render such service since the passage of the Act.

The Supreme Court of the United States in interpreting the meaning and effect of the grandfather clause contained in the Federal Motor Carrier Act, in the case of *Crescent Express Lines v. United States, supra,* said: "The statute, . . . contemplated 'substantial parity' between future and prior operations," citing *Alton R. Co. v. United States, supra.* To like effect are the following decisions: *United States v. Carolina Freight Carriers Corp.,* 315 U.S. 475, 86 L. Ed. 971; *Goncz v. Interstate Commerce Commission,* 48 F. Supp. 286; *Chicago, St. P., M. & O. Ry. Co. v. United States,* 50 F. Supp. 249, affirmed 322 U.S. 1, 88 L. Ed. 1093; *Transamerican Freight Lines v. United States,* 51 F. Supp. 405; *Peninsula Corp. v. United States,* 60 F. Supp. 174.

In the case of *McCracken v. United States,* 47 F. Supp. 444, the court in considering a motor carrier's rights under the grandfather clause contained in the Federal Motor Carrier Act, said: "There is often a clear conflict between the public convenience and necessity and the rights thus confirmed. However, the principle is clear that if the operator had strictly complied with the requirements of the statute, his right to operate should be recognized. . . . While the Commission had no power to take away any rights or privileges thus confirmed by Congress to an established operator, they could place such terms in the certificate as were required by public necessity to make the operations conducted thereunder consistent with operations carried on by others and convenient for the public."

The appellees contend that a contract carrier, as defined in our Act, cannot perform charter service since contracts of a contract carrier must cover a series of trips in contrast to a single trip. G.S. 62-121.46 (6) (d). The first sentence in this section defines a contract carrier as "any person not included in the definition of a common carrier by motor vehicle and which, under individual contracts or agreements, engages in the transportation by motor vehicle of passengers in intrastate commerce for compensation." Clearly this definition includes charter service, unless such service is excluded by the remaining provisions in the section or by other provisions in the Act. The appellees argue and contend that the further provisions in this section delimit the scope of service a contract carrier may perform to such an extent as to exclude the exercise of charter rights under a permit issued pursuant thereto. There might be merit in such contention with respect to an application for a permit as a contract carrier pursuant to the provisions of the Act, separate and apart from any grandfather rights contained therein. But we hold that the provisions contained in this section, which the appellees contend exclude any right to render charter service under a contract carrier permit, are definitive or regulatory and intended to be applied prospectively with respect to applications for permits as contract carriers under the general provisions of the Act, and have no bearing on or relation to the grandfather rights confirmed in the Act. Whether such provisions are valid we need not now decide. To make these definitive and regulatory provisions retroactive so as to place a limitation on the rights of the appellant under the grandfather clause contained in the Act, would be in contravention of his constitutional rights and contrary to due process of law. Article I, section 17, Constitution of North Carolina; Fifth and Fourteenth Amendments of the Constitution of the United States. Moreover, such a construction would completely nullify the grandfather clause and make it feckless.

The purpose of a grandfather clause is to protect and preserve *bona fide* rights existing at the time of the passage of the legislation which contains such clause. Other provisions in such Act intended to apply to applicants seeking rights thereunder, separate and apart from any grandfather rights confirmed therein, will not be permitted to impinge upon or defeat such rights as are intended to be protected by the grandfather clause.

The appellees likewise contend that the appellant had no right to amend his application as requested, due to the provision in subsection (5) of G.S. 62-121.52, which reads as follows: "No certificate or permit shall be amended so as to enlarge or in any manner extend the scope of operations of a motor carrier without complying with the provisions of this section." The contention is without merit. In the first place, the appellant was not seeking to amend a permit so as to enlarge or in any manner

extend the scope of his operations. He was only seeking to amend his application so there could be no question about his position with respect to his charter rights. In the second place, the protestants, with the exception of Seashore Transportation Company, never interposed the slightest objection to the appellant's application except as it related to charter rights. And counsel for the Carolina Coach Company and Queen City Coach Company stated in open court that they had no objection to the appellant's request for a contract carrier permit provided he was not permitted to render charter service thereunder.

While it would have been proper to have allowed the amendment as requested, we do not think its denial has any material bearing on the merits of the controversy. It was clearly understood by the Commission and the protestants that the appellant was seeking a contract carrier permit that would authorize him to continue his charter and contract business in the same general manner he had been operating such service prior to and since the passage of The Bus Act of 1949. Moreover, the only burden resting on the appellant was to show that he was a *bona fide* operator engaged in charter service and in the transportation by motor vehicle of passengers in intrastate commerce for compensation, at the time of and prior to the passage of the Act, and that he had continued to render such service since its passage; that he had the necessary equipment; was financially responsible and otherwise qualified to perform the service he seeks to render on a continuing basis. An applicant seeking to preserve rights confirmed to him in a grandfather clause, is required to show neither public convenience and necessity, nor public need. *United States v. Carolina Freight Carriers Corp., supra; McDonald v. Thompson,* 305 U.S. 263, 83 L. Ed. 164; *Chicago, St. P., M. & O. Ry. Co. v. United States, supra; McCracken v. United States, supra.*

On this record, according to the Commission's findings, the appellant has met the burden of proof required of him in every essential particular.

The appellees also contend that a contract carrier may not be authorized to render charter service because the charges to be made for such service are determined by a "tariff, lawfully on file with the Commission." They state in their brief, in support of this contention, that "only common carriers by motor vehicle file tariffs with the Utilities Commission; contract carriers by motor vehicle do not. Section 23 of the Act (G.S. 62-121.65)." They appear to have overlooked the provisions of section 24 of the Act (G.S. 62-121.66), which, in pertinent part, reads as follows: "(1) It shall be the duty of every contract carrier to establish and observe reasonable minimum rates and charges for any service rendered or to be rendered in the transportation of passengers or in connection therewith, and to establish and observe reasonable regulations and practices to be applied in connection with said reasonable minimum rates and charges.

It shall be the duty of every contract carrier to file with the Commission, publish, and keep open for public inspection, in the form and manner prescribed by the Commission, schedules containing the minimum rates or charges of such carrier actually maintained and charged for the transportation of passengers in intrastate commerce, and any rule, regulation, or practice affecting such rates or charges and the value of the service thereunder. No such contract carrier, unless otherwise provided by this article, shall engage in the transportation of passengers in intrastate commerce unless the minimum charges for such transportation by said carrier have been published, filed, and posted in accordance with the provisions of this article." We do not construe the word "tariff," used in connection with the rates of a common carrier, to have any special legal significance that would differentiate it in effect from the word "rates," used in connection with a contract carrier. Moreover, an examination of rates or tariffs filed with the Utilities Commission for charter service by a number of common carriers, some operating in intrastate commerce and others operating both in intrastate and interstate commerce, reveals that such service is now being rendered on a mileage basis per coach, or for an hourly or daily charge for a coach; and that the charges vary depending on the seating capacity of the coach. There is likewise some variance in the rates charged by different carriers.

We hold that on the undisputed evidence adduced in the hearing before the Utilities Commission, and the facts found by the Commission, which facts are amply supported by the evidence, the appellant is entitled, as a matter of law, to a contract carrier permit authorizing him to continue to operate as a charter and contract carrier on a substantial parity between his future and prior operations. The Commission may impose upon the holder of this permit any reasonable rules and regulations with respect to the operations thereunder which are now in effect or which may be adopted hereafter for the regulation of motor vehicle carriers performing similar service. In other words, he must file his rates in compliance with the provisions of G.S. 62-121.66, and comply with all other reasonable rules and regulations of the Commission.

The order of the Commission entered 24 October, 1950, except in the respects pointed out herein, is affirmed, and the proceeding is remanded to the Superior Court to the end that it may direct the Commission to modify its order in accord with this opinion.

Modified and affirmed.

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 11 June, 1952.)

1. Eminent Domain § 6—

In a proceeding by a municipality to condemn land for an elevated water storage tank, intervening property owners may not defend on the ground that the erection of the tank would amount to a partial taking of their dwelling property in contravention of G.S. 40-10, since the provisions of that statute have no application in proceedings by the city to acquire land for water purposes. G.S. 160-204, G.S. 160-205.

2. Eminent Domain § 18b—

In a proceeding by a municipality to condemn land for an elevated water storage tank, intervening property owners claiming that the erection of the tank would be a partial taking of their vested property rights for which compensation should be paid *held* entitled to join the additional defense that the erection of the tank would constitute a nuisance amounting to a partial taking of their dwelling property in contravention of G.S. 40-10.

3. Nuisance § 3a: Eminent Domain § 1—

In an action by a municipality to condemn land for an elevated water storage tank, allegations of intervening property owners that the operation of the tank would constitute a nuisance in the overflow of water from the tank on their premises and the increase in water pressure in the pipes in their dwellings *held* no defense, and the city's demurrer thereto is properly sustained, since an elevated water storage tank is not a nuisance *per se* and the pleading of prospective damage in its operation is premature, since such damage cannot be recovered by interveners before they have occurred.

4. Easements § 5: Deeds § 16b—

Restrictive covenants in deeds to purchasers of land within a development create a negative easement constituting a vested interest in land.

5. Eminent Domain § 3—

Where a municipality condemns land for the erection of an elevated water storage tank in a development which is subject to covenants restricting the use of the land to private dwelling purposes alone, *held* the violation of the negative easements constitutes a taking of vested interests in property for which the owners are entitled to compensation commensurate with any loss they may sustain. Art. I, sec. 17, of the Constitution of N. C.; Fifth Amendment to the Constitution of the United States.

APPEAL by petitioner, City of Raleigh, from *Carr, J.*, March Term, 1952, of WAKE.

Special proceeding instituted by the City of Raleigh, a municipality, against the respondents, A. J. Edwards and Mamie H. Edwards, to condemn certain lots within the City as a site for the erection of an elevated

water storage tank, heard below on demurrer to the answer filed by the interveners, W. Harold Barbee and wife Virginia M. Barbee, who, as adjoining landowners, allege that the erection of the proposed water tank will (1) constitute a nuisance amounting to a partial taking of their home as prohibited by G.S. 40-10, and (2) impair the value of their property by depriving them of the benefits of existing covenants restricting to "private dwelling purposes only" the use of the property sought to be condemned.

The case was here at the Fall Term, 1951, on appeal by both the petitioner and the interveners. The decision dismissing both appeals on procedural grounds is reported in 234 N.C. 528, 67 S.E. 2d 669, where the background facts may be found.

When the case went back to the court below, the interveners, Barbee and wife, filed answer setting up affirmative defenses as follows:

"A. These defendants, as well as all other persons owning or claiming to own an interest in lots appearing in the subdivision known as the Fairview Section of Budleigh, have an interest in the subject matter of this proceeding and an interest in the lands described in the petition herein which are or may be materially affected by any judgment rendered herein, the property and interests of these defendants and of said other lot owners in Budleigh arising as follows:

"1. Cloverdale, Incorporated, was heretofore the owner of a tract of land formerly adjacent to and now within the City limits of the City of Raleigh, N. C., as same appears of record in the office of the Register of Deeds of Wake County, North Carolina, in a map recorded in Book of Maps 1928, at page 1, which map is made part of this answer in like manner as if herein set out in detail, and Cloverdale, Incorporated, during or about the year 1927, undertook to develop, and has developed under a general scheme and plan of development whereby said development was restricted to residential uses only, and sold said land as a high-class suburban residential section known as the "Fairview Section of Budleigh."

"2. In carrying out said plan of development Cloverdale, Incorporated, inserted in the deeds affecting the conveyances of all of the lots in said subdivision certain covenants, conditions, and restrictions among which was the following:

" 'There shall not be erected on any lot as such lot may be described and designated on said plat more than one private dwelling house and the necessary outhouses; said premises shall be used for said private dwelling purposes only, and each dwelling so constructed shall cost not less than Seven Thousand and No/100 ($7,000.00) Dollars, . . .'

"That said covenant has not expired and does not expire until April 1, 1978.

"3. The property of the defendants Edwards in which these defendants and all other lot owners have an interest or estate, and which are sought to be condemned and taken by this proceeding are a portion of lots Nos. 2 and 3 as same appear upon the aforementioned map of the Fairview section of Budleigh, and the aforementioned restrictive covenant is in full force and effect with respect to said lands so proposed to be taken.

"4. These defendants are the owners of a portion of lots Nos. 4 and 5 as the same appear on said map and said covenants and restrictions are in full force and effect as respects the lots of these defendants.

"5. The property sought to be condemned by the petitioner abuts directly upon the rear lot of these defendants and said tank if so erected will be within a few feet of the dwelling house of these defendants and will be erected in violation of the covenants, restrictions, and conditions above referred to and contrary to the plan and scheme of development above mentioned and will result in irreparable damage to these defendants and be in direct violation of their rights and easements in said lands.

"6. These defendants are advised, informed and believe and, upon such information and belief, allege that the erection of the large unsightly water tank on the lands immediately abutting the lands of these defendants will constitute a burden and nuisance upon the lands of these defendants in that said water tank from time to time will overflow and either spray or pour water upon the lands of these defendants and the dwelling house thereon; and further in that the location of said tank so close to the dwelling house of these defendants will cause the water pressure in the dwelling house of these defendants to be so great that from time to time there will be exceedingly great danger of the bursting of the water pipes in the dwelling house of these defendants; that the erection of the large unsightly water tank immediately to the rear of the premises of these defendants and almost overhanging their home is so located as to be unduly offensive to the neighbors of these defendants and to the general public and to the defendants themselves resulting in substantial injury to these defendants, not only in great diminution of the value of property of their home, but to the reasonable and comfortable use by and enjoyment of their property, rendering the ordinary use of their home uncomfortable and unpleasant to them and amounting in law to the taking of their dwelling house within the principle of eminent domain and condemnation proceeding thereunder.

"B. These defendants are advised and believe that the taking of their home or dwelling house is prohibited by the provisions of 40-10 of the Statutes of North Carolina relating to eminent domain and they therefore aver that the petitioner is without power to condemn the premises sought to be condemned in this proceeding.

"C. If petitioner can in law condemn the lands and premises sought to be condemned by this proceeding, then these defendants aver that by the condemnation of said land and the use thereof by the petitioner in violation of the restrictive covenants as contained in the deeds pertaining to the title to said lands, the defendants will be greatly damaged in their property and they are entitled to have such damages determined and assessed in this proceeding."

The petitioner, City of Raleigh, demurred to the further answer, including both affirmative defenses therein alleged, (1) for failure to state facts sufficient to constitute a defense, and (2) for misjoinder of the nuisance defense.

The demurrer first came on for hearing before the Clerk of the Superior Court of Wake County. The Clerk entered an order overruling the demurrer, to which the petitioner, City of Raleigh, excepted and appealed to the Judge of the Superior Court, who signed an order "overruling in all respects the demurrer" and affirming the previous order of the Clerk.

The petitioner, City of Raleigh, appealed, assigning errors.

Paul F. Smith, Henry H. Sink, and Grover H. Jones for plaintiff, appellant.

Ruark & Ruark and Joseph C. Moore for interveners, appellees.

JOHNSON, J. This appeal from the ruling of the court below on the petitioner's demurrer tests the sufficiency of the interveners' answer to allege facts sufficient to constitute these alternate affirmative defenses: (1) that the erection by the City of Raleigh of the proposed elevated water storage tank on lands adjoining their home site would constitute a nuisance, impairing the value of their property and amounting in law to a partial taking of their home, as prohibited by G.S. 40-10; (2) that the erection of the proposed water tank in violation of the covenants restricting the use of all the property in the subdivision to "private dwelling purposes only" would deprive the interveners of vested property rights of substantial value created by these restrictive covenants, entitling them to compensation for such deprivation, in the event their cause of action in nuisance should fail and the City should prevail in its attempt to erect the proposed water tank.

1. *The Nuisance Defense.*—Notwithstanding governmental immunity from liability for negligent tort (*Millar v. Wilson*, 222 N.C. 340, 23 S.E. 2d 42; *Stephenson v. Raleigh*, 232 N.C. 42, 59 S.E. 2d 195), our decisions hold—and they are in accord with the weight of authority elsewhere—that the creation and maintenance of a governmental project so as to constitute a nuisance substantially impairing the value of private property, is, in a constitutional sense, a taking within the principle of eminent

domain. *Hines v. Rocky Mount,* 162 N.C. 409, 78 S.E. 510; *Dayton v. Asheville,* 185 N.C. 12, 115 S.E. 827. See also *Hiatt v. Greensboro,* 201 N.C. 515, 160 S.E. 748; *Jones v. High Point,* 202 N.C. 721, 164 S.E. 119; *Gray v. High Point,* 203 N.C. 756, 166 S.E. 911; *Hudson v. Morganton,* 205 N.C. 353, 171 S.E. 329; Anno.: 2 A.L.R. 2d 677.

In *Dayton v. Asheville, supra,* in holding that the City of Asheville in impairing the value of neighboring property by the erection and operation of an incinerator might be liable for the damage thereby caused (as a taking within the principle of eminent domain), notwithstanding the incinerator was operated in the exercise of a governmental duty in disposing of the city garbage, *Stacy, J.,* speaking for the Court, said: ". . . the city having a right to erect the incinerator and to maintain it for the benefit of the public, in the exercise of a governmental duty, it will not be held civilly liable to individuals for injuries resulting therefrom, when properly built and operated, upon the theory of a trespass, in the absence of some legislative authority or a statute conferring such right of action. . . . But the denial of a right to recover against a municipality for an alleged injury upon the theory of its constituting a trespass does not militate against the right of recovery for a taking or appropriating, in whole or in part, of property for a public use without due compensation. . . . 'Public necessity may justify the taking, but cannot justify the taking without compensation.' "

In the instant case the interveners allege in substance that the erection of the proposed water tank on the Edwards property "almost overhanging their home" will overflow and spray or pour water on their dwelling house, and that the water pressure in the house will be so increased, by reason of the close proximity of the tank, as to create a grave danger of "bursting the water pipes" in their home, thus amounting to a nuisance greatly diminishing the value of their home and rendering its ordinary use "uncomfortable and unpleasant to them and amounting in law to a taking of their dwelling house," as prohibited by the provisions of G.S. 40-10.

G.S. 40-10 provides as follows: "No such corporation shall be allowed to have condemned to its use, without the consent of the owner, his dwelling house, yard, kitchen, garden or burial ground, unless condemnation of such property is expressly authorized in its charter or by some provision of this code."

G.S. 160-204 provides as follows: "When in the opinion of the governing body of any city, or other board, commission, or department of the government of such city having and exercising or desiring to have and exercise the management and control of the streets, water, electric light, power, gas, sewerage or drainage systems, or other public utilities, parks, playgrounds, cemeteries, wharves, or markets, open-air or enclosed, which are or may by law be owned and operated or hereafter acquired by such

city or by a separate association, corporation, or other organization on behalf and for the benefit of such city, any land, right of way, water right, privilege, or easement, either within or outside the city, shall be necessary for the purpose of opening, establishing, building, widening, extending, enlarging, maintaining, or operating any such streets, parks, playgrounds, cemetery, water, electric light, power, gas, sewerage or drainage systems, wharves, or other public utility so owned, operated, and maintained by or on behalf of any such city, such governing body, board, commission, or department of government of such city may purchase such land, right of way, water right, privilege, or easement from the owner or owners thereof and pay such compensation therefor as may be agreed upon."

G.S. 160-205 provides as follows: "If such governing body, board, commission or department of the government of such city are unable to agree with the owners thereof for the purchase of such land, right of way, privilege, or easement, for the purposes mentioned in the preceding section, or for a site for city hall purposes, condemnation of the same for such public use may be made in the same manner and under the same procedure as is provided in chapter Eminent Domain, article 2; and the determination of the governing body, board, commission, or department of government of such city of the land necessary for such purposes shall be conclusive."

G.S. 40-10 was originally Chapter 61, Section 21, Session Laws of 1852. At the time of the enactment of this statute, municipalities were not included among corporations authorized to condemn land under the provisions of what is now Chapter 40, Article 1, of the General Statutes, to which the limitations set out in G.S. 40-10 specifically refer; whereas the original provisions of G.S. 160-204 and 160-205 were enacted in 1917. These statutes, as subsequently amended, are not limited by the provisions of G.S. 40-10. *Mt. Olive v. Cowan, ante,* 259, p. 263, 69 S.E. 2d 525.

Therefore, it would seem that there is no merit in the interveners' contention to the effect that the City of Raleigh is without power to condemn the Edwards property and erect thereon the proposed water tank, on the theory that it will amount to a taking, in part at least, of the interveners' dwelling property.

It follows from what we have said that by virtue of G.S. 160-204 and 160-205 the governing body of a municipality, for the purpose of erecting an elevated water storage tank as an addition to its water system, has the power, in the exercise of a sound discretion, to acquire by condemnation, if need be, dwelling house properties "either within or outside the city," and this is so irrespective of the provisions of G.S. 40-10 and the related statute, G.S. 40-2 (2).

The decision in *Selma v. Nobles,* 183 N.C. 322, 111 S.E. 543, cited and relied on by the interveners, is distinguishable. There the Town of

Selma was proceeding under its charter as amended by Chapter 116, Private Laws of 1915, which conferred upon the Town the right to condemn land for cemetery purposes, "in the same manner as lands are condemned by railroads and public utility companies, . . ."

The petitioner's contention that this defense may not be joined in this proceeding is without merit. See G.S. 40-16 and also 39 Am. Jur., Parties, Sec. 79, pp. 951 and 952.

However, an elevated water tank is not a nuisance *per se*. Therefore, unless and until the tank is erected, the interveners in no event may be entitled to damages as for nuisance. This being so, the nuisance defense is premature. No subsisting affirmative defense is alleged presently entitling the interveners to damages. Consequently, as to this defense the demurrer should have been sustained, and it is so ordered. *Green v. Road Commission,* 184 N.C. 636, 114 S.E. 819. See also: *Pake v. Morris,* 230 N.C. 424, 53 S.E. 2d 300; *Mitchell v. Barfield,* 232 N.C. 325, 59 S.E. 2d 810. If and when the interveners' right of action thereon accrues, it may be reasserted by petition in the cause.

2. *The question whether the restrictive covenants contained in the deeds to the lots in the subdivision vested in the interveners a property right in the land sought to be condemned which must be paid for.*—This precise question does not seem to have been presented heretofore to this Court for determination, and the decisions from other jurisdictions reflect a contrariety of opinion.

However, the decided weight of authority in other jurisdictions supports the proposition that such a restriction, being in the nature of an equitable servitude, is an interest in land and must be paid for when taken. The theory is that these restrictions impose negative easements on the land restricted in favor of and appendant to the rest of the land in the restricted area, and when a particular parcel thereof is appropriated for a public use that will violate the restrictions, such appropriation amounts in a constitutional sense to a taking or damaging of property of the other landowners for whose benefit the restrictions are imposed. 18 Am. Jur., Eminent Domain, Sec. 157, p. 788; Annotations: 17 A.L.R. 554; 67 A.L.R. 385; 122 A.L.R. 1464.

It is true that such other landowners may not enforce the restrictions against the condemnor, but they are nonetheless entitled to an award of compensation "where, through the exercise of the power of eminent domain, there is a taking or damaging of such property rights. . . ." 18 Am. Jur., Eminent Domain, Sec. 157, p. 788. See *Peters v. Buckner,* 288 Mo. 618, 232 S.W. 1024; *Flynn v. New York, Etc., R. Co.,* 218 N.Y. 140, 112 N.E. 913; *Allen v. Detroit,* 167 Mich. 464, 133 N.W. 317; *Stamford v. Vuono,* 108 Conn. 359, 143 A. 245; *Britton v. School Dist.,* 328 Mo. 1185, 44 S.W. 2d 33; *State ex rel. Britton v. Mulloy,* 332 Mo. 1107,

61 S.W. 2d 741; *Johnstone v. Detroit, G. H. & M. R. Co.*, 245 Mich. 65, 222 N.W. 325; *Allen v. Wayne Circuit Judge*, 159 Mich. 612, 124 N.W. 581; *Ladd v. Boston*, 151 Mass. 585, 24 N.E. 858 (opinion by *Holmes, J.*).

In *Peters v. Buckner, supra,* it was held by the Missouri Court that under the provisions of the State and Federal Constitutions prohibiting the taking of private property for public use without just compensation, where lots in a tract of land were platted and sold by a land company subject to the restriction that the lots should be used only for residential purposes, the rights conferred on the lot owners by such restriction were property rights not to be taken or damaged without just compensation being paid therefor; and that, on condemnation by the city of certain of the lots for the purpose of erecting a schoolhouse thereon, the other lot owners were entitled to compensation for the loss of the easement created by such restriction.

In *Flynn v. New York, Etc., R. Co., supra,* it was held by the New York Court that where a railroad company bought lots in a tract of land which was subject to restrictions, including a prohibition against the erection of any structure for business purposes, and built and maintained thereon an electric railroad, there was a deprivation of property rights entitling the other lot owners in the tract to compensation.

In *Allen v. Detroit, supra,* the Michigan Court held that the erection by a city of a fire engine house on property purchased by it, but restricted to residential purposes, was a taking of private property for public use and the owners of the lots for the benefit of which the restriction was imposed were entitled to compensation. The Court said: "Building restrictions are private property, an interest in real estate in the nature of an easement, go with the land, and a property right of value, which cannot be taken for the public use without due process of law and compensation therefor; . . ."

The decisions representing the minority view rest for the most part on the theory that since all property is held subject to the power of eminent domain, the rights of the Sovereign or condemnor are impliedly excepted from the operation of these restrictive covenants; and that if not so excepted, the condemnor, not being party or privy to the contract creating the covenants, no action for damages will lie against the condemnor. See 18 Am. Jur., Eminent Domain, Sec. 157, p. 788, footnote 20. Thus, in the final analysis the minority view is grounded on the theory that these restrictions, being contractual rights enforceable in equity only between parties in privy, do not constitute an interest in property at all. See Nichols on Eminent Domain, 3d Edition, Vol. 2, Sec. 5.73, pp. 82 and 83.

On the other hand, the majority view rests squarely upon the theory that a negative easement created by a building restriction is a vested interest in land (18 Am. Jur., Eminent Domain, Sec. 157, p. 788), and

this Court has adhered unvaryingly to the principle that a negative easement of this kind is a vested interest in land. *McKinney v. Deneen,* 231 N.C. 540, 58 S.E. 2d 107; *Hildebrand v. Telephone & Telegraph Co.,* 219 N.C. 402, 14 S.E. 2d 252; *Charlotte v. Heath,* 226 N.C. 750, 40 S.E. 2d 600 (here it was conceded by all parties concerned that the negative easements involved were property rights to be condemned and paid for); *Turner v. Glenn,* 220 N.C. 620, 18 S.E. 2d 197; *Davis v. Robinson,* 189 N.C. 589, 127 S.E. 697; *East Side Builders v. Brown,* 234 N.C. 517, 67 S.E. 2d 489. See also *Glenn v. Board of Education,* 210 N.C. 525, 187 S.E. 781; *Hiatt v. Greensboro, supra;* Mordecai's Law Lectures, 2d Edition, p. 557; Thompson on Real Property, Permanent Edition, Vol. 7, Sec. 3620 through Sec. 3631; Clark, Covenants and Interests Running with Land, p. 174, *et seq.*

In *Davis v. Robinson, supra,* opinion by *Varser, J.,* it is said: " 'Easements are classified as affirmative or negative. Negative easements are those where the owner of a servient estate is prohibited from doing something otherwise lawful upon his estate, because it will affect the dominant estate (mid. p. 598) . . . An easement always implies an interest in land. It is real property and is created by grant.' (mid. p. 600). . . . *A building restriction is a negative easement.*" (Italics added.)

In *Turner v. Glenn, supra,* with *Barnhill, J.,* speaking for the Court, it is said (mid. p. 625): "The servitude imposed by restrictive covenants is a species of incorporeal right. It restrains the owner of the servient estate from making certain use of the property. *It is an interest in land,* conveyance of which is within the statute of frauds." (Italics added.)

Thus, holding as we do that these negative easements are vested property rights, it follows by force of natural logic and simple justice that for the taking of such property just compensation must be paid as in the case of the taking of any other type of property, and the lack of contractual privity between the owners and the condemnor is in no sense a determinative factor.

Treating the allegations of the further defense as true, as is the rule on demurrer (*Hall v. Coble Dairies,* 234 N.C. 206, 67 S.E. 2d 63), we conclude that the interveners have a vested property right of value in the restrictions imposed on the lots sought to be condemned and that the proposed use of the property amounts in a constitutional sense to a taking or damaging of this property right, for which the interveners are entitled to compensation commensurate with any loss they may sustain. Art. I, Sec. 17, of the Constitution of North Carolina; Fifth Amendment of the Constitution of the United States.

Except as herein modified, the judgment of the court is affirmed.

Modified and affirmed.

FRANK PARKER v. R. SHELTON WHITE AND WIFE ELIZABETH K. WHITE, BELVIDERE BUILDING COMPANY, C. L. LAWRENCE, TRUSTEE, AND FIRST-CITIZENS BANK AND TRUST COMPANY.

(Filed 11 June, 1952.)

1. Lis Pendens § 2—

Lis pendens is authorized only in actions affecting the title to real property. G.S. 1-116.

2. Election of Remedies § 2—

A party who has been induced by fraud to enter into a contract of sale, either of real or personal property, must elect between an action for damages and an action for reformation or for cancellation and rescission, nor will he be allowed to affirm in part and rescind in part.

3. Same—Complaint held to disclose election to affirm sale of realty and sue for fraud, and plaintiff could not assert remedies of rescission or reformation.

Plaintiff alleged that he was induced to execute deed to defendants for a part of the tract of land owned by him by reason of false and fraudulent representations made by defendants as to the manner in which defendants would develop the land, maintain and keep open the roads thereon, drain the land, pay a stipulated sum for the privilege of connecting with a water main installed by plaintiff, and make available to plaintiff and his heirs the use of the water main in the development of the remaining property, that defendants breached these representations to plaintiff's damage in specified amounts, which sum should be declared a lien upon the land conveyed. Plaintiff also alleged that by mutual mistake and by error of the draftsman the deed and other papers did not incorporate and include the agreed easement to make it possible for plaintiff to extend and use the water main, and that the deed and other papers should be corrected or declared void and redrawn. *Held:* The complaint shows an election by plaintiff to confirm the transaction and sue to recover damages for fraud, and therefore plaintiff may not at the same time sue to rescind or reform in whole or in part.

4. Lis Pendens § 2—

Where it is apparent from the pleadings that grantor has elected to sue for damages for fraud inducing him to execute deed, such election precludes him from asserting the relief of cancellation and rescission or reformation, and therefore the action does not involve title to realty so as to justify the filing of *lis pendens*, and the trial court properly grants defendants' motion for cancellation of such notice.

APPEAL by plaintiff from *Morris, J.*, at October Civil Term, 1951, of WAKE.

Civil action to recover damages for alleged breach of contract in connection with sale by plaintiff and purchase by defendant of certain land, for mandatory injunction, and for reformation of deed, heard upon motion of defendants for order canceling and removing from the records notice of *lis pendens* which plaintiff filed in office of Clerk of Superior

Court of Wake County, N. C., against lands of defendant Belvidere Building Company, etc.

The complaint, filed by plaintiff, when stripped to its framework, alleges substantially the following:

I. That plaintiff, in the year 1928, purchased from his father a certain tract or parcel of land located about 1¼ miles south of the city of Raleigh in St. Mary's Township, Wake County, North Carolina, containing thirty-one acres out of a tract of fifty-one acres owned by his father; that plaintiff planned, by gradual development over a long period of time, to establish on the land so purchased by him, a residential suburb composed of medium sized homes on spacious lots,—for which purpose the land was suitable; that he graded and improved the natural drainage so that in the year 1949 the drainage would take care of any amount of rain water without damage to the land; that in the year 1947, at cost of $8,000, he constructed on said land several large lakes or ponds,—the largest of which to be for fishing and boating, and one of the smaller ones, for swimming; that in the year 1949, at cost of approximately $20,000, he laid into a portion of the land and at a place where it would be useful to the entire area "a large city of Raleigh water main and line,"—the line being so constructed that it could be connected with, and used in further development of plaintiff's property and "adjoining or nearby land" owned by members of his family; that through the years to 1950 he planted trees on, and otherwise improved, the land, and, in the year 1947, constructed, at expense of about $4,000, two main roads, or streets, which ran "in an eastward direction from the old Fayetteville Road and . . . gave easy . . . ingress, egress and regress to, from, over and across the said lands," which roads, by the year 1950, had good surface and side drains; and that U. S. Highway 15-A, a four-lane road southward from Raleigh, has been located, and is now being constructed by the State of North Carolina along the approximate location of the old Fayetteville Road through said land.

II. That in the fall of 1947 plaintiff was approached by a real estate agent (the one, as plaintiff is now informed and believes, frequently used by defendant R. Shelton White and Belvidere Company), who "undertook to persuade" plaintiff to sell to defendant R. Shelton White about 20 acres of said land lying along the east side of the "old Fayetteville Road"; that plaintiff revealed to the real estate agent his plans for developing the property; that the real estate agent represented to plaintiff that if he would sell, White would (1) cause the land to be developed and used in the same manner and for the same type development as that planned by plaintiff, (2) maintain and keep open the roads in substantially the same location, or, if the course be changed, construct the changed portion so as not to impair the purpose for which the roads were intended, (3) use the

land "only in such manner as would be approved by, and acceptable to plaintiff," (4) make the water pipe line which plaintiff had installed available to the remaining portion of plaintiff's land for the use of plaintiff and his family, and (5) do nothing on the land that would depreciate or damage the remainder of plaintiff's land; and that, as a result of, and in reliance upon these representations, plaintiff gave, and executed to said White a 60-day option on the approximate acreage located as above stated. (Apparently the option was not exercised.)

III. That thereafter, in the spring of 1950, the said real estate agent and defendant White renewed efforts to obtain from plaintiff additional agreement, and conveyance of the property located along the highway as stated in preceding paragraph, and, in addition to the representations theretofore made as set forth in preceding paragraph, represented to plaintiff "that if he would agree to sell said property to defendants, the said defendants would pay to the plaintiff the price of $900 per acre for the property so sold, but that the plaintiff would be paid the sum of $5,000 for the privilege to the defendants to connect with and use the city water pipe line which the plaintiff had installed . . .," and same, and the use of it, would be made available to plaintiff and members of his family for use and development of their property; that plaintiff, relying upon the said representations, agreed to sell said property, along the highway, consisting of about 20 acres,—the "sale to be expressly subject to all the terms, conditions and agreements on the part of the purchasers which are above set forth in this complaint and the defendants agreed to purchase the said land on said terms and subject to the foregoing agreements, representations, conditions and provisos."

IV. That "further relying upon all of the aforesaid representations, agreements and conditions," the plaintiff and his wife in July, 1950, executed a certain deed to R. Shelton White and wife, Elizabeth K. White, which appears of record in Wake County Registry in Book 1049, at p. 349, which purports to convey a certain tract of land, specifically described, containing 20.10 acres, etc., and that "plaintiff relied upon the good faith and his belief in defendant's integrity and the agreements made by defendant,"—all of which were material to the transaction, and were intended to, and did induce plaintiff to act.

V. That defendants "breached and violated the agreements and representations, terms and conditions of the understanding between the plaintiff and the defendants" in respect of: (1) The roads; (2) the class of houses constructed; (3) the drains, drain ditches and drainage; (4) the water pipe line; and (5) the swimming pool, all in manner and to the extent set forth in evidentiary detail, to the damage of plaintiff "that the plaintiff was misled to his hurt and damage as aforesaid by the wrongful and false representations and the breach of the terms and conditions be-

tween the plaintiff and the defendants and their agents and employees as aforesaid, all as a result of the plaintiff's inexperience in such matters and due to the experience and misrepresentations of the defendants and/or their agents, servants and employees; that the plaintiff and the defendants were not on an equal footing in respect to this matter and the plaintiff is entitled to the assistance and aid of a court of equity in relieving him from the terrible situation in which he finds himself and as a result of the matters hereinbefore alleged; that as a result of the information now available to the plaintiff, he believes and therefore alleges that the defendants never intended to comply with their representations and promises and agreements, or many of them, concerning the development of the said lands purchased from the plaintiff on the basis thereof and reliance thereupon"; and that the defendants are liable to him in the respective sums of at least: (1) $20,000 for damages caused to the adjoining land of plaintiff "because of cheapening of the neighborhood and depreciation of plaintiff's land"; (2) $2,000 because of "contamination of plaintiff's pool . . . intended for swimming," as result of construction work in manner detailed; and (3) $3,000, as result of wrongful diversion of water upon land of plaintiff in manner detailed; and that defendants should be restrained from continuing the development of said property adjacent to that of plaintiff in such manner as to continue to cause damages to plaintiff's property; that each of the amounts stated in items (2) and (3) just above "should be adjudged to be a lien" against or upon the lands of defendants until and unless the same is paid; and that mandatory injunction issue requiring defendants to correct conditions created by them resulting in damage to plaintiff, as set out in detail.

VI. "16. That in the original agreement between plaintiff and defendants, it was specifically provided that if defendants should use the water pipe line which plaintiff had constructed to and partly across the lands now held by defendants, that defendants would pay to plaintiff the sum of $5,000 therefor, and that plaintiff also should have full right to use said pipe line to supply the lands retained by him; that, during construction of buildings, defendants have been using said line, but have not paid plaintiff the agreed amount, and plaintiff is entitled to recover of them the sum of $5,000; and that defendants have dug up and obstructed or destroyed portions of said pipe line, and should be required, by mandatory injunction, to so repair same as to make it available to plaintiff as agreed. (And see amendment as stated hereinafter.)

VII. "17. That the Belvidere Building Company, as plaintiff is informed and believes and so alleges, is solely owned and controlled by the defendants R. Shelton White and wife, Elizabeth K. White" . . . and another "an attorney for them, being the sole incorporators; and . . . that any purported conveyance to the said Belvidere Building Company

is subject and subsequent to the agreements, representations, terms and conditions between the plaintiff and the defendants as aforesaid."

VIII. "18. That the defendant C. L. Lawrence, Trustee, and the defendant First-Citizens Bank & Trust Company are the holders of a purported lien upon said property of the defendants as appears of record in Wake County Registry of Deeds in Book 1075 at p. 280, and that any rights, if any, of the said defendants are subsequent and subject to the claims of the plaintiff as hereinbefore alleged, but that said trustee and Bank are made parties to this suit in order that the whole matter may be fully presented to the court in this action."

IX. "19. That contemporaneously with the institution of this action the plaintiff caused a *lis pendens* to be filed in the office of the clerk of the court of Wake County under the provisions of General Statutes of North Carolina, Sections 1-116 through 1-120 (1), etc.

"Wherefore the plaintiff prays judgment . . . for relief as hereinabove set forth in detail in this complaint, and for all such other and further relief as may be proper and necessary to protect the rights of the plaintiff, both in law and in equity," etc.

Later plaintiff amended his complaint in these respects:

(1) Paragraph 16 covered by paragraph VI hereinabove, so that the last sentence reads: "That by mutual mistake of the parties and by error of the draftsman, the deed from plaintiff for the said lands, and other paper writings concerning said lands, did not incorporate and include the agreed and necessary easement across the conveyed lands to make it possible for plaintiff to extend and use the said pipe line as agreed; and that the said deed and any other papers or instruments should be corrected or else declared null and void and new papers executed to effectuate said agreement and show correctly the said easement."

(2) By adding a new paragraph to follow paragraph 17 of the complaint covered by paragraph VII hereinabove, reading: "17 (a) That at the times herein mentioned, as plaintiff is informed and believes, R. Shelton White was the President and chief executive officer and agent of Belvidere Building Company; and that the said company, through whom he developed the said lands, therefore and thereby had full knowledge of all the representations, negotiations, transactions and agreements leading up to the purchase and development of this land, and the said company is liable and responsible therefor, and is bound thereby; and the company was and is in law and in fact an 'alter ego' of the said White."

Defendants filed motion on 18 October, 1951, for the cancellation of plaintiff's notice of *lis pendens,* and in support thereof set forth the following:

1. That defendants R. Shelton White and wife, Elizabeth K. White, to whom plaintiff conveyed said land executed and delivered a deed con-

veying same to defendant Belvidere Building Company on 1 August, 1950, as appears of record in Book 1062, p. 297, Wake County Registry, more than 13 months before notice of *lis pendens* was filed, and said defendants were not the owners and holders of title to said land on 7 September, 1951, the date on which the notice of *lis pendens* was filed.

2. That plaintiff was not entitled to file and is not entitled to have a notice of *lis pendens:* (a) Against Belvidere Building Company, owner and holder of title to said lands, for the reason that plaintiff does not allege and show that said company was not and is not a purchaser for value in good faith, and that it had notice of any alleged fraud of the defendants White, when it acquired title to said lands on 1 August, 1950, more than a year prior to the filing of said notice of *lis pendens;* (b) against the defendants C. L. Lawrence, Trustee, and First-Citizens Bank & Trust Company, because it is not alleged and shown in the complaint that said defendants were not and are not purchasers for value in good faith and that they had notice of any alleged fraud of the defendants White, when they acquired title to said lands by deed of trust on 22 May, 1951, more than three months prior to the filing of said notice of *lis pendens;* and (c) against any of defendants in this action,—for the reason that this is not an action affecting the title to real property, in that plaintiff is not seeking to rescind the transaction whereby he agreed to convey, and did convey, the lands in the complaint to defendants White, but on the contrary is seeking to recover damages for alleged breach of the terms and conditions of his contract to convey and his conveyance of said land, and, therefore, has made his election and is now estopped to seek a rescission of his contract to convey and his conveyance of said lands.

3. That although plaintiff alleges in paragraph 16 of his complaint that his deed conveying said lands to defendants White should be corrected or else declared null and void and new papers executed to effectuate said alleged agreement and show correctly said "easement," he failed to attach to his complaint a copy of said agreement or contract, which was in writing, and make it a part of his complaint, or to quote its provisions, —the portion relating to said water line which reads as follows:

"FOURTH. A city water line has already been extended into a portion of the property hereinbefore described. If approval can be secured to further extend said city water line so as to use said water line in the development of the above described property and other adjoining property, and the party of the second part elects to make use of said city water line, the party of the second part agrees to pay to the party of the first part the sum of $5,000.00. If said water line is extended by the party of the second part, the party of the first part and all of the heirs of T. B. Parker shall have the right to tap on to said extended water line without

charge and to extend said water line in any street or streets shown on a subdivision plat covering said land; and such extension cost shall be paid for by the party of the first part or the heirs of T. B. Parker."

And plaintiff fails to allege that approval has been secured, or could be secured, to further extend said city water line so as to use said water line in developing the property described in said contract, and also fails to allege that the party of the second part elected to make use of said city water line in developing said property; that both plaintiff and defendants White and Belvidere made diligent efforts to secure approval to further extend said city water line so as to use said water line in the development of the property described in this contract and other adjoining property, but the city of Raleigh declined and refused to extend or to approve the extension of said city water line, and consequently defendants R. Shelton White and Belvidere Building Company did not and could not elect to make use of said city water line, in the development of said property, but the defendant Belvidere Building Company, to whom the Whites conveyed said property, found it necessary to make and did make other arrangements for supplying water for use in the development of said property.

And defendants attached affidavit of R. Shelton White in support of their said motion tending to show, among other things: (1) That he is president and chief executive officer of defendant Belvidere Company;

(2) That plaintiff and this defendant entered into a written contract on 12 June, 1950 (a copy of which is attached and made a part of the affidavit), by the terms of which contract plaintiff, as party of the first part, contracted to sell to this defendant and this defendant, as party of the second part, contracted to purchase from plaintiff, a certain tract or parcel of land in Wake County, containing 19.84 acres, at the price of $900 per acre, to be paid $1,000 in cash upon execution of the contract and balance payable on 12 July, 1950, upon payment of which plaintiff agreed to execute and deliver to defendant, "or his assigns, a good and sufficient deed, in fee simple, conveying said land and premises" to "said party of the second part or his assigns, with general warranty and free from encumbrances . . . " This contract also contained the "Fourth" paragraph as quoted in the motion of defendants, and was not recorded.

(3) That thereafter, on 18 July, 1950, plaintiff and his wife, upon payment to them of the purchase price thereof, executed and delivered to this defendant and his wife, a warranty deed conveying said tract of land, which deed was duly filed for record on 20 July, 1950, as appears of record in Book 1049 at page 349 in office of Register of Deeds for Wake County, N. C.

(4) That thereafter, on 1 August, 1950, this defendant and his wife executed and delivered to defendant Belvidere Building Company, a

North Carolina corporation, a warranty deed conveying to it the said tract of land, along with other land, which deed was duly filed for record 27 November, 1950, as appears of record in Book 1062 at page 297 in office of Register of Deeds for Wake County, N. C.

(5) That thereafter on 22 May, 1951, defendant Belvidere Building Company executed and delivered to defendant First-Citizens Bank & Trust Company its note in the sum of $335,000, and, as security therefor, executed and delivered to C. L. Lawrence, Trustee for defendant First-Citizens Bank and Trust Company, a deed of trust conveying a part of said land together with other land, which deed of trust was filed for record 31 May, 1951, as appears of record in Book 1075, at page 280, in office of Register of Deeds for Wake County, N. C. . . .

(8) And, that with reference to the provisions of paragraph 4 of the agreement of 12 July, 1950, plaintiff and affiant, this defendant, and Belvidere Building Company made diligent effort, but failed to secure approval to further extend said city water line, in full support of pertinent portion of said motion of defendants hereinabove set forth.

When the motion of defendants came on for hearing before the judge presiding at the regular October Civil Term, 1951, of Superior Court, and being heard, and "it appearing to the court from an examination of the entire record, including the notice of *lis pendens,* complaint, amendment to complaint, and the motion and attached papers of defendants, the said motion should be allowed," and in accordance therewith judgment was entered.

Plaintiff excepted thereto, and appeals to Supreme Court and assigns error.

Simms & Simms and John M. Simms for plaintiff, appellant.

Smith, Leach & Anderson for defendants, appellees.

WINBORNE, J. Does this action affect the title to real property? If it does, the judgment from which this appeal is taken would be in error. But if it does not, then the judgment is correct and should be affirmed. For the filing of the notice of the action, that is, *lis pendens,* is authorized only in actions affecting the title to real property. G.S. 1-116. From a careful consideration and analysis of the various phases of the complaint, in the light of applicable principles of law, it seems apparent that the purpose of this action is to recover damages caused by fraud. Hence, error in the judgment is not made to appear.

"The essential elements of actionable fraud or deceit are the representation, its falsity, scienter, deception, and injury. The representation must be definite and specific; it must be materially false; it must be made with knowledge of its falsity or in culpable ignorance of its truth; it must

be made with fraudulent intent; it must be reasonably relied on by the other party; and he must be deceived and caused to suffer loss," *Adams, J.*, in *Electric Co. v. Morrison,* 194 N.C. 316, 139 S.E. 455; see also *Berwer v. Ins. Co.,* 214 N.C. 554, 200 S.E. 1, and cases there cited, and also *Hill v. Snider,* 217 N.C. 437, 8 S.E. 2d 202.

This principle applies to contracts and sales of both real and personal property. *May v. Loomis,* 140 N.C. 350, 52 S.E. 728; *Tarault v. Seip,* 158 N.C. 363, 74 S.E. 3; *Evans v. Davis,* 186 N.C. 41, 118 S.E. 845; *Berwer v. Ins. Co., supra.*

And a party who has been fraudulently induced to enter into a contract or sale has a choice of remedies. He may repudiate the contract, and, tendering back what he has received under it, may recover what he has parted with or its value; or he may affirm the contract, keeping whatever property or advantage he has derived under it, and may recover in an action for deceit the damages caused by the fraud. And, in a proper case, the defrauded party may be entitled to the equitable remedies of rescission and cancellation or reformation. But, as a general rule, the defrauded party cannot both rescind and maintain an action for deceit. If he elects to rescind the contract, he may recover back what he has parted with under it, but cannot recover damages for the fraud. On the other hand, if he elects to maintain an action for deceit, he cannot sue for rescission or reformation. *Fields v. Brown,* 160 N.C. 295, 76 S.E. 8; *Lykes v. Grove,* 201 N.C. 254, 159 S.E. 360; *Smith v. Land Bank,* 213 N.C. 343, 196 S.E. 481.

But the defrauded party is not allowed to rescind in part and affirm in part,—he must do one or the other. *May v. Loomis, supra; McNair v. Finance Co.,* 191 N.C. 710, 133 S.E. 85; *Willis v. Willis,* 203 N.C. 517, 166 S.E. 398; *Bolich v. Ins. Co.,* 206 N.C. 144, 173 S.E. 320; *Lykes v. Grove, supra; Smith v. Land Bank, supra.*

In the light of these principles, while the prayer for relief contained in plaintiff's complaint is framed in general terms, it is clear from a reading of the complaint, and the amendments thereto, that this is an action to recover monetary damages. Whether the allegations, or the proof in support thereof, make out a case for the jury, is of no concern on this appeal. But having elected to affirm the transaction in question, and sue to recover damages, plaintiff may not, at the same time, sue to rescind or reform in whole or in part. Hence, the action is not one affecting the title to real property within the purview of G.S. 1-116. See *Horney v. Price,* 189 N.C. 820, 128 S.E. 321; *Threlkeld v. Land Co.,* 198 N.C. 186, 151 S.E. 99; *Jarrett v. Holland,* 213 N.C. 428, 196 S.E. 314.

Therefore, the judgment below is

Affirmed.

RESORT DEVELOPMENT COMPANY v. B. J. PARMELE.

(Filed 11 June, 1952.)

1. Appeal and Error § 6c (2)—

An assignment of error to the signing of the judgment presents the sole question of whether the facts agreed support the judgment rendered.

2. Common Law—

So much of the common law as is not destructive of or repugnant to, or inconsistent with, our form of government and which has not been abrogated or repealed by statute, or become obsolete, is in full force and effect in this State. G.S. 4-1.

3. Waters and Watercourses § 11—

Under the common law rule, the ebb and flow of the tide is the test of navigable waters.

4. Same—

Under the decisions of this State, waters which are actually navigable by sea vessels are navigable waters.

5. Same—

Chap. 42, sec. 1, of the revised statutes of 1836 did not have the effect of abrogating or repealing the common law rule defining navigable waters, and therefore a State grant issued in 1841 for land under navigable waters as defined by common law could not transfer title thereto.

6. Same—

Where it is agreed or found as a fact that all of the *locus in quo* is covered by water at high tide and that adjacent waters are navigable by ocean-going vessels with channels or sloughs running through the land navigable by small motor launches, etc. *Held:* The North Carolina Board of Education is not vested with authority to convey such land, G.S. 146-1, and no title can be acquired by such conveyance, the land not being swamp land within the meaning of G.S. 146-4.

APPEAL by defendant from *Burney, J.*, Resident Judge of Eighth Judicial District, out of term by agreement, of NEW HANOVER.

A controversy without action under provisions of G.S. 1-250 duly submitted to the court on the following agreed facts:

"(1) The plaintiff is a corporation duly created, organized, and existing under and by virtue of the laws of the State of North Carolina with its principal place of business in the City of Wilmington. The defendant is a resident of the County of New Hanover and State of North Carolina.

"(2) By an instrument in writing dated July 2, 1951, defendant offered to purchase from the plaintiff, for the sum of $7,626.00, the following described land:

" 'Beginning at the intersection of the southerly or westerly line of the 50-foot right of way conveyed to the Town of Wrightsville Beach by deed

recorded in Book 362, page 138, New Hanover County Registry, with the highwater mark of Banks Channel and Sunset Lagoon; and running thence north 9 deg. 38′ west along said southerly or westerly line of said 50-foot right of way to a point located north 9 deg. 39′ west 1,346.22 feet from the western line of Lumina Avenue; thence south 56 deg. 45′ west 1,880.12 feet; thence south 53 deg. 12′ east 301 feet, more or less, to a point in the agreed dividing line between the tract of land conveyed to Charles B. Parmele by the State Board of Education by deed recorded in Book 173, page 129, New Hanover County Registry, and the Stephens-Sneeden grant, said point also bearing about north 89 deg. 22′ west from a stone located in the eastern line of Lumina Avenue 300 feet northwardly from its intersection with the northern line of Mallard Street; thence about north 89 deg. 22′ west about 445 feet to the Beginning corner of the aforesaid tract conveyed to Charles B. Parmele by the State Board of Education (said point also being the northeast corner of a tract conveyed by the State Board of Education by deed recorded in Book 150, at page 185, New Hanover County Registry, said point now being Colonel Owen H. Kenan's northeast corner); thence with the F. A. Matthes' (now Colonel Owen H. Kenan's) line south 8 deg. 50′ west 515 feet, more or less, to a point that would be intersected by an extension westwardly of the northern line of Salisbury Street; thence eastwardly along the extended northern line of Salisbury Street 750 feet, more or less, to a concrete bulkhead; thence in a general northwestward direction with and along the highwater mark of Banks Channel and Sunset Lagoon as they meander to the Beginning'; which offer was accepted by the plaintiff. Said tract is designated by the letters 'F' through 'M' on the map hereto attached and marked 'Exhibit A.'

"(3) The plaintiff has offered to deliver to the defendant a good and sufficient deed with covenants of warranty conveying the fee simple title to the land described in paragraph (2) hereof, and the defendant has refused to accept said deed and pay the agreed purchase price on the ground that he has been advised by his attorney that the plaintiff is not possessed of an indefeasible fee in and to said land.

"(4) Said land lies in Wrightsville Sound, west of Wrightsville Beach, and at high tide is covered entirely by the waters of the sound; at low tide portions of said land, consisting of sand bars and marshland are above water, while other portions are covered with shallow water.

"(5) Said land is bounded on the northeast and east by Wrightsville Beach and by a causeway running northwardly from Wrightsville Beach to the Wrightsville Beach sewerage disposal plant, on the north and west by a continuous tract of more than 2,000 acres of marshland, through which run small shallow creeks or sloughs, which has heretofore been conveyed by the North Carolina State Board of Education to various

individuals, and on the southwest and south by an island known as Shore Acres and by the waters of Banks Channel.

"(6) Banks Channel extends southwestwardly from said land and along the western shore of Wrightsville Beach, a distance of approximately three miles to Masonboro Inlet, at which point its waters enter the Atlantic Ocean, and at a point about one mile south of said land is crossed by a stationary highway bridge. South of the bridge the channel is used by pleasure and commercial vessels, including seagoing vessels up to 75 feet in length. It is possible for vessels of approximately 30 feet in length and having a beam of not more than 10 feet and a clearance of approximately 15 feet to pass beneath the bridge and negotiate the channel northwardly as far as the southern edge of the land described in paragraph (2).

"(7) Two shallow channels or sloughs enter into and upon the land, one on the southeast side and the other on the northwest side, which can be negotiated by small motor launches, outboard motorboats and skiffs at low tide, but neither has a public terminus. The southeast channel or slough, which is known as Sunset Lagoon, ends at the causeway mentioned in paragraph (5); and the northwest channel turns westwardly and runs approximately one mile to the Intracoastal Canal.

"(8) Northeast of the causeway and at the northern tip of Wrightsville Beach lies Moore's Inlet which connects the waters of the Atlantic Ocean and the Intracoastal Canal via a channel known as Stokeley's Cut. Moore's Inlet is very shallow and can be navigated only by small outboard motorboats and rowboats and because of its shallowness is very seldom used by any type of boat. The only way to reach Moore's Inlet by boat from the waters adjoining the *locus in quo,* other than by the ocean through Masonboro Inlet at the south end of Wrightsville Beach, is to travel westwardly about a mile to the Intracoastal Canal, northwardly along the canal to Stokeley's Cut, eastwardly along Stokeley's Cut to the Inlet. The Inlet is now, and has been for a number of years, slowly filling in and growing more shallow.

"(9) It is the purpose of the defendant to dredge sand from the bottom of Banks Channel and the two channels or sloughs referred to in paragraph (7) and to fill in the described land, thereby raising it above the level of high tide and increasing the navigability of the surrounding waters.

"(10) The plaintiff claims title to the land described in paragraph (2) by *mesne* conveyances from Stephen Sneeden, to whom the State of North Carolina issued Grant #1649 on December 3, 1841, which grant is recorded in Book Z, page 68, in the office of the Register of Deeds of New Hanover County. It is agreed by the parties that the description in the

grant covers the *locus in quo.* Moore's Inlet was not in existence at the time the grant was issued, it having been opened by a storm in 1857.

"(11) In addition to claiming under the Sneeden Grant, the plaintiff further claims to have acquired title by *mesne* conveyances from Q. B. Snipes, Trustee, to that portion of the *locus in quo* described as follows:

" 'Beginning at a stake near the highwater line of the Sound, said stake being located south 80 deg. 30′ west 120 feet from the intersection of the eastern line of Lumina Avenue with the southern line of Mallard Street (said Mallard Street being in a development known as North Shores, and located near the North end of Wrightsville Beach); thence from the beginning south 80 deg. 30′ west 1530 feet to a stake located 300 feet westwardly, as measured parallel with Salisbury Street, from the end of the concrete bulkhead, and also 62 feet northwardly as measured parallel with Lumina Avenue from a westerly extension of the northern line of Salisbury Street; thence north 9 deg. and 30′ west 530 feet to a stake in the Parmele-Wright Southern line; thence north 82 deg. and 30′ east along the said Parmele-Wright line 1150 feet to a stake; thence continuing along the Parmele-Wright line south 76 deg. and 30′ east 600 feet to a stake near the highwater mark of the Sound; thence south 25 deg. west 310 feet to the beginning, the same containing 17.3 acres, more or less;' and designated by the letters 'A' through 'E' on the map hereto attached, the said Q. B. Snipes, Trustee, having a deed executed by the State of North Carolina and the North Carolina State Board of Education on the 31st day of October, 1944, which purports to convey said tract.

"(12) The plaintiff contends that the defendant should be required to purchase under their contract, for that they are the owners in fee simple of the *locus in quo,* and that the public generally, and that land owners to the north and south of the *locus* in particular, have no right, title or interest, riparian or otherwise, in said lands; and that by virtue of their ownership of said land they have the lawful right to construct the above mentioned canal and fill in the above mentioned lands so that the same will be above the level of the waters of Wrightsville Sound.

"(13) The defendant contends that the title of the plaintiff to the land described in paragraph (2) hereof is not good because all of the land at high tide is covered by the waters of Banks Channel, a navigable stream.

"(14) It is agreed that if the title to the entire tract described in paragraph (2) hereof is good that the defendant will fully comply with said contract and pay to the plaintiff the sum of $7,626.00, upon delivery to him of good and sufficient deed executed by the plaintiff; it is further agreed that if the title to the tract described in paragraph (11) is good, the defendant will pay that proportion of the $7,626.00 which the tract described in paragraph (11) bears to the tract described in paragraph

(2), upon delivery to him of good and sufficient deed executed by the plaintiff.

"(15) Plaintiff and defendant agree that this cause may be heard in term or out of term, and in the county or out of the county, by either the Resident Judge of the Eighth Judicial District or by the Judge Presiding over the courts of said District."

When the matter came on for hearing before the resident judge of the Eighth Judicial District, the court entered judgment in which it is stated that the court finds that the questions presented are:

"1. Is the plaintiff the owner of the land described in paragraph 2 of the agreed statement of facts?

"2. If the plaintiff is not the owner of all the land described in paragraph 2 of the agreed statement of fact, is it the owner of that portion of said land which is described in paragraph 11 of the agreed statement of facts?

"3. Can the plaintiff convey all or any portion of the lands described in paragraph 2 of the agreed statement of facts to B. J. Parmele in fee simple, under the agreement between the parties hereto dated July 2, 1951?" and that "The answer to each of the above said questions is 'Yes,' except that the slough known as 'Sunset Lagoon' and the slough running from Banks Channel along the northerly and northeasterly end of Harbor Island, and on to the Inland Waterway, are parts of a navigable stream and free passage over said sloughs shall not be obstructed. Upon the Court's ruling, in reference to the above mentioned Sunset Lagoon and slough, it was stipulated and agreed between the parties hereto that the northern line of Sunset Lagoon should be the lines designated as X-Y-Z, and that the width of the slough running northwestwardly along Harbor Island and southwest of the *locus in quo* shall not be less than 200 feet at low water."

And then the court "ORDERED, ADJUDGED AND DECREED that the plaintiff, Resort Development Company, is the owner in fee simple and can convey good title to the lands described in paragraph 2 of the agreed statement of facts, but it is further ordered, adjudged and decreed that the northern lines of Sunset Lagoon shall not be moved south of the lines designated X-Y-Z on the map, nor shall the width of the slough running northwardly along the eastern side of Harbor Island be made a width of less than 200 feet."

To the signing of the foregoing judgment defendant excepted, and appeals to Supreme Court, and assigns error.

Carr & Swails for plaintiff, appellee.

Kellum & Humphrey for defendant, appellant.

WINBORNE, J. The assignment of error, based upon exception to the signing of the judgment from which this appeal is taken, presents for decision one question: Do the facts shown in the agreed statement of facts on which this controversy without action is predicated, support the judgment rendered? *Culbreth v. Britt Corp.*, 231 N.C. 76, 56 S.E. 2d 15; *Duke v. Campbell*, 233 N.C. 262, 63 S.E. 2d 255; *In re Hall, post*, 697, and cases cited therein.

While a similar factual situation does not seem to have been presented to this Court, we hold that, in the light of pertinent statutes, the common law, decisions of this Court of kindred character, and general principles relating to navigable waters, the agreed facts do not support the judgment, and that error is made to appear. Decision on the first two of the three questions stated in the judgment are the determinative factors.

The answer to first question: "Is the plaintiff the owner of the land described in paragraph 2 of the agreed statement of facts?" pivots on the answer to the fundamental question as to whether on 3 December, 1841, at the time Grant 1649 was issued to Stephen Sneeden, the land therein described, the *locus in quo*, covered by navigable waters, was the subject of entry by, and grant to a private citizen.

In this connection it is appropriate to note that the Revised Statutes of North Carolina (1836) then in effect provided in Chapter 22, Sec. 1, that "All such parts of the common law, as were heretofore in force and use within this State, or so much of the said common law as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this State, and the form of government therein established, and which has not been otherwise provided for in the whole or in part, not abrogated, repealed, or become obsolete, are hereby declared to be in full force within this State."

Previously the General Assembly of North Carolina, beginning in 1711, had enacted statutes declaring that "the common law is, and shall be in force in this government." See Laws of N. C. 1711, Chap. 1, Sec. III (Published in Vol. 25 The State Records of North Carolina by Clark), Laws of N. C. 1715, Chap. 31, Sec. VI, Laws of N. C. 1715, Chap. 66, Sec. VIII, Laws of N. C. 1749, Chap. 1, Sec. VI, Laws of 1777 (First Session) Chap. 25, Laws of 1777 (Second Session) Chap. XIV, Sec. II, Laws of N. C. 1778 (First Session) Chap. V, Sec. II.

Too, it is pertinent to ascertain what are navigable waters both at common law, and under the laws of this State. While much has been written on the subject, it seems clear that by the rule of the common law, adopted in England, navigable waters are distinguishable from others by the ebbing and flowing of the tides, that is, the ebb and flow of the tide was the test of a navigable stream. *Hatfield v. Grimsted*, 29 N.C. 139; *Hodges v. Williams*, 95 N.C. 331; *Bond v. Wool*, 107 N.C. 139, 12 S.E.

281. And it is said that for a time our courts adhered to that definition of the common law. But "the rule now most generally adopted, and that which seems best fitted to our domestic condition, is that all water courses are regarded as navigable in law that are navigable in fact," *Douglas, J.*, in *S. v. Baum,* 128 N.C. 600, 38 S.E. 900. See also *Wilson v. Forbes,* 13 N.C. 30; *Collins v. Benbury,* 25 N.C. 277; *s.c.*, on rehearing, 27 N.C. 118; *Fagan v. Armistead,* 33 N.C. 433; *S. v. Dibble,* 49 N.C. 108; *S. v. Glen,* 52 N.C. 321; *S. v. Narrows Island Club,* 100 N.C. 477, 5 S.E. 411; *S. v. Eason,* 114 N.C. 787, 19 S.E. 88; *Mfg. Co. v. R. R.,* 117 N.C. 579, 23 S.E. 43; *Land Co. v. Hotel,* 132 N.C. 517, 44 S.E. 39; *S. v. Twiford,* 136 N.C. 603, 48 S.E. 586.

In the cases of *Collins v. Benbury, supra,* the headnotes epitomizing the opinions of the Court are to the effect that what is a navigable stream in this State does not depend upon the common law rule, but that waters, which are sufficient in fact to afford a common passage for people in sea vessels, are to be taken as navigable; that is, that all waters which are actually navigable for sea vessels are to be considered navigable waters under the laws of this State.

Tested by these rules the land in question is covered by waters which come within the common law tidal rule, and the rule of navigability in fact applied in North Carolina.

Moreover, as stated in *S. v. Baum, supra,* under the common law of England, streams, distinguishable as navigable waters, were said to be *publici juris,* that is, of public right,—owned by the public and not by any private person,—such common property that "anyone can make use of it who likes." Black's Law Dictionary. And, hence, land covered by navigable waters could not be granted. *S. v. Baum, supra.*

And on the other hand, decisions of this Court hold that waters navigable in fact are navigable in law, and to that extent and for that purpose are *publici juris*—of public right. *S. v. Narrows Island Club, supra.*

In this connection, it appears that in the case of *Tatum v. Sawyer,* 9 N.C. 226, involving a grant from the State, bearing date 21 June, 1819, conveying certain land in Currituck County, near Currituck Inlet, this Court, in opinion by *Henderson, J.*, declared that "Lands covered by navigable waters are not subject to entry under the entry law of 1777, not by any express prohibition in that act, but being necessary for public purposes as common highways for the convenience of all, they are fairly presumed not to have been within the intention of the Legislature."

But in the Revised Statutes of North Carolina (1836), Chap. 42, entitled "An act concerning entries and grants of land," the Legislature provided, in Section 1, "That all vacant and unappropriated lands belonging to this State shall be subject to entry in the manner herein pro-

vided except in the cases hereinafter mentioned . . ." (not pertinent here), but omitted any reference to the provisions of the Act of 1777.

And thereafter the Legislature at its 1846-47 session passed an act, Laws of 1846-47, Chapter 36, in which it is declared "That it shall not be lawful to enter any land covered by any navigable sound, river or creek; and that entries of land lying on any navigable water, shall be surveyed in such manner, that the water form one side of the survey, and the land be laid off back from the water."

And the Legislature, at its 1854-55 session enacted a statute, Chapter 18, Section 1, that "all vacant and unappropriated lands, belonging to the State, shall be subject to entry by any citizen thereof, in the manner hereinafter provided, except: (1) Lands covered by navigable water, and others not here pertinent. This last statute has been re-enacted in The Code as Section 2751; Revisal 1693, C.S. 7540, now G.S. 146-1.

And in *Hatfield v. Grimsted, supra,* an appeal from Currituck County, at Spring Term, 1846, and involving two grants, dated in 1839, located so as to take in a small quantity of the marshes at the banks, and then run out with the channel about 1½ miles into the Sound, the trial court held that the Sound was not the subject of entry. This Court, in opinion by *Ruffin, C. J.,* wrote as follows: "His Honor probably founded his opinion that the grants to the plaintiff were void upon Laws 1715, Rev. Code 6, Sec. 3, and of 1777, Ch. 114, Sec. 10, which directed how land lying on a navigable water should be entered and surveyed, not adverting to the circumstance that those provisions were not in force in 1839, when the grants were issued. Whether the *locus in quo* would have been the subject of entry or not, under those acts, it is not material to inquire; for the Revised Statutes, Ch. 42, omits the acts under consideration, and so left the matter at common law. Now, at common law this land could clearly be granted by the sovereign, for this case does not state any regular flood and ebb of the tide in Currituck Sound since the closing of the inlet. The omission in the act of 1836 has been supplied by an act at the late session of the Assembly which re-enacts those parts of the acts of 1715 and 1777; but while they were dormant, and the common law alone in force, the grants to the plaintiff were valid."

And in *Ward v. Willis,* 51 N.C. 183, involving boundaries of the town of Beaufort as contained in its charter, *Ruffin, J.,* adverting to the above statutes, and cases, had this to say: "The Acts of 1715 and 1777, in regulating entries and surveys on which to found a grant, provided that land lying on any navigable water should be surveyed so that the water should form one side of the survey, whether the water was the sea or a bay, creek or river. In *Tatum v. Sawyer, supra, Judge Henderson* intimated that those provisions could not be considered as prohibiting the entry of land covered by navigable waters, but said, nevertheless, that it

was not subject to entry, because, being necessary for public purposes as common highways, it was to be presumed not to have been within the intention. It happened, however, that in the revisal of 1836 those parts of the previous acts were omitted, and therefore the Court felt bound to hold in *Hatfield v. Grimsted,* 29 N.C. 139, that entries of land in Currituck Sound were good, after it ceased to have a tide or be navigable by reason of the closing of the inlet, or rather of such parts of the sound as were frequently not covered by water."

In the light of these decisions we are constrained to hold that the provisions of the Revised Statutes (1836), Chapter 42, Sec. 1, did not have the effect of abrogating, or repealing the common law rule that navigable waters were then *publici juris,* and hence not subject to entry and grant.

The answer to the second question: "If the plaintiff is not the owner of all the land described in paragraph 2 of the agreed statement of facts, is it the owner of that portion of said land which is described in paragraph 11 of the agreed statement of facts?" is found in the fact that that portion of the *locus in quo,* described in paragraph 11 is covered by navigable waters, and is not swamp lands within the meaning of G.S. 146-4. Hence, the North Carolina Board of Education was not vested with authority to convey it. The cases relied upon by appellees are distinguishable in factual situation.

The judgment below is

Reversed.

IN THE MATTER OF: GUARDIANSHIP OF JAMES BRYANT HALL, INFANT; BEATRICE HIATT FAGAN AND HUSBAND, LEO FRANK FAGAN, AND LACY BRYANT HALL, SR., RESPONDENT.

(Filed 11 June, 1952.)

1. Appeal and Error § 6c (2)—

An exception to the judgment or the signing of the judgment presents for decision the sole question whether the facts found support the judgment.

2. Guardian and Ward § 3—

The clerk of the Superior Court in the county in which an infant resides has jurisdiction to appoint a guardian for such infant. G.S. 33-1.

3. Domicile § 3—

An unemancipated infant cannot select or change his domicile.

4. Same—

A legitimate child at birth takes the domicile of its father, and its domicile so continues after the death of its father until its domicile is legally

changed. As to whether its surviving mother upon remarriage may change the domicile of the child by changing her own domicile, *quaere?* G.S. 33-3.

5. Same—

Where the mother and father of an infant both die and its paternal grandfather takes the child to his home and actually stands *in loco parentis*, such grandfather is the natural guardian, and his domicile determines that of the child.

6. Domicile § 2—

As a general rule, an adult student does not acquire a legal domicile at the educational institution where he resides with the ultimate intention of returning to his home.

7. Guardian and Ward § 3: Domicile § 3—Domicile of natural guardian of orphan is its domicile.

The parents and grandparents of the child in question resided in Alamance County. Upon the death of the child's father the child and its mother resided with the child's paternal grandparents. The mother of the child later remarried. Upon the death of its mother the child was taken to the home of its paternal grandparents in Alamance County and resided with them. *Held:* Irrespective of any change in residence by the child's mother during the period of her second marriage, upon her death the domicile of its grandfather became the child's domicile, and the clerk of the Superior Court of Alamance County had jurisdiction to appoint such grandfather the guardian of the person of the child. Later order of such clerk striking out the appointment for want of jurisdiction was erroneous, and order of the clerk of another county appointing the child's maternal aunt its guardian is void.

8. Same—

There may be separate appointments of guardian of the person and of the estate of an orphan. G.S. 33-6.

APPEAL by Beatrice Hiatt Fagan and husband, Leo Frank Fagan, from *Carr, Resident Judge,* in Chambers, 2 April, 1952, ALAMANCE.

Proceedings before Clerks of Superior Court of Alamance County, and of Orange County, respectively, relating to guardianship of the person of James Bryant Hall, Infant, heard by the Honorable Leo Carr, Resident Judge of the Tenth Judicial District, upon appeals from the respective orders of said Clerks.

The record discloses these uncontroverted facts:

I. James Bryant Hall was born 25 March, 1944, of the marriage of Lacy Bryant Hall, Jr., and his wife Katherine Louise Hiatt Hall. His father, Lacy Bryant Hall, Jr., resident of Alamance County, North Carolina, was killed on or about 2 September, 1944, while in the Armed Forces of the United States during World War II. Thereafter on 12 April, 1947, his mother, Katherine Louise Hiatt Hall, married Robert Leon Kirkland. She died on 15 June, 1951.

II. Thereafter on 16 July, 1951, Lacy Bryant Hall, Sr., paternal grandfather of James Bryant Hall, and with whom he was then residing in Alamance County, North Carolina, applied to the Clerk of Superior Court of said county for appointment, and was appointed, as guardian of the person of James Bryant Hall.

III. On 25 October, 1951, Beatrice Hiatt Fagan, maternal aunt of James Bryant Hall, and her husband, Leo Frank Fagan, residents of Guilford County, North Carolina, applied to the Clerk of Superior Court of Orange County, North Carolina, for appointment of them as guardians of the person of James Bryant Hall. In respect to this application, Lacy Bryant Hall, Sr., and his wife appeared, and moved for its dismissal for lack of jurisdiction in the Clerk of Superior Court of Orange County in the premises. Nevertheless, the application was granted by the Assistant Clerk, and in accordance therewith an order was entered by him on 28 November, 1951.

To this order Lacy Bryant Hall, Sr., and his wife excepted, and appealed to the Superior Court.

IV. Thereafter, and pending the said appeal, by petition sworn to 5 February, 1952, Beatrice Hiatt Fagan and Leo Frank Fagan petitioned the Clerk of Superior Court of Alamance County, and moved that the order of 16 July, 1951, appointing Lacy Bryant Hall, Sr., as guardian of the person of James Bryant Hall, be vacated and declared void, upon the ground that the Clerk of Superior Court of Alamance County had no jurisdiction in the matter. Lacy Bryant Hall, Sr., appeared and resisted the motion. However, the Clerk entered an order on 11 February, 1952, vacating and declaring void his order of 16 July, 1951. Lacy Bryant Hall, Sr., objected thereto and appealed to Superior Court.

V. These appeals, as above set forth, that is, (1) from the order dated 28 November, 1951, entered by the Assistant Clerk of Superior Court of Orange County, and (2) from the order, dated 11 February, 1952, entered by the Clerk of Superior Court of Alamance County, came on for hearing before the Resident Judge of the Tenth Judicial District, and by consent of the parties the appeals were consolidated for hearing, and were heard on 16 February, 1952, at the courthouse in Graham, North Carolina, when and where Lacy Bryant Hall, Sr., was present with his counsel, and Beatrice Hiatt Fagan and husband, Leo Frank Fagan, were present with their counsel, and "upon the pleadings, the admission of the parties, and the evidence introduced at the hearing," the court found facts, in addition to those uncontroverted as above stated, substantially these:

1. Lacy Bryant Hall, Jr., father of James Bryant Hall, was a resident of Alamance County, North Carolina, all of his life and enlisted in the Armed Forces of the United States from said county; that the parents of Lacy Bryant Hall, Jr., have been residents of said county for many years;

that Katherine Hiatt Hall, mother of James Bryant Hall, before her marriage to Lacy Bryant Hall, Jr., and at the time of his death, was a resident of Alamance County, and her parents were residents of said county, and that after the death of Lacy Bryant Hall, Jr., his wife, Katherine Hiatt Hall and her child, James Bryant Hall, resided with the parents of Lacy Bryant Hall, Jr., to wit: Lacy Bryant Hall, Sr., and wife, until Katherine Hiatt Hall remarried.

2. That after the marriage of Katherine Hiatt Hall and Robert Leon Kirkland, 12 April, 1947, they resided in Alamance County until the fall of 1947, when they moved to Durham County where Kirkland engaged in a business enterprise, and they resided there until shortly after Christmas, 1949; that the Kirklands then moved to Chapel Hill, Orange County, for the purpose of permitting Kirkland to matriculate as a student at the University of North Carolina, and he registered as such student, and this was his only purpose for living in Chapel Hill, and they lived there until June, 1951; that he and she voted in Durham County in the primary election of 1950; that on 25 October, 1950, by and with their consent, the Security National Bank of Greensboro, Guilford County, North Carolina, was appointed by Clerk of Superior Court of Orange County as guardian of the property of James Bryant Hall; that they, the Kirklands, voted in Durham County in the general election in November, 1950; that in January, 1951, they listed for taxation in Orange County such personal property as he had in Chapel Hill; and that James Bryant Hall resided with his mother and step-father from date of their marriage until her death.

3. That shortly after the death of Katherine Hiatt Hall Kirkland, 15 June, 1951, James Bryant Hall was taken to the home of his aunt, Beatrice Hiatt Fagan and her husband, Leo Frank Fagan, in Greensboro, Guilford County, and, within a few days, was taken by them to the home of his grandparents, Lacy Bryant Hall, Sr., and his wife, in Burlington, Alamance County; and that there was some discussion as to where he should reside,—Beatrice Hiatt Fagan indicating a desire that he stay with his grandparents during the summertime and reside with her in the wintertime,—that such was the request of his mother, and the grandfather stating that there should be some definite policy adopted in respect to the residence of the child—that his son Lacy Bryant Hall, Jr., had requested that if anything happened to him he would expect his father to look after his child.

4. That when Lacy Bryant Hall, Sr., was appointed guardian 16 July, 1951, as above stated, by Clerk of Superior Court of Alamance County, James Bryant Hall was in the home of his grandparents, Lacy Bryant Hall, Sr., and wife in Alamance County; that he was living with his grandfather on 28 November, 1951, when Beatrice Hiatt Fagan and her

husband, Leo Frank Fagan, applied to and were appointed guardians of him by order of Assistant Clerk of Superior Court of Orange County; and that at that time the order of the Clerk of Superior Court of Alamance County appointing Lacy Bryant Hall, Sr., guardian, as above stated, was in full force and effect and he was acting as such guardian.

5. That at the time the orders of Clerk of Superior Court of Alamance County, and the order of Assistant Clerk of Superior Court of Orange County were entered the grandparents of James Bryant Hall were his next of kin; that his paternal grandparents were residents of Alamance County, as was his maternal grandfather,—his only maternal grandparent; that the maternal grandfather was not then, and is not now, in position to give the child a satisfactory and comfortable home; that if the child lives with any of his maternal relatives it will be necessary for him to live with one of his aunts, Mrs. Beatrice Hiatt Fagan, in Greensboro, whose home is a fit and proper place in which the child can reside; and that his paternal grandparents, Lacy Bryant Hall, Sr., and his wife have a comfortable home in Burlington, Alamance County, wherein the child can reside, and it is for his best interest that he remain in the care and custody of his paternal grandparents the greater part of the time.

6. That the child, James Bryant Hall, has an estate that comes in the form of government benefits paid to him by reason of the fact that his father was killed in the military service of the United States, and it is held by the Security National Bank of Greensboro, Guilford County, N. C., under the order of Clerk of Superior Court of Orange County, appointing it as guardian of his estate.

Upon the foregoing facts, the court, being of opinion that the Clerk of Superior Court of Alamance County had jurisdiction to enter the order of 16 July, 1951, appointing the grandfather, Lacy Bryant Hall, Sr., guardian of the person of James Bryant Hall, and that said order should remain in full force and effect, ordered and adjudged that the order of the Clerk of Superior Court of Alamance County, bearing date 11 February, 1952, vacating his order of 16 July, 1951, be declared null and void; that the order of the Assistant Clerk of Superior Court of Orange County appointing Beatrice Hiatt Fagan and husband, Leo Frank Fagan, guardians of the person of James Bryant Hall, bearing date 28 November, 1951, be declared null and void; and that the order of the Clerk of Superior Court of Alamance County, bearing date 16 July, 1951, appointing Lacy Bryant Hall, Sr., guardian of the person of James Bryant Hall be declared valid and in full force and effect, and that Lacy Bryant Hall, Sr., be and he is adjudged to be the lawful guardian of the person of the infant James Bryant Hall.

"Appeal Entries: To the entry of the foregoing judgment, Beatrice Hiatt Fagan and husband, Leo Frank Fagan, object, and move that the same be set aside. Motion denied, and said parties except.

"To the foregoing judgment Beatrice Hiatt Fagan and husband, Leo Frank Fagan, except and give notice of appeal therefrom to the Supreme Court . . ." Pursuant thereto appeal is perfected, and error is assigned.

Falk, Carruthers & Roth for petitioners, appellants.
Barnie P. Jones for respondent, appellee.

WINBORNE, J. Exceptions to the judgment, and to the entry of it, assigned as error on this appeal, present for decision one question: Do the facts found by the judge below support the judgment? *Culbreth v. Britt Corp.*, 231 N.C. 76, 56 S.E. 2d 15, and cases there cited. See also *Duke v. Campbell*, 233 N.C. 262, 63 S.E. 2d 555, and cases cited.

While a similar factual situation does not seem to have been presented to this Court, we hold that in the light of pertinent statutes and decisions of this and other courts, and of general principles of law applicable thereto, the facts found by the judge do support the judgment, and that error is not made to appear.

Provision is made by statute in this State for the appointment of guardians for infants, and the clerks of Superior Courts within their respective counties have full power to appoint guardians in all cases of infants who reside in such county. G.S. 33-1. And the word "reside" as used in the statute relating to the appointment of guardians has been construed to mean the domicile of the infant. 25 Am. Jur. p. 22, Guardian and Ward, Sec. 25. 39 C.J.S. p. 21, Guardian and Ward, Sec. 10. Compare *Roanoke Rapids v. Patterson*, 184 N.C. 135, 113 S.E. 603; *Thayer v. Thayer*, 187 N.C. 573, 122 S.E. 307; *Owens v. Chaplin*, 228 N.C. 705, 47 S.E. 2d 12.

On the subject of Domicil, The Conflict of Laws, by Joseph H. Beale, Vol. 1, Chapter 2, declares that every person must have a domicile of origin; that this domicile comes into being as soon as the child becomes at birth an independent person; that this domicile is retained until it is changed in accordance with law; and that there can be no change of domicile without an intention to acquire the new dwelling as a home, or as it is often phrased, without *animus manendi*. Hence "an unemancipated infant, being *sui non juris*, cannot of his own volition select, acquire, or change his domicile." *Thayer v. Thayer, supra; Duke v. Johnston*, 211 N.C. 171, 189 S.E. 504; *In re Blalock*, 233 N.C. 493, 64 S.E. 2d 848; *Allman v. Register*, 233 N.C. 531, 64 S.E. 2d 861.

The father is the natural guardian of his child. *In re TenHoopen*, 202 N.C. 223, 162 S.E. 619. And a legitimate child, whose father is alive, takes at birth, and continues during minority, the domicile of his father, —following it as it changes. Upon the death of the father his domicile at death continues to be the domicile of his minor child until the domicile

of such child is legally changed. Beale on The Conflict of Laws, Vol. 1, pp. 210 and 217. Domicil Secs. 30.1 and 36.2. *Thayer v. Thayer, supra.*

Moreover, in this State it is provided by statute, G.S. 33-3, that in case of the death of the father of an infant, the mother of such child, surviving the father, immediately becomes "the natural guardian of the child to the same extent and in the same manner, plight and condition as the father would be if living"; and that "the mother in such case shall have all the powers, rights and privileges, and be subject to all the duties and obligations of a natural guardian," but that "this shall not be construed as abridging the powers of the courts over minors and their estates and over the appointment of guardians."

And the text writers say that on the death of the father, the domicile of an infant follows that of its mother during her widowhood, and ordinarily may be changed by the mother in changing her own. It is also held that the domicile of an infant will not follow that of its mother after her remarriage, since by remarrying her domicile is again fixed by that of her husband. And "there is, however, authority to the effect that a widow does not, by remarrying, lose her power to change the domicile of her children by a former marriage," and that "she may change their domicile in the same manner as she might have done prior to her remarriage." 17 Am. Jur. 625-628. Domicil Sections 57, 62, 63. But see *Lamar v. Micou* (1884), 112 U.S. 452, 5 S. Ct. 221, 28 L. Ed. 751, rehearing denied, 114 U.S. 218, 5 S. Ct. 857, 29 L. Ed. 94.

In this case, *Lamar v. Micou,* this headnote epitomizes the opinion of the Court: "The widow of a citizen of one State does not, by remarrying again and taking the infant children of the first husband from that State to live with her at the home of the second husband in another State, change the domicile of the children."

However, the authorities seem to be agreed that on the death of both parents the domicile last derived from the parents, or either of them, continues to be the domicile of the infant, during minority, until it is legally changed. But that a guardian by nature may change the domicile of such infant. And within this rule, a grandfather or grandmother, when next of kin, is a guardian by nature, who may change the infant's domicile after the parents' death; and that "by taking up his residence with his grandfather, or, if the grandfather is dead, with his grandmother, the orphan may in that way acquire the domicile of the grandparent." In Beale on Conflict of Laws, Vol. 1, p. 222 Domicil Sec. 39.1, it is held that "When both parents of a minor child are dead, and no legal guardian of the person has been appointed, the grandparent, who takes the child to his home and actually stands *in loco parentis* to the child becomes the natural guardian, and the domicile of the grandparent thereupon becomes the domicile of the child . . ."

However, "it would seem that the doctrine of natural guardianship has never been extended to uncle or aunt when they stand as next of kin to the minor." 17 Am. Jur., 627, Domicil Sec. 64. See also *Lamar v. Micou, supra.*

Indeed, on the rehearing of the case, *Lamar v. Micou,* the opinion of the Court expressed in this headnote is pertinent to case in hand: "Infants having domicile in one State, who after the death of both parents take up their residence at the home of their paternal grandmother and next of kin in another State, acquire her domicile."

Furthermore, in the case of *In re Martin,* 185 N.C. 472, 117 S.E. 561, this Court in opinion by *Stacy, J.,* said: Domicile is a question of fact and intention. Hence to effect a change of domicile there must be an actual abandonment of the first domicile, coupled with an intention not to return to it, and there must be a new domicile acquired by actual residence at another place, or within another jurisdiction, coupled with an intention of making the last acquired residence a permanent home." See cases there cited. Also, *In re Finlayson,* 206 N.C. 362, 173 S.E. 902; *Owens v. Chaplin, supra.*

And, in keeping with this principle, and as a general rule, a student, although an adult, does not acquire a legal domicile at an educational institution where he resides with the ultimate intention of returning to his original home. 28 C.J.S. p. 28, Domicile 12 (g) 3.

In the light of these principles, and of the findings of fact that both parents of the infant James Bryant Hall are dead, that his grandparents, paternal and maternal, next of kin to him, reside in Alamance County, and that after the death of his mother, the father having predeceased her, he was taken to the home of his paternal grandparents in Alamance County, and resided with them, we hold that regardless of what theretofore may have been his domicile, such grandfather became, and is, his guardian by nature, and the domicile of his grandfather then became his domicile. Hence, the Clerk of Superior Court of Alamance County had jurisdiction of him at time the order of 16 July, 1951, appointing Lacy Bryant Hall, Sr., as his guardian was made. Therefore, the rulings of the judge below legally follow.

And it may be noted that it is provided by statute G.S. 33-6 that there may be separate appointments of guardian for the person and for the estate of an orphan.

The judgment below is

Affirmed.

FRED C. HILL v. CAROLINA FREIGHT CARRIERS CORPORATION.

(Filed 11 June, 1952.)

1. Courts § 15—

In an action instituted in this State to recover damages resulting from a collision which occurred in another state, the substantive law of such other state controls.

2. Carriers § 5: Master and Servant § 4a: Automobiles § 24b—

Under a "trip lease agreement" for the operation of a vehicle under the franchise and license plates of lessee in fulfillment of lessee's contracts for transportation of freight in interstate commerce, *held* in those instances in which the lessor owner elects to drive the vehicle himself, he is an employee of the franchise carrier in regard to the consignor, the consignee, and third parties generally, and also in regard to the franchise carrier as far as his personal operation of the vehicle is concerned, but in regard to damage to his vehicle he is a bailor operating under a contract which makes him an independent contractor.

3. Automobiles § 24b: Master and Servant § 19—

In an action by the owner-lessor of a vehicle under a "trip lease agreement" in interstate commerce to recover for damages to his vehicle from a collision caused by the negligence of the driver of another vehicle of the franchise carrier, *held* the fellow servant doctrine has no application and cannot constitute a defense.

4. Same: Carriers § 5: Indemnity § 2a—

A provision in a "trip lease agreement" of a vehicle for a trip in interstate commerce that lessor-owner should assume all loss through fire, theft, and collision to his vehicle, *held* no defense to an action by the lessor-owner to recover for damages to the vehicle caused by the negligence of an employee operating another vehicle of the franchise carrier.

5. Indemnity § 2a: Contracts § 7e—

A contract indemnifying a party for damage to property caused by negligence will be strictly construed, and will not indemnify him for damages caused by his own negligence or the negligence of his employees unless the language of the contract clearly indicates that the parties so intended, taking into consideration the circumstances surrounding the parties and the object in view which induced them to make the agreement.

6. Contracts § 7e—

Contracts which seek to exculpate one of the parties from liability for his own negligence are not favored by the law, and will be strictly construed against the party asserting it.

7. Same—

A common carrier cannot contract against its own negligence in the regular course of its business or in performing one of its duties of public service, and therefore provision in a "trip lease agreement" that lessee, a franchise carrier in interstate commerce, should not be liable for damage resulting to the vehicle through negligence cannot exculpate the carrier

from liability for such damage if caused by negligence of itself or one of its employees while transporting goods in interstate commerce.

APPEAL by plaintiff from *Nettles, J.*, February Term, 1952, STANLY. Reversed.

Civil action to recover compensation for damages to an automotive tractor heard on motion for judgment on the pleadings.

Defendant is a common carrier of merchandise in interstate commerce under an I.C.C. franchise. It conducts a part of its business under trip-lease contracts with individual owners of tractors and trailers. On 12 February, 1951, plaintiff entered into a contract with defendant under the terms of which he leased an automotive tractor owned by him to defendant. The contract contained the usual trip-lease contract provisions giving defendant control of the vehicle and its operation while used in transporting merchandise for defendant in conformity with the requirements of the I.C.C. In particular it contained a provision as follows: "The party of the second part will bear the expense of all losses thru fire, theft & collision to said motor vehicle and Carolina Freight Carriers Corp. is not responsible for any of the above said losses."

On the night of 24 February 1951, plaintiff was operating his tractor, to which was attached a trailer belonging to defendant, in a northerly direction on U. S. Highway 25 in the State of Georgia on a trip under his said contract. One Brown was at the same time operating a tractor leased by defendant from its owner. A trailer belonging to defendant was attached. Brown was at the time on a trip for defendant under a trip-lease contract. A third party was also operating a tractor-trailer for defendant along with the other two.

Plaintiff alleges that Brown was traveling to his rear; that as he (plaintiff) approached and was rounding a curve, Brown undertook to pass him at a time when an oncoming vehicle rendered it impossible to pass in safety; and that Brown drove his vehicle into and against plaintiff's tractor, thereby forcing plaintiff off the road and inflicting substantial damage to his tractor. He also pleads special damages caused by the loss of the use of his tractor. Negligence is sufficiently alleged.

The defendant, answering, admits the allegations in respect to the ownership and operation of the two tractor-trailers, denies the allegations of negligence and pleads as affirmative defenses (1) that plaintiff and Brown were fellow servants, and (2) plaintiff by his contract assumed all responsibility for damages to his tractor caused by negligence and expressly agreed that defendant should not be responsible therefor.

At the February Term, 1952, Stanly County Superior Court, defendant moved for judgment on the pleadings. The motion was allowed and judgment was entered dismissing the action. Plaintiff excepted and appealed.

D. A. Rendleman and Morton & Williams for plaintiff appellant.
Don A. Walser for defendant appellee.

BARNHILL, J. Defendant asserts two affirmative defenses, either one of which, if well founded, would, on the facts admitted in the pleadings, bar plaintiff's right to recover. This is true unless, as contended by plaintiff, the master is not protected under the fellow servant doctrine against liability for damages to the personal property of his servant caused by the negligent act of a fellow servant committed in the course, and in the furtherance, of his master's business. This necessitates a discussion of both defenses to the end that we may answer the two questions posed for decision: (1) Were the plaintiff and Brown, the operator of the truck which collided wtih plaintiff's tractor, fellow servants; and (2) does the trip-lease contract between plaintiff and defendant, fairly and correctly construed, exculpate defendant from liability for damages proximately caused by one of its employees while about his master's business?

The mishap out of which this action arose occurred in Georgia. Hence plaintiff seeks to enforce in the courts of this State a cause of action which arose in that State. His right of action depends upon and is controlled by the substantive law of that State.

In Georgia the fellow servant doctrine has been reduced to statutory form. Georgia Code of 1933, sec. 66-304, provides: "Except in case of railroad companies, the master shall not be liable to one servant for injuries arising from the negligence or misconduct of other servants about the same business."

In interpreting and applying this statute, the Supreme Court of Georgia has expressly rejected the consociation or departmental limitation now engrafted on the doctrine by modern decisions and apparently adheres to the general rule as originally formulated. *Georgia Coal & Iron Co. v. Bradford,* 62 S.E. 193 (Ga.); *Holliday v. Transp. Co.,* 132 S.E. 210 (Ga.). Therefore, we may concede, without deciding, that plaintiff, as operator of his tractor, and Brown were coemployees and, being coemployees, were fellow servants.

The Georgia Code, sec. 66-302, further provides that: "All contracts between master and servant, made in consideration of employment, whereby the master is exempted from liability to the servant arising from the negligence of the master or his servants, as such liability is fixed by law, shall be null and void, as against public policy."

So then, if plaintiff and Brown were fellow servants, the exculpatory provisions in the contract are void and unenforceable.

Thus it becomes essential to determine whether plaintiff's cause of action and the rights he now asserts arose out of the master-servant relation.

The contract between plaintiff and defendant is of a hybrid nature. It is labeled "A TRIP LEASE AGREEMENT." In form, in part at least, it purports to create a bailment for hire. The lessor is to "deliver" the leased vehicle to the lessee who "is to have exclusive possession and control" for operation under his exclusive supervision. As actually performed by the parties in accord with some of its other terms, the leased vehicle remained in the custody of the lessor or owner and was to be operated by him or by one of his own choosing, on a point-to-point trip, for a stipulated consideration. The plaintiff was to make "deliveries and pick-ups according to CFCC dispatchers instructions from trip to trip." He determined the number of helpers to be employed, he assumed responsibility for overloads, improper tags, the actual operation as to speed and the like, losses from fire, theft, or collision, and he was to be paid a per-trip stipend for the use of his vehicle and driver.

Hence, as between the plaintiff and the defendant, purely in respect to their mutual contractual rights and liabilities, one to the other, the owner of the vehicle occupied the position of independent contractor. *Hayes v. Elon College,* 224 N.C. 11, 29 S.E. 2d 137; *Bass v. Wholesale Corp.,* 212 N.C. 252, 193 S.E. 1; *Hudson v. Oil Co.,* 215 N.C. 422, 2 S.E. 2d 26; *Beach v. McLean,* 219 N.C. 521, 14 S.E. 2d 515; *U. S. v. Trucking Co.,* 141 F. 2d 655.

On the other hand, the vehicle was to be operated in interstate commerce in furtherance of the business of the lessee as a franchise carrier of freight. It was to be operated under the franchise and license plates of the lessee in fulfillment of its contracts for transportation of freight in interstate commerce. Therefore, the person who actually operated the vehicle (whether the owner or a third party hired by him) was, as between the franchise carrier and the consignor, the consignee, and third parties generally, a servant or employee of the defendant. This is true in fact for he transported cargoes in behalf of the franchise carrier and dealt with the consignors, consignees, and the public generally as agent of the franchise carrier. Furthermore, public policy requires it to be so held.

As plaintiff elected to operate his own tractor, he was, as operator, a servant of defendant. *Brown v. Truck Lines,* 227 N.C. 299, 42 S.E. 2d 71; *Roth v. McCord,* 232 N.C. 678, 62 S.E. 2d 64; *Greyvan Lines v. Harrison,* 156 F. 2d 412, affd. 331 U.S. 704, 91 L. Ed. 1757.

That is to say, the relation of independent contractor was created by the contract. The master-servant relation arose when plaintiff—in lieu of employing someone else—undertook to operate the tractor-trailer for defendant in fulfillment of his contract. One is entirely dependent upon, and the other is entirely independent of, the contract.

The plaintiff's cause of action did not arise out of and does not rest upon the master-servant relation created when he became the operator of

the tractor he had "let" to defendant. He sues as owner of the tractor. In respect to this action he is in the same position he would have been had he employed some third party to operate the vehicle. Had he employed someone else to operate the tractor, it could not then have been said that he was an employee of defendant. He would have been nothing more than a bailor operating under a contract which made him an independent contractor. For the purpose of determining the relative rights and liabilities of the parties involved in this litigation, that is his status in this action.

It follows that the fellow servant doctrine has no application here and constitutes no valid defense to plaintiff's action.

Brown, as operator of the vehicle which collided with plaintiff's tractor, was an employee of defendant. *Brown v. Truck Lines, supra; Roth v. McCord, supra.* Conceding that his negligence proximately caused the damages to the tractor for which plaintiff seeks to recover, does the provision in the contract that plaintiff "will bear . . . all losses thru . . . collision to said motor vehicle" exculpate defendant and relieve him of all liability therefor?

The question must be answered in the negative for two reasons: (1) the language used does not clearly indicate that the parties so intended; and (2) if the parties so intended it would be contrary to established public policy to permit a common carrier to contract against liability for damages caused by the negligence of its own employees while engaged in operating its vehicles used in interstate commerce.

In evaluating the force and effect of the contract provision, it is essential that we take into consideration the circumstances surrounding the parties and the object in view which induced the making of it. *Slocumb v. R. R.*, 165 N.C. 338, 81 S.E. 335; *Terminal R. Asso. v. Ralston-Purina Co.*, 180 S.W. 2d 693; *Elevator Co. v. Building Corp.*, 63 N.E. 2d 411, affd. 70 N.E. 2d 604; Anno. 175 A.L.R. 30.

The motivating reason why the parties stipulated that the owner should bear all damages caused by collision would seem to be clear. While "exclusive supervision and control" of the vehicle was vested in the defendant for the purpose of meeting the requirements of the I.C.C., actual possession or custody thereof was retained by plaintiff. It was to be operated by one of his choosing and in the selection of whom defendant had no part. Immediate control and supervision as to speed, manner of operation, hours of work, and the like necessarily remained with plaintiff. The tractor was to be operated on the public highways in interstate commerce where want of due care on the part of the operator selected by plaintiff or of some third party motorist might well produce damage to the vehicle. But this does not warrant the conclusion the parties intended

that plaintiff should assume responsibility for damages to the vehicle resulting from the negligence of defendant or its employees.

Contracts which seek to exculpate one of the parties from liability for his own negligence are not favored by the law. *Gulf Compress Co. v. Harrington,* 119 S.W. 249; *Warehouse Co. v. Munger,* 77 P. 5. Hence it is a universal rule that such exculpatory clause is strictly construed against the party asserting it. *Luedeke v. R. Co.,* 231 N.W. 695, 71 A.L.R. 912; *Crew v. Bradstreet Co.,* 19 A. 500. It will never be so construed as to exempt the indemnitee from liability for his own negligence or the negligence of his employees in the absence of explicit language clearly indicating that such was the intent of the parties. *Fisk Tire Co. v. Hood Coach Lines,* 188 S.E. 57 (Ga.); *Griffiths v. Broderick,* 182 P. 2d 18, 175 A.L.R. 1; Anno. 175 A.L.R. 30; *Elevator Co. v. Building Corp., supra; Gross v. General Inv. Co.,* 259 N.W. 557; *Thompson-Starrett Co. v. Otis Elevator Co.,* 2 N.E. 2d 35; *Perry v. Payne,* 66 A. 553, 11 L.R.A. N.S. 1173, Anno. 11 L.R.A. N.S. 1174; *Schwartz v. Constr. Corp.,* 48 N.E. 2d 299; 38 A.J. 649, sec. 8; 42 C.J.S. 583.

The language used in the contract does not explicitly exempt defendant from liability for damages to the tractor proximately caused by the negligence of one of its employees. Strictly construed it will not permit—indeed it repels—the conclusion the parties so intended.

In view of our interpretation of the language used, it is needless for us to discuss at length the invalidity of the provision for that it is contrary to public policy. Suffice it to say that defendant is a common carrier, and a public service corporation cannot contract against its own negligence in the regular course of its business or in performing one of its duties of public service. *Insurance Asso. v. Parker,* 234 N.C. 20; *Slocumb v. R. R., supra; Singleton v. R. R.,* 203 N.C. 462, 166 S.E. 305. A party may not 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. *Insurance Asso. v. Parker, supra;* Anno. 175 A.L.R. 14.

Defendant, as a franchise carrier of freight, operates its tractor-trailers upon the public highways. The law imposes upon it and its employees the positive duty to observe the statutory rules of the road and operate the vehicles at all times with due care and caution. *Martin v. Waltman,* 61 S.E. 2d 214 (Ga.); *Williams v. Henderson,* 230 N.C. 707, 55 S.E. 2d 462. This is a duty against which the defendant may not protect itself by contract, for it is a duty imposed by law for the protection of the public. *Singleton v. R. R., supra; Slocumb v. R. R., supra;* 12 A.J. 683, sec. 183.

It follows that this provision, in any event, is unenforceable as a defense to the plaintiff's cause of action.

For the reasons stated the judgment entered in the court below is Reversed.

TRAVIS HALL v. LUKIE ROGERS HALL, ADMINISTRATRIX OF THE ESTATE OF JAMES EDWARD HALL; LUKIE ROGERS HALL, INDIVIDUALLY, AND THE UNITED STATES FIDELITY & GUARANTY COMPANY.

(Filed 11 June, 1952.)

1. Appeal and Error § 13c—

Certiorari will not lie to bring up matter which was not a part of the record when it was certified to the Supreme Court.

2. Appeal and Error § 10e—

The trial court is without power to settle the case on appeal without notice to the adverse party or after the record has been certified to the Supreme Court.

3. Same—

Where oral evidence has been offered, the trial court is without power to settle the case on appeal by an anticipatory order.

4. Same—

The trial court has no power to settle the case on appeal when oral evidence has been offered until and unless there is a disagreement of counsel. G.S. 1-283.

5. Appeal and Error § 10a—

A "case on appeal" or a "case agreed" is the sole statutory method of vesting the Supreme Court with jurisdiction to review exceptions which point out errors occurring during the progress of a trial in which oral testimony is offered or which challenge the sufficiency of the evidence to support the facts found by the trial court, and unless so presented such exceptions are mere surplusage and are without force and effect and must be treated as a nullity.

6. Appeal and Error § 31b—

Where there is no case on appeal or case agreed, appellee's motion to dismiss must be allowed in respect to all exceptions and assignments of error other than those to the conclusions of law made on the facts found and to the judgment entered, but does not require a dismissal of the appeal, since appellants are entitled to be heard on the exceptions presented by the record proper.

7. Appeal and Error § 6c (2)—

Where there is no case on appeal or case agreed, review is limited to exceptions presented by the record proper and the judgment must be affirmed if it is supported by the findings of fact.

8. Gifts § 1: Husband and Wife § 12a—

Where a man has his deposit in a building and loan association changed upon his marriage from his name to the names of himself or wife, *held*

the effect is to constitute the wife an agent with authority to withdraw the funds during the lifetime of the husband, which agency is revoked by his death, and such change does not constitute a gift *inter vivos* to her.

9. Same: Estates § 16—

Upon his marriage, a husband had his deposit in a building and loan association changed to the names of himself or wife. The fact that he also signed a written subscription for blank shares of stock which when issued were to be held for the account of himself and wife with right of survivorship *held* not to warrant the Supreme Court in overruling the conclusion of law of the trial judge that there was no right of survivorship in the account, there being nothing on the face of the exhibit in conflict with the finding of the court that the subscription agreement was not executed for the purpose of transferring the account into a joint account, and there being no evidence of record that the agreement related to the existing account.

APPEAL by defendants from *Grady, Emergency Judge,* February-March Term, 1951, DURHAM. Judgment signed 20 December 1951 *nunc pro tunc.*

Civil action for an accounting by defendant administratrix.

On 17 June 1945, J. E. Hall and defendant Lukie Rogers Hall intermarried. At that time Hall had on deposit in the Home Building & Loan Association the sum of $2,012.50 plus an accrued dividend of $18.45. On 27 June, 1945, he and his wife went to the office of the Building & Loan Association and had the heading on the ledger sheet showing said deposit changed to read "J. E. Hall, or wife, Lukie R. Hall," and Hall's passbook was changed in the same manner.

While at the Building & Loan Association office, Hall and wife signed a paper writing purporting to be a subscription for ..... optional savings shares for the joint account of the subscribers.

On or about 3 December 1945, Hall deposited an additional $1,400 with the Building & Loan Association which was credited on the ledger sheet in the name of Hall and wife.

On 3 April 1946 Hall died intestate, leaving surviving one son, the plaintiff, and his widow, defendant Lukie Rogers Hall. His widow qualified as administratrix. At that time there was a balance, after deducting withdrawals, in the sum of $3,012.50. This sum was withdrawn by the administratrix and reported in her official inventory with the notation that she claimed it individually. In her final account this sum is listed as a disbursement to the *feme* defendant individually.

Plaintiff instituted this action for an accounting, alleging that all of said Building & Loan Association account money belonged to the estate and should be accounted for and disbursed as an asset of said estate.

When the cause came on for trial, the parties waived trial by jury and submitted evidence, both oral and by way of exhibits, to the judge to find

the facts, state his conclusions of law, and render judgment either in or out of term and district.

The judge, after hearing the evidence, found the facts in detail and made his conclusions of law—five in number. Upon the facts found and conclusions made, judgment was entered 20 December 1951 that plaintiff recover of defendants the sum of $1,119.20 with interest, which sum represents one-half of the net personal estate of *feme* defendant's intestate after deducting all proper disbursements, commissions, and expenses of administration. In arriving at said sum, the court took into consideration the Building & Loan Association account and treated it as an asset of the estate.

Defendants excepted and gave notice of appeal. Thereafter, on 25 April 1952, they filed with the clerk of this Court what purports to be a record on appeal including eleven exceptions to findings of facts and conclusions of law made by the judge for that such findings are either in conflict with the exhibits or are not supported by the evidence. Three additional exceptions are directed to the judgment or parts thereof. No case on appeal has ever been filed in the office of the clerk of the Superior Court or served on plaintiff or his counsel or settled by the parties.

Plaintiff, in due time, appeared and moved to dismiss the appeal for the failure to serve case on appeal and for that the cause is not properly constituted in this Court. The defendants countered by suggesting a diminution of the record and applying for a writ of *certiorari* to bring up a certificate of the trial judge dated 9 May 1952 and filed in the clerk's office 15 May 1952 in which he certifies "that the attached pages 25 through 31 of the mimeographed record in the above-entitled case, plus the attached photostatic copies of Plaintiff's Exhibits A, B, C and D, constitute the exhibits offered by the parties referred to in the appeal entries appearing on page 21 of said mimeographed record."

Claude V. Jones and L. H. Mount for plaintiff appellee.

J. Ira Lee and Jane A. Parker for defendant appellants.

BARNHILL, J. The defendants' petition for *certiorari* is denied. The certificate they seek to have brought up was no part of the record when it was certified to this Court. It was made without notice and the Court was then without jurisdiction to settle the case on appeal, of which the exhibits offered in evidence are or would be an essential part. *Russos v. Bailey,* 228 N.C. 783, 47 S.E. 2d 22.

The judge undertook to settle the case on appeal at the time judgment was signed. When, however, oral evidence is offered, the judge cannot settle the case on appeal by an anticipatory order. Indeed, in such case,

he has no authority to settle the case on appeal until and unless there is a disagreement of counsel. G.S. 1-283; *Russos v. Bailey, supra.*

Exceptions which point out errors occurring during the progress of a trial in which oral testimony is offered or challenge the sufficiency of the evidence to support the facts found can be presented only through a "case on appeal" or "case agreed." This is the sole statutory method of vesting this Court with jurisdiction to hear the appeal. Unless so presented, they are mere surplusage without force or effect and must be treated as a nullity. *Russos v. Bailey, supra; Harney v. Comrs. of McFarlan,* 229 N.C. 71, 47 S.E. 2d 535; *Western North Carolina Conference v. Tally,* 229 N.C. 1, 47 S.E. 2d 467. Hence plaintiff's motion to dismiss must be allowed in respect to the purported evidence and all exceptions and assignments of error appearing in the record, other than the exceptions to the conclusions of law made on the facts found and to the judgment entered.

While the failure to have a case on appeal works an abandonment of all exceptions and assignments of error other than those directed to alleged error appearing on the face of the record proper, it does not require a dismissal of the appeal. *Bell v. Nivens,* 225 N.C. 35, 33 S.E. 2d 66. The defendants are entitled to be heard on their exceptions presented by the record proper "which are cognizable *sua sponte, e.g.,* want of jurisdiction or some patent defect." *Bell v. Nivens, supra,* and cases cited. *Russos v. Bailey, supra.*

"As the record contains no proper statement of case on appeal, we are limited to the question whether there is error in the judgment . . ." *Parker Co. v. Bank,* 200 N.C. 441, 157 S.E. 419; *Casualty Co. v. Green,* 200 N.C. 535, 157 S.E. 797; *Winchester v. Brotherhood of R. R. Trainmen,* 203 N.C. 735, 167 S.E. 49; *Dixon v. Osborne,* 201 N.C. 489, 160 S.E. 579.

The exception to the judgment "presents the single question, whether the facts found and admitted are sufficient to support the judgment, that is, whether the court correctly applied the law to the facts found. It is insufficient to bring up for review the findings of fact or the evidence upon which they are based." *Roach v. Pritchett,* 228 N.C. 747, 47 S.E. 2d 20; *Russos v. Bailey, supra; Western North Carolina Conference v. Tally, supra; Bond v. Bond, post,* 754.

The court below correctly concluded that the change of the name on the ledger sheet and passbook from "J. E. Hall" to "J. E. Hall, or wife, Mrs. Lukie R. Hall" had the effect only of constituting said Lukie R. Hall agent with authority to withdraw said funds during the lifetime of J. E. Hall, and that said power of attorney or agency was revoked upon the death of J. E. Hall. *Jones v. Fullbright,* 197 N.C. 274, 148 S.E. 229; *Nannie v. Pollard,* 205 N.C. 362, 171 S.E. 341; *Redmond v. Farthing,* 217 N.C. 678, 9 S.E. 2d 405.

"To make a gift of a bank deposit there must be not only an intention to give but a delivery and loss of dominion of the property given, 30 C.J. 701, sec. 297. The title to the deposit remained in the husband; hence the only right the wife had to draw out the money was by virtue of the authority conferred upon her by her husband, she acting as agent; and her power as agent was revoked by the death of her husband. 3 R.C.L. 579; *Jones v. Fullbright,* 197 N.C. 274." *Nannie v. Pollard, supra.*

What purports to be Exhibit K, offered in evidence at the hearing, appears in the record. It has no proper place in the record and is not before us for consideration. However, it is upon this exhibit the defendants primarily rely. For that reason we may note that on its face it makes no reference to the savings account Hall then had with the Building & Loan Association. It is a written subscription for ..... optional shares which, when issued, are to be held for the account of J. E. Hall or wife, Lukie R. Hall as joint tenants "with right of survivorship and not as tenants in common" with the right in either to pledge the shares as collateral.

In this connection the court made the following findings: "That although the signature card or card referred to as Plaintiff's Exhibit K, which was signed by J. E. Hall and Lukie R. Hall on June 27, 1945, contains the language 'We hereby subscribe for ..... optional Savings Shares . . .' the fact is that no shares of stock were actually subscribed for and no shares of stock were issued by the Home Building and Loan Association, and the amount of the deposit in said account at that time remained in said account until it was later withdrawn as hereinafter found to be the fact . . . There is no evidence before the Court that James Edward Hall made any statement to the effect that he was giving the said savings account or any part thereof to Lukie Rogers Hall and there is no written instrument offered in evidence signed by the said James Edward Hall by which the said savings account was given to the said Lukie Rogers Hall, the only thing in writing being the signature card marked Plaintiff's Exhibit K, which the Court is of the opinion and concludes falls short of a gift of the account or an agreement between James E. Hall and his wife, Lukie Rogers Hall, as to the disposition of said fund upon the death of James E. Hall . . . That there is no evidence from which the Court can find that there was any donative intent on the part of James Edward Hall to make a gift of said savings account to his wife, Lukie Rogers Hall, or to part with or surrender dominion or control of said account; and the Court is unable to find from the evidence that the said James Edward Hall made any agreement with his wife, Lukie Rogers Hall, to the effect that the said savings account should vest in her and be her sole property upon his death . . . That the said account in the Build-

ing and Loan Association belonged to the estate of James Edward Hall at the time of his death . . ."

The finding that Exhibit K was not executed for the purpose of transferring the account then in the name of J. E. Hall to a joint account is implicit in the affirmative findings made. There is nothing on the face of the exhibit in conflict with the findings of the court. And the record before us fails to show that the oral testimony related the exhibit to the account. Therefore, even if we consider it, we can find nothing therein to warrant us in overruling the conclusions of law made by the court below.

It may be that in fact the account existing at the time Hall and wife visited the office of the Building & Loan Association was the subject matter of the agreement evidenced by Exhibit K and that the *feme* defendant has a valid claim to the balance remaining in the account at the time of the death of her intestate. If so, she has failed to bring up the evidence so as to enable us to review the findings of the judge in the light of all the testimony. On this record we are precluded from going behind the findings made. Those findings support the judgment entered. Therefore, the judgment must be

Affirmed.

IN THE MATTER OF CURNEL NATHANIEL HICKERSON.

(Filed 11 June, 1952.)

1. Statutes § 5a—

All parts of the same statute dealing with the same subject are to be construed together as a whole, and every part thereof must be given effect if this can be done by any fair and reasonable intendment.

2. Same—

Where a literal interpretation of a statute will lead to absurd results or contravene the manifest purpose of the Legislature, the reason and purpose of the law shall control and the strict letter thereof shall be disregarded.

3. Same—

If the meaning of a statute be in doubt, reference may be had to its title and context as legislative interpretations of the purpose of the act.

4. Statutes § 13—

An action captioned a public-local or private act does not repeal a public law unless it makes specific reference to such public law, nor will it be held to repeal such public law in its entirety even though the public law be specifically referred to therein when the public-local or private act expressly limits its purpose of repeal to a single county. G.S. 12-1.

5. Courts § 8—

Chap. 896, Session Laws of 1949, *held* to repeal G.S. 7-285 only in regard to Surry County, and therefore Wilkes County is still excluded from the provisions of the general county court act and the Wilkes County Board of Commissioners is without authority to establish a general county court in said county.

6. Public Officers § 9: Habeas Corpus § 2—

Where the county commissioners of a county are without authority to establish a general county court, the person named in their resolution to be judge of such court is without any actual or apparent authority to so act, and therefore a person sentenced by him may attack the validity of his imprisonment at any time in any proceeding.

RETURN to writ of *certiorari* allowed on petition of the State of North Carolina and Board of County Commissioners of Wilkes County, to bring up for review judgment of *Phillips, J.*, entered on writ of *habeas corpus* in behalf of Curnel Nathaniel Hickerson, a prisoner in N. C. Prison Camp No. 809.

The record on this appeal reveals these facts:

1. The County Board of Commissioners of Wilkes County, in regular meeting in February, 1952, purporting to act under and by virtue of and in compliance with provisions of Article 30 of Chapter 7 of General Statutes of North Carolina, G.S. 7-265, to and including G.S. 7-284, passed a resolution for the establishment of a general county court, appointing therein T. E. Story, as judge of such court, and F. J. McDuffie, as prosecutor, with direction that the "court . . . shall commence its operation at the earliest possible date provided by statute," etc.

2. Thereafter, on 14 February, 1952, T. E. Story subscribed and took oaths prescribed for a judge of such court.

3. And on 25 February, 1952, and upon affidavit charging that "at and in said county of Wilkes . . . on or about 24 day of February, 1952, Curnel Nathaniel Hickerson did unlawful, wilfully and feloniously operate a motor vehicle on the public highways of North Carolina while under the influence of some alcoholic beverage or other narcotic drug . . .," etc., a warrant for the arrest of Curnel Nathaniel Hickerson, signed by "T. E. Story, Judge General County Court" and directed to "any lawful officer of Wilkes County" was issued, and served, and to which on same day "in the General County Court" defendant pleaded guilty. Thereupon "T. E. Story, Judge, General County Court," ordered that "defendant be confined in the common jail of Wilkes County for the term of thirty (30) days to be assigned to work on public roads under the supervision of the State Highway and Public Works Commission," etc., and then be discharged according to law,—"said sentence to commence February 25, 1952."

Thereafter, Curnel Nathaniel Hickerson, upon petition sworn to and subscribed by him, 6 March, 1952, petitioned Phillips, J., one of the Superior Court judges of the State of North Carolina, for a writ of *habeas corpus,* and for cause, in substance, showed: (1) That he, the petitioner, is imprisoned and restrained of his liberty in a prison camp of the State of North Carolina, No. 809, located in Wilkes County, North Carolina,—"the cause of pretense of said imprisonment or restraint . . . is a commitment issued pursuant to a conviction of this petitioner" as above set forth. (2) That his imprisonment and restraint is illegal for that the said T. E. Story was vested with no power or authority to act in the capacity of judicial officer, and to try and convict this petitioner, and by reason thereof his conviction is void, in that:

(a) The General County Court of Wilkes County was established in violation of G.S. 7-285;

(b) Chapter 896, Sec. 1, of the 1949 Session Laws of North Carolina applies only to Surry County and, being a public-local law, is unconstitutional, particularly as applied to Wilkes County; and

(c) The General County Court of Wilkes County was established in violation of the statutes and Constitution of North Carolina and is unconstitutional and void.

A writ of *habeas corpus,* directed to the superintendent of said prison camp No. 809, was issued and served on 6 March, 1952, returnable before Phillips, J. And upon the return thereof, and after hearing at March Term, 1952, Phillips, J., under date of 7 March, 1952, entered judgment in which, after reciting that "it appearing that the petitioner is now in custody, and the court finding as a fact that the said Curnel Nathaniel Hickerson was tried in a General County Court of Wilkes County, and that his time for appealing had expired prior to hearing of the writ," and that "court is of opinion and holds that the General County Court for Wilkes County, established by resolution of the County Commissioners, is void and without power or authority to operate . . . that the resolution establishing said court is void and illegal, and that the County Commissioners were without authority to adopt said resolution under the law of North Carolina," it was ordered, adjudged and decreed that the prisoner Curnel Nathaniel Hickerson be released and discharged from further custody.

Thereafter, the State of North Carolina and Board of County Commissioners of Wilkes County petitioned the Supreme Court of North Carolina for writ of *certiorari* to bring up for review the record of the proceedings on the writ of *habeas corpus* as above set forth. The petition was allowed, and the record of the proceeding is now before the Supreme Court for review on error assigned.

Hayes & Hayes for County of Wilkes.

Harry McMullan, Attorney-General, of counsel for petitioner.

W. H. McElwee, Larry S. Moore, Max Ferree, Robert M. Gambill, W. G. Mitchell, Eugene Trivette, and J. H. Whicker, Jr., for defendant, appellee.

WINBORNE, J. Decision on this appeal rests upon the determination of this question: Was the statute G.S. 7-285 repealed by the provisions of Chapter 896 of the 1949 Session Laws of North Carolina?

If this statute was so repealed, Wilkes County was thereby brought within the purview of the public statutes, Article 30 of Chapter 7 of General Statutes, G.S. 7-265, G.S. 7-266, *et seq.*, authorizing, and making provision for, the establishment of general county courts, and in such event the board of commissioners for the county of Wilkes would have been authorized to establish a general county court in Wilkes County.

But, on the other hand, if it was not so repealed, Wilkes County, as one of the counties comprising the Seventeenth Judicial District, was expressly excepted from the provisions of the above statutes, Article 30 of Chapter 7 of General Statutes, and, in such event, the board of commissioners for the county of Wilkes would have had no authority to establish a general county court under the provisions of these statutes.

The decision of the court below is based upon the latter view,—that G.S. 7-285 was not repealed by the provisions of Chapter 896 of the 1949 Session Laws of North Carolina. And in the light of applicable principles of law we are of opinion and hold that the decision is correct.

In this connection it is appropriate to note that the statute providing for the establishment of general county courts was enacted by the General Assembly of 1923, Public Laws 1923, Chapter 216, of which a part is now G.S. 7-265. This enactment was amended by Chapter 85 of the Public Laws of 1924, Extra Session, in various details and by adding, among others, these sections: "Sec. 24a," now G.S. 7-266, authorizing the establishment of such court without holding an election on the question; "Sec. 24e," now G.S. 7-270, relating to the taxing of costs in both civil and criminal actions; and "Sec. 24f," now in the main G.S. 7-285, which reads: "This act shall not apply to any county in which there has been established a court, inferior to the Superior Court by whatever name called, by a special act, nor shall this act apply to the following counties: Granville, Iredell, New Hanover, Pasquotank, and Wake, nor shall it apply to the counties in the Sixteenth (16th), Seventeenth (17th), and Nineteenth (19th) Judicial Districts." Later other counties were added to those to which the act did not apply, and still others were placed under the provisions of the act. None of either class is here involved.

And, taking note of public-local statutes, it appears that Surry County was a county in which there had been established a court, inferior to the Superior Court, to wit: Recorder's Court of Mt. Airy Township, by a special act P.L. 1913, Chapter 692. Notice is also taken of the fact that Surry County was in the Eleventh Judicial District of North Carolina in the years 1923 and 1924, and until 23 March, 1937, when it became, and is now, a part of the newly created Twenty-first Judicial District. See Article 6 of Chapter 27 of Consolidated Statutes of 1919, P.L. 1937, Chapter 413, and Article 9 of Chapter 7 of General Statutes.

Too, notice is taken of the fact that Wilkes County was in the years 1923 and 1924, and still is, in the Seventeenth Judicial District. See Article 6 of Chapter 27 of Consolidated Statutes of 1919, and Article 9 of Chapter 7 of General Statutes.

Thus it appears that both Surry County and Wilkes County were excluded from the general county court act.

Such was the situation of each of these counties with respect thereto when House Bill 1073 was passed by the General Assembly, and became Chapter 896 of the 1949 Session Laws of North Carolina.

This act is entitled "An Act repealing Section 7-285 of the General Statutes relating to the establishment of General County Courts and amending certain other sections of Article 30, of Chapter 7 as they relate to the Surry County General Court."

Section 1 of the act reads: "Section 7-285 of the General Statutes is hereby repealed."

Section 2 provides for specific amendments of Article 30 of Chapter 7 of the General Statutes, particularly G.S. 7-270 and G.S. 7-271, in so far as it, the Article, relates to any general county court which has been, or which may be established in Surry County, and adds to G.S. 7-274 authority to justices of the peace of Surry County to issue warrants and make same returnable before the judge of the general county court.

Sections 3 and 4 provide for the county commissioners of Surry County to draw a jury, for a jury tax and other costs, and for appeals to Superior Court, setting forth procedural matters in connection therewith, and fixing time within which a defendant tried and convicted in the general county court for Surry County may appeal to Superior Court.

Then there follows:

"Sec. 5. That if any part of this act shall be held unconstitutional, such unconstitutionality shall not affect the remainder of this act.

"Sec. 6. That all laws and clauses of laws in conflict with the provisions of this act are hereby repealed."

The question then arises as to what was the intention of the Legislature in passing this act.

In this connection, in *S. v. Barksdale,* 181 N.C. 621, 107 S.E. 505, this Court, in opinion by *Hoke, J.,* stated that parts of the same statute, and dealing with the same subject, are "to be considered and interpreted as a whole, and in such case it is the accepted principle of statutory construction that every part of the law shall be given effect if this can be done by any fair and reasonable intendment, and it is further and fully established that where a literal interpretation of the language of a statute will lead to absurd results, or contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control and the strict letter thereof shall be disregarded," citing *S. v. Earnhardt,* 170 N.C. 725, 86 S.E. 960; *Abernethy v. Comrs.,* 169 N.C. 631, 86 S.E. 577; *Fortune v. Comrs.,* 140 N.C. 322, 52 S.E. 950; *Keith v. Lockhart,* 171 N.C. 451, 88 S.E. 640; Black on Interpretation of Laws (2d), pp. 23-66.

Moreover, if the meaning of a statute be in doubt, reference may be had to the title and context as legislative declarations of the purpose of the act. *S. v. Woolard,* 119 N.C. 779, 25 S.E. 719; *Machinery Co. v. Sellers,* 197 N.C. 30, 147 S.E. 674; *Dyer v. Dyer,* 212 N.C. 620, 194 S.E. 278; *S. v. Keller,* 214 N.C. 447, 199 S.E. 620.

In the *Woolard case, supra, Clark, J.,* said: ". . . the title is part of the bill when introduced, being placed there by the author, and probably attracts more attention than the other parts of the proposed law, and if it passes into law the title thereof is subsequently a legislative declaration of the tenor and object of the act . . . Consequently when the meaning of an act is at all doubtful, all the authorities now concur that the title should be considered."

And in *Abernethy v. Comrs., supra, Walker, J.,* writing for the Court, declared that "We may call to our aid other laws or statutes relating to the particular subject, or to the one under construction, so that we may know what the mischief was which the Legislature intended to remove or to remedy."

In the light of these principles, applied to the case in hand, it seems clear that the object and purpose of the Legislature was to take Surry County out of those counties to which the general County court act did not apply, and place it under the provisions of the act, and to make special provisions as shown above in respect of the general county court of Surry County. And, hence, the provision for the repeal of G.S. 7-285 must be taken to mean that it be repealed only in so far as it relates to Surry County. In fact, reference to the original bill and to the House Journal discloses that the bill was introduced by the Representative from Surry County. And the original bill shows that while at first it was stamped "PUBLIC BILL," the word "LOCAL" hand-printed in red pencil, was inserted between the word "Public" and the word "Bill," so as to read

"PUBLIC LOCAL BILL." This may be considered as indicative of the character of the act,—and as bearing upon the intention of the Legislature. We, therefore, hold that the bill was local in purpose.

And it may be noted that the statute, G.S. 12-1, pertaining to statutory construction, declares that "No act, which by its caption purports to be a public-local or private act, shall have the force and effect to repeal, alter or change the provisions of any Public Law, unless the caption of said public local or private act shall make specific reference to the Public Law it attempts to repeal, alter or change." In this respect, while the caption of the act Chapter 896 of 1949 Session Laws contains specific reference to the public statute, G.S. 7-285, the purpose of repeal of it is expressly limited by the clause "as they relate to the Surry County General Court."

Hence we hold that Wilkes County is still excluded from the provisions of the general county court act; that the board of commissioners for Wilkes County was without authority to establish a general county court in said county; that the resolution of the said board of commissioners, attempting to do so, is void; and that the person named in the resolution to be judge of such general county court, who undertook to act officially in the criminal prosecution of Curnel Nathaniel Hickerson, did so without any actual or apparent authority. Thus, as stated in the case of *In re Wingler,* 231 N.C. 560, 58 S.E. 2d 372, opinion by *Ervin, J.,* "Since he is not an officer at all or for any purpose, his acts are absolutely void, and can be impeached at any time in any proceeding." See cases there cited.

Therefore, the judgment of the court below is

Affirmed.

WALLACE AUSTIN, ON BEHALF OF HIMSELF AND OTHER PROPERTY OWNERS AND TAXPAYERS IN THE CITY OF CHARLOTTE, N. C., v. VICTOR SHAW, MAYOR, LILLIAN R. HOFFMAN, CLERK, AND THE CITY OF CHARLOTTE, A MUNICIPAL CORPORATION.

(Filed 11 June, 1952.)

1. Municipal Corporations § 41—

While ordinarily a municipality may not expend public funds for improvements and construction outside its corporate limits unless specifically authorized by statute or its charter, where the building of underpasses and overpasses along a cross-line railroad track within the city would be greatly in excess of the cost of relocating the cross-line outside the city limits, the city may contribute funds for the construction of such cross-line outside its limits under the principle of compensation by way of substitution.

2. Same—

The power of a city to compel a railroad company at its own expense to eliminate grade crossings within the city is subject to the limitation that such power may not be exercised arbitrarily or unreasonably, and therefore the existence of such power does not preclude the municipality from contributing public funds in good faith under a comprehensive plan for the elimination of grade crossings within the city in the public interest. G.S. 136-20.

3. Same—

Where a comprehensive over-all plan for the elimination of grade crossings within the limits of a populous city requires alterations and constructions near the railroad company's passenger station, the city may lawfully expend its funds in contribution to such alterations and structures as expenses incidental to the over-all plan for the elimination of the grade crossings.

APPEAL by plaintiff from *McLean, Special Judge,* April Term, 1952, of MECKLENBURG. Affirmed.

This was a taxpayer's suit to restrain the City of Charlotte from executing a contract with the Southern Railway Company entailing the expenditure by the City of $1,250,000, for the purpose of eliminating railroad grade crossings in the City. Upon consideration of the pleadings and evidence offered the court denied the injunctive relief sought, and dismissed the complaint. Plaintiff appealed.

Taliaferro, Clarkson & Grier for plaintiff, appellant.

John D. Shaw for defendants, appellees.

DEVIN, C. J. The City of Charlotte according to the census of 1950 has a population of 133,212. The Southern Railway Company operates trains over three lines of railroad tracks through the City, the main line in the west side of the City, a freight line in the eastern portion of the City, and a cross-line connecting the main line with the line from Charlotte to Columbia and Augusta. Within the city limits there are 32 railroad crossings at grade. For the purpose of eliminating these hazards to public safety, the City, pursuant to resolution and notice, submitted to the qualified voters of the City an ordinance authorizing issue of $1,500,000 bonds to provide funds for the elimination of grade crossings and improvements incident thereto. The ordinance and bond issue were duly approved.

Thereafter, and following negotiations between the engineer for the City and the Chief Engineer of the Southern Railway Company, a comprehensive plan was tentatively agreed to providing ways and means for the accomplishment of the purpose sought, and a contract embodying the

terms of this plan has been prepared and will be executed on behalf of the City unless restrained in this action.

Without undertaking to set out in detail the proposed plan, which is a part of the record in the case, its salient features are these: The plan calls for elevating the main line double tracks of the Southern Railway Company near the passenger station, constructing underpasses and overpasses at other crossings, elimination of the use of the cross-line through the City and removing a portion of that track and substituting a new line outside the city limits to serve the same purpose of connecting the main line with line to Columbia and Augusta. The plan also contemplates changes in the structure of the passenger station and other buildings to conform to the grade separation plan at that place. It also appeared that it would cost less to build the cross-line outside the city limits than to build it within or to construct all grade separations. It was estimated that the completion of this entire plan would cost $5,000,000, and it was tentatively agreed that of this amount the City should contribute $1,250,000, the Southern Railway Company $1,250,000, with the expectation of the parties that Federal funds for highway improvement will be available in an amount equal to these combined contributions, provided the contributions of City and Railway are pooled in the manner set out in the proposed contract.

It is admitted that the results to be secured by the performance of the contract would be conducive to the welfare of the City and its inhabitants, and that the means and methods of accomplishing this desirable end are feasible and reasonable, but the plaintiff's complaint voices the objection that the City is without power to enter into the contract, and that the contribution of the City's share toward the completion of the proposed plan would constitute an illegal expenditure of public funds of the City.

Three questions are raised: (1) whether the City has power to contribute City funds for the construction of the cross-line railroad track beyond the limits of the City; (2) whether it is necessary to expend public funds for the elimination of grade crossings if the City has power to require the railroad to do so at its own expense; and (3) whether the City may lawfully expend its funds in contribution to the cost of alterations of railroad structures not directly related to grade crossings.

1. The general rule is that a municipal corporation has no extra-territorial powers, and may not expend public funds for improvements and construction outside its corporate limits, unless for a public purpose it is so authorized by statute or by its charter. *Berry v. Durham,* 186 N.C. 421, 119 S.E. 748; *Asheville v. Herbert,* 190 N.C. 732, 130 S.E. 861; *Holmes v. Fayetteville,* 197 N.C. 740, 150 S.E. 624; *Riddle v. Ledbetter,* 216 N.C. 491, 5 S.E. 2d 542; *Murphy v. High Point,* 218 N.C. 597, 12 S.E. 2d 1; *Wilson v. Mooresville,* 222 N.C. 283, 22 S.E. 2d 907; *Nash v.*

Tarboro, 227 N.C. 283, 42 S.E. 2d 209; *Horner v. Chamber of Commerce,* 231 N.C. 440, 57 S.E. 2d 789; *Laughinghouse v. New Bern,* 232 N.C. 596, 61 S.E. 2d 802; 5 McQuillin Municipal Corporations, sec. 1969.

The general statute enumerating the powers conferred upon municipal corporations, G.S. 160-204, provides that property may be acquired by a city outside its corporate limits for certain specified purposes in connection with public services operated by the city, and the City of Charlotte by its charter, Ch. 366, Public Local Laws 1939, is given power to regulate and control the construction of railroad tracks so that they may not interfere with the public use of the streets. But neither of these statutes expressly authorizes the City to expend its funds for the construction outside its corporate limits of several miles of railroad track for the use of the Southern Railway Company.

However, after careful consideration of the pleadings and the evidence, and the findings of the court thereon, we think that in order to carry out the comprehensive plans tentatively agreed to between the City and the Southern Railway Company, as set forth in the proposed contract, for the purpose of eliminating grade crossings in the public interest, the expenditure of city funds for the purpose of this extra-territorial construction would be justified under the principle of compensation by way of substitution. Instead of building a line in the City and expending a much larger sum for many structures for underpassing and overpassing, the plan for acquiring rights of way and building a line outside of the city limits may properly be considered as a substitute the one for the other, and as a means to the completion of an over-all plan for a necessary public service. This view is in accord with the decisions of this Court in *Dudley v. Charlotte,* 223 N.C. 638, 27 S.E. 2d 732, where the City's agreement to build a bridge on another's property in part compensation for a conveyance of land for the establishment of a public park was upheld. Numerous authorities support the principle of compensation by substitution for the completion of definite projects for the public benefit. *Brown v. U. S.,* 263 U.S. 78; *Dohany v. Rogers,* 281 U.S. 362, 68 A.L.R. 434; *Darwin v. Cookeville,* 170 Tenn. 508; *Pitznogle v. R. R.,* 119 Md. 673; *Fitzsimons v. Rogers,* 243 Mich. 649; *Smouse v. Ry. Co.,* 129 Kan. 176.

In *Brown v. U. S., supra,* where the creation by the Government of a reservoir for irrigation inundated lands of adjacent owners, the right of the Government to condemn other lands to compensate such owners was upheld as a natural and proper part of the construction. *Chief Justice Taft,* speaking for the Court in that case, said: "A method of compensation by substitution would seem to be the best means of making the parties whole."

In *Dohany v. Rogers, supra,* where the State of Michigan in improving a highway moved a railroad track, and in substitution condemned other

lands for the railroad's use, it was held that, notwithstanding the land was to be used as a railroad right of way, its condemnation for that purpose was proper as essentially a part of the project for improving a public highway.

In *Darwin v. Cookeville, supra,* the town as part of a street project, pursuant to agreement between the town and the Railroad Company, proposed to acquire a strip of land for the use of the railroad as a right of way in relocating its tracks, and eliminating a grade crossing. This was approved, the Court holding the town had a right to make a reasonable expenditure of public funds for this purpose, as this was an incidental part of the cost of street improvement considering the project as a whole.

In *Pitznogle v. R. R., supra,* the right of the railroad to condemn land for the location of a substitute private road in lieu of an existing private road to be closed for railroad purposes, was upheld as a proper compensation by way of substitution.

2. The plaintiff contends the expenditure of the amount agreed upon as the City's share of the cost entailed by the proposed contract is unnecessary and unwarranted for the reason that the City has the power by proper ordinance to require the Railway Company at its own expense to adjust its tracks to eliminate grade crossings in the City.

The City by its charter, Ch. 366, Public Local Laws 1939, sec. 31 (6), is empowered "to regulate and control the laying and construction of railroad tracks . . . and to require railway companies of all kinds to construct at their own expense such bridges, underpasses, turnouts, culverts, crossings and other things as the City Council may find necessary." See also G.S. 160-54.

In *R. R. v. Goldsboro,* 155 N.C. 356, 71 S.E. 514 (decided in 1911), it was decided that in the exercise of its police power, when the safety of the public required, the City had power to compel a railroad company to lower its tracks to conform to the grade of the city streets. And in *Durham v. R. R.,* 185 N.C. 240, 117 S.E. 12, it was held the city had power to require the railroad company at its own expense to construct an underpass under a busy city street. This was affirmed on appeal to the Supreme Court of the United States (266 U.S. 178).

The broad principle stated in these decisions is in accord with the consensus of judicial opinion in other jurisdictions, but in its application to particular cases consideration must be given to the limitation on the sensus of judicial opinion in other jurisdictions, but in its application to or unreasonable in the light of all the facts. *Erie Railroad Co. v. Board of Public Utility Comrs.,* 254 U.S. 394. In that case *Justice Holmes* remarked, "But the extent of the states' power varies in different cases from absolute to qualified." Nor do we find from an examination of those

cases a necessary compulsion upon municipal corporations which would render invalid the action of a city in adopting in good faith a feasible and reasonable method for obtaining the desired results by co-operation with the railway company.

This view is supported by the decision in *Jones v. Durham,* 197 N.C. 127, 147 S.E. 824, where it was said: "The Municipal Finance Act, C.S. 2942 (r), (now G.S. 160-382), implies not only that a city may bear a part of the expense incident to the elimination of grade crossings, but it may issue bonds therefor." The agreement on the part of the City of Durham to pave the underpass constructed by the Railroad Company (*Durham v. R. R., supra*) was held legal and binding. In *Powell v. R. R.,* 178 N.C. 243, 100 S.E. 424, the action of the City of Raleigh in requiring the Railroad Company to replace with steel a decaying wooden bridge on Hillsboro Street over its tracks, was upheld, but it was said, this was done by the Company "for its own benefit."

In *Missouri P. R. Co. v. Omaha,* 235 U.S. 121, it was held that when the safety of the public required, a railway company may, consistent with due process of law, be required by municipal authority to construct at its own expense the means of abolishing grade crossings, but this was stated to be upon the view that the company would be "deemed to be compensated by the public benefit which the company is supposed to share."

As bearing on the question of benefit to the railway company by the elimination of grade crossings, we note that in *Nashville, C. & St. L. R. Co. v. Walters,* 294 U.S. 405, *Justice Brandeis* in writing the opinion called attention to the fact that the changes incident to the enormous increase in motor transportation, the aid given by the Federal Government to road building, the changes in the construction and use of highways have all resulted in depletion of rail revenue; that the highways were no longer feeders of railroads but provide competition to rail traffic; and that the prime instrument of danger is not so much from railroads as from motor vehicles. In that case it was held that where the authorities had required the railroad company to pay one-half the cost of eliminating grade crossings, the question of the reasonableness of the requirement was for the State Court to decide in view of the particular facts found. The Court said: "Police power is subject to the constitutional limitation that it may not be exerted arbitrarily or unreasonably."

Not only has the General Assembly authorized municipal corporations to issue bonds for the elimination of grade crossings, but in the construction of highway crossings at railroad intersections it is provided that the cost shall be divided between the railroad and the State. G.S. 136-20.

In our case the power of the City of Charlotte to execute the proposed contract with the Southern Railway Company for the elimination of grade crossings may not be successfully challenged on the ground that

the City did not require the Company to bear the entire expense of the operation. There is no allegation or suggestion that the action of the City was in bad faith or was arbitrary or unreasonable. Neither the necessity of the elimination of grade crossings in the City nor the appropriateness of the plan chosen to accomplish this purpose is controverted. Considering all the factors which entered into the solution of the problem confronting the City in its effort to abolish grade crossings in the public interest, and the delay and the uncertainty of the result of the extended litigation which would doubtless follow if it undertook to require the Railway Company to undergo the entire cost of $5,000,000 for this purpose, the action of the City in agreeing to a co-operative plan for the accomplishment of its objective should not be held by the court to be unwarranted or invalid. The voters have already signified their approval of the plan by voting a bond issue to pay the City's share of the expense involved.

3. If the City has power under the facts here shown to authorize execution of the proposed contract and to share in the expense of eliminating grade crossings in Charlotte, and the plan proposed is reasonably adapted to the speedy accomplishment of that purpose, it follows that the inclusion in the total expense, which the City agrees to share, of alterations and constructions made necessary by the elevation of the Railway Company's track near the passenger station is merely incidental to the comprehensive over-all plan adopted, and may not be made the basis of attack upon the validity of the proposed contract or the power of the City to execute it.

We conclude that the City of Charlotte has the power by proper resolution to authorize the execution of the proposed contract, and that the judgment denying plaintiff's motion for an injunction and dismissing his complaint filed for that purpose must be, and it is hereby,

Affirmed.

LYMAN W. LAMM, ADMINISTRATOR OF THE ESTATE OF FAY K. LAMM, DECEASED, v. J. J. LORBACHER AND MURRAY J. CANNADY.

(Filed 11 June, 1952.)

1. Death § 8—

Right of action for wrongful death is solely statutory and the statute also determines the basis and extent of recovery of damages therefor. G.S. 28-173, G.S. 28-174.

2. Death § 8—

In an action for wrongful death, an instruction on the issue of damages to the effect that the jury was to determine the pecuniary worth of the deceased to her "family or estate" taking into consideration her age,

habits, character, industry and skill, business, etc., and that the jury should not undertake to give the equivalent of human life or allow anything for punishment, *is held* without prejudicial error on plaintiff's appeal.

3. Same—

The value of the gratuitous labor performed by deceased as a housewife is not a proper element of damages in an action for wrongful death.

4. Appeal and Error § 40b: Trial § 49½—

A motion to set aside the verdict for inadequate award is addressed to the sound discretion of the trial court, and its refusal of the motion will not be reviewed on appeal except upon a showing of manifest abuse.

5. Trial § 47—

A new trial for newly discovered evidence cannot be allowed for evidence which relates solely to an issue answered in appellant's favor.

APPEAL by plaintiff from *Burgwyn, Special Judge,* November Term, 1951, of ALAMANCE. No error.

This was an action to recover damages for injury and death of plaintiff's intestate alleged to have been due to the negligence of the defendants.

On the issue of damages the court charged the jury as follows:

"Now, gentlemen, I charge you that if the plaintiff is entitled to recover at all, he is entitled to recover the present value of the net pecuniary worth of decedent to be ascertained by deducting the cost of her own living and expenditures from her gross income based upon her life expectancy. As a basis on which to enable you to make your estimate, it is competent to show, and for you to consider, the age of the deceased—I understand, gentlemen, that she was 33 years of age—her prospects in life, her habits, her character, her industry and skill, the means she had for making money, the business in which she was employed, the end of it all being to enable you to fix upon that net income which might be reasonably expected if death had not ensued, and thus arrive at the pecuniary worth of the deceased to her family or estate. You do not undertake, ladies and gentlemen, to give the equivalent of human life. That is impossible. You allow nothing for punishment. You do not attempt to punish the defendant but you seek to give a fair, reasonable pecuniary worth of the deceased to her family, under the rules which I have given you."

The jury rendered the following verdict:

"1. Was the plaintiff's intestate injured and killed by the negligence of the defendants, as alleged in the complaint? Answer: Yes.

"2. Did the plaintiff's intestate, by her own negligence, contribute to her injury and death, as alleged in the answer? Answer: No.

"3. What damages, if any, is the plaintiff entitled to recover of the defendants? Answer: $4,000.00."

From judgment on the verdict plaintiff appealed, assigning error in the court's charge on the issue of damages, and the court's denial of motion to set aside the verdict on the third issue.

Brooks, McLendon, Brim & Holderness and Barney P. Jones for plaintiff, appellant.

Cooper, Sanders & Holt and Jordan & Wright for defendants, appellees.

DEVIN, C. J. The plaintiff appeals from the judgment below on the ground that the amount of damages awarded for the wrongful death of his intestate was inadequate. He assigns as error the court's charge to the jury in stating the rule for the measure of damages in this case.

In 1846 the common law rule that right of action for personal injury did not survive the death of the injured person was abrogated in England by statute (9 and 10 Vict. C. 93), known as Lord Campbell's Act, which permitted recovery in an action by the administrator when the death of the decedent was due to the unlawful or negligent act of another. In North Carolina this change in the common law rule was adopted by statute in 1869, now codified as G.S. 28-173, and G.S. 28-174, and right of action for wrongful death was conferred upon the personal representative of the decedent, with the further provision that "The plaintiff in such action may recover such damages as are a fair and just compensation for the pecuniary injury resulting from such death." So that the action for wrongful death exists only by virtue of this statute and the statutory provision must govern not only the right of action but also the rule for determining the basis and extent of recovery of damages therefor.

In interpreting the language of the statute the rule has been well stated by *Chief Justice Stacy* in a recent opinion in *Journigan v. Ice Co.*, 233 N.C. 180 (184), 63 S.E. 2d 183, as follows:

"The measure of damages in actions for wrongful death is the present worth of the net pecuniary value of the life of the deceased to be ascertained by deducting the probable cost of his own living and usual or ordinary expenses from his probable gross income which might be expected to be derived from his own exertions during his life expectancy. *Carpenter v. Power Co.*, 191 N.C. 130, 131 S.E. 400; *Gurley v. Power Co.*, 172 N.C. 690, 90 S.E. 943. In arriving at the net pecuniary value of the life of the deceased, the jury is at liberty to take into consideration the age, health and expectancy of life of the deceased, his earning capacity, his habits, his ability and skill, the business in which he was employed and the means he had for earning money, the end of it all being, as expressed in *Kesler v. Smith*, 66 N.C. 154, to enable the jury fairly to arrive at the net income which the deceased might reasonably be expected to earn from

his own exertions, had his death not ensued, and thus assess the pecuniary worth of the deceased to his family, had his life not been cut short by the wrongful act of the defendant. *Burns v. R. R.*, 125 N.C. 304, 34 S.E. 495; *Burton v. R. R.*, 82 N.C. 505." See also *Hanks v. R. R.*, 230 N.C. 179, 52 S.E. 2d 717; *Rea v. Simowitz*, 226 N.C. 379, 38 S.E. 2d 194; *Coach Co. v. Lee*, 218 N.C. 320 (328), 11 S.E. 2d 341.

In the excerpt from the charge to which plaintiff noted exception the trial judge seems to have instructed the jury in substantial accord with the decisions of this Court, and particularly to have followed the language in *Coach Co. v. Lee, supra,* and *Carpenter v. Power Co., supra.* The use of the word "family" in the connection in which it was used may be understood as meaning estate. *Hanks v. R. R., supra.* It affords the plaintiff no ground of complaint.

The plaintiff, however, urges upon us that in view of the evidence that the plaintiff's intestate, aged 33 years, was an educated woman, a housewife and mother of two children, and had several years before been employed at $165 per month, the court's instruction to the jury on the issue of damages should have included "a statement as to the value of her labor" as a housewife, and relies upon what was said in *Bradley v. R. R.*, 122 N.C. 972, 30 S.E. 8. In that case in an action for wrongful death of a wife and mother a new trial was awarded for the trial court's error in charging the jury they might consider the number of decedent's children in so far as that helped them to put a pecuniary value on the intellectual and moral training that she might be able to give them. This was held for error, but in the opinion of *Chief Justice Faircloth* it was said in interpreting the phrase pecuniary injury, "It will be noted that under our statute the pecuniary injury is the measure. That means the value of the labor or the amount of the earnings of the deceased if he had lived." In a concurring opinion in that case *Justice Douglas* observed moral training of children was beyond the reach of human calculations and that "We have no scales by which to measure the value of a mother and the moral influence she may have upon her children." We do not understand that the Court in the *Bradley case* intended to extend the rule for the admeasurement of damages in such case to include as an element of damage labors of the decedent which were gratuitous and for which she received no compensation. The view that the value of decedent's labor in the home as a housewife should be considered by the jury in determining the amount of damages recoverable is supported by reputable authority in some other jurisdictions (74 A.L.R. 95, note), but under the North Carolina statute as interpreted by the decisions of this Court compensation for wrongful death is limited to "the pecuniary injury resulting from such death." This phrase has remained unchanged since the statute was enacted in 1869. Hence this Court has uniformly held, in view of this

restrictive language, that the consideration of the jury should be confined to determining the amount of money the decedent would have earned during the period the jury find he would otherwise have lived, and, then, after deducting the probable cost of his ordinary living expenses, to ascertaining the present worth of the accumulation of such net earnings as the pecuniary value of the life of the decedent to his estate. This rule, though sometimes difficult of application, applies to all alike. *Rea v. Simowitz,* 226 N.C. 379, 38 S.E. 2d 194. The right of action is for the personal representative of the deceased only. "The right of action for wrongful death, being conferred by statute at death, never belonged to the deceased, and the recovery is not assets in the usual acceptation of the term." *Broadnax v. Broadnax,* 160 N.C. 432, 76 S.E. 216; *Hood v. Tel. Co.,* 162 N.C. 92, 77 S.E. 1094; 28 N.C. Law Review 106.

The jurors to whom was committed the determination of the facts from the evidence in this case have allowed compensation for the wrongful death of plaintiff's intestate, but have fixed the amount in what plaintiff contends is an insufficient sum. The plaintiff availed himself of the only relief from an inadequate verdict by motion addressed to the trial judge to exercise his power to set the verdict aside. This the judge in his discretion declined to do. His refusal would not be reviewed here except upon showing of manifest abuse of discretion. The verdict of which the plaintiff complains was rendered by a presumably intelligent jury who had heard all the evidence, and the motion to set the verdict aside was denied by the trial judge who also had heard all the evidence. We do not find there was such a manifest abuse of discretion on the part of the judge as would warrant this Court in reversing his ruling. *Johnston v. Johnston,* 213 N.C. 255, 195 S.E. 807; *McClamroch v. Ice Co.,* 217 N.C. 106, 6 S.E. 2d 850.

"It is the rule in this jurisdiction that in the absence of some imputed error of law or legal inference arising in connection therewith the direct supervision of verdicts is a matter resting in the sound discretion of the trial court and is not reviewable on appeal." *Johnston v. Johnston, supra.* "It is well settled in this State that the exercise of a discretionary power by the trial court is not reviewable upon appeal, unless there has been a palpable abuse of such discretion." *Hughes v. Oliver,* 228 N.C. 680 (685), 47 S.E. 2d 6.

Plaintiff's motion for new trial for newly discovered evidence is based upon proffered testimony applicable to the first issue only. Upon that issue the verdict was in favor of the plaintiff. Hence we are unable to say as a matter of law that the jury's verdict on the third issue was affected by lack of the additional testimony now presented. The proposed new evidence tends to show the falsity of the testimony of defendants' witnesses to the effect that plaintiff's automobile skidded on the

occasion of the collision in which plaintiff's intestate was killed, and to impeach one of defendants' witnesses. Without the new evidence the jury answered the first two issues in favor of the plaintiff. The plaintiff's motion based upon the evidence offered does not meet the requirements set out in *Johnson v. R. R.*, 163 N.C. 431, 79 S.E. 690. The motion for new trial for newly discovered evidence is denied.

Upon consideration of the case and all the questions involved in plaintiff's appeal, we conclude that in the trial there was

No error.

WOODIE C. ARMSTRONG, LIZZIE McCALLUM, CURTIS GEORGE, SARAH GEORGE, DICK GEORGE AND DETLAW GEORGE, BY THEIR NEXT FRIEND, ADDELL MARTIN, AND HETTIE GEORGE, BY HER NEXT FRIEND, ADDELL MARTIN, v. ALICE ARMSTRONG AND HENRY ARMSTRONG.

(Filed 11 June, 1952.)

1. Wills § 31½—

Ordinarily, a will and codicil thereto are to be treated as a single and entire instrument, taking effect at the time of testator's death.

2. Same—

A codicil imports some addition, explanation, or alteration of the prior will and, the codicil being the latest expression of testator's intent, its provisions are to be given precedence, and when plainly repugnant or inconsistent with provisions of the will revokes the will to the extent of the repugnancy or inconsistency, even in the absence of any express words of revocation, but in order to do so the inconsistency or repugnancy must be such as to exclude any legitimate inference other than that of a change in testator's intention.

3. Wills § 32—

The presumption against partial intestacy is only an aid in construction and may not be invoked to alter the will when its language is plain and unambiguous, or to include in the will property not embraced by its terms.

4. Wills § 31½—

The will in suit devised to testator's son the remaining 33½ acres of a certain tract. The codicil devised the son 10 acres of the same tract. *Held:* The provisions of the will and codicil are inconsistent and repugnant, and the codicil revokes by implication the cognate provision of the will, even though it results in testator dying intestate as to the remaining 23½ acres.

5. Wills § 34e—

A devise of 10 acres to be cut off of a designated tract on the side adjoining the lands of specified persons is sufficiently definite to be valid.

ARMSTRONG *v.* ARMSTRONG.

APPEAL by plaintiff Woodie C. Armstrong from *Bone, J.*, September Term, 1951, of COLUMBUS.

Special proceeding for partition of land, involving interpretation and construction of alleged inconsistent items of a will.

William H. Armstrong, late of Columbus County, North Carolina, died during the year 1939, leaving a last will and testament dated 28 September, 1936, and a codicil thereto dated 20 April, 1938. The plaintiffs Woodie C. Armstrong and Lizzie McCallum are children of the testator. The other plaintiffs are his grandchildren. The defendant Alice Armstrong is the surviving widow, and the defendant Henry Armstrong is an heir at law of the testator (relationship not disclosed by the record).

The appeal relates only to the disposition of a 38½ acre tract of land. These are the provisions of the will and codicil which bear directly thereon:

Item 3 of the will is as follows: "I give, devise and bequeath unto my beloved daughter Lizzie McCallum 5 acres, of land, a part of my Sykes 38½ acre tract, the said five acres, to be cut off by my executor, from the south side of the tract adjoining D. M. Smith, Seeth L. Smith and J. M. Shipman estate."

The third paragraph of the codicil is in part as follows: "I give, devise and bequeath to my beloved grand daughter Hettie George five (5) acres of my 38½ acre tract, the said five acres to be cut off by my executrix hereinafter mentioned from the south side of the 38½ acre tract adjoining the lands of D. M. Smith, Seth L. Smith and J. M. Shipman estate. . . ."

Item 7 of the will is in pertinent part as follows: "I give, devise, and bequeath, unto my beloved son Woody (Woodie) C. Armstrong in fee simple the remainder of my 38½ acre Sykes tract of land which remainder, should be 33½ acres."

The fourth paragraph of the codicil is as follows: "I give, devise and bequeath to my beloved son Woody (Woodie) C. Armstrong ten (10) acres of the remainder of the 33½ acre tract in fee simple to be cut off by my executrix hereinafter mentioned, from the land adjoining Rufus Shipman, Seth L. Smith and J. M. Shipman estate."

In construing the foregoing portions of the will and codicil the court below held and entered judgment decreeing:

1. "That the third item of said will is revoked by the codicil of William H. Armstrong, and that the five acres devised therein to Lizzie McCallum is defeated by the third paragraph of the said codicil and said five acres is instead devised to Hettie George."

2. "That so much of item 7 of said last will and testament which devises the balance of the 38½ acre Sykes tract to Woodie Armstrong is revoked by the fourth paragraph of the codicil and that under said codicil

the said Woodie C. Armstrong is devised 10 acres of the balance of said land to be cut off by the executrix as directed in said codicil and that the balance of the 38½ acre tract, after cutting off 5 acres and 10 acres, is undevised and undivided real estate and that the heirs at law of William H. Armstrong are seized of said remainder as tenants in common as in case of intestacy."

To the signing of the judgment the plaintiff Woodie C. Armstrong excepted and appealed, assigning error.

Burns & Burns for plaintiff, appellant.

Powell & Powell for defendants, appellees.

JOHNSON, J. The single question presented by this appeal is whether the codicil revokes by implication the original devise to Woodie C. Armstrong of the 38½ acre tract of land (less 5 acres to be cut off for another devisee) and limits his devise to 10 acres thereof, thus leaving the residue of approximately 23½ acres as undevised real estate belonging to the heirs at law of William H. Armstrong as tenants in common as in case of intestacy.

Ordinarily, for the purpose of determining testamentary intention, a will and codicil thereto are to be treated as a single and entire instrument, taking effect at the time of the testator's death. *Brown v. Brown,* 195 N.C. 315, 142 S.E. 4; *Bolling v. Barbee,* 193 N.C. 787, 138 S.E. 163; *Darden v. Matthews,* 173 N.C. 186, 91 S.E. 835.

But the mere making of a codicil gives rise to the inference of a change in the testator's intention, importing some addition, explanation, or alteration of a prior will. *In re Will of Goodman,* 229 N.C. 444, 50 S.E. 2d 34; *Baker v. Edge,* 174 N.C. 100, 93 S.E. 462; *Boyd v. Latham,* 44 N.C. 365; 57 Am. Jur., Wills, Sec. 608, p. 417.

It is an established rule of construction that where a will and codicil are repugnant and irreconcilable in their provisions, the codicil, being the latest expression of the testator's desires, is to be given precedence. *Hallyburton v. Carson,* 86 N.C. 290; 57 Am. Jur., Wills, Sec. 608, p. 417. And the testator's intent in making the codicil may be found in the codicil itself. *Homer v. Brown,* 16 U.S. 354, 14 L. Ed. 970.

Accordingly, a codicil plainly inconsistent with the provisions of the will operates, to the extent of the inconsistency, as a revocation of the will, and this is so even in the absence of any express words of revocation. 57 Am. Jur., Wills, Sec. 485, p. 339.

However, "in order that a codicil shall operate as a revocation of any part of a will, in the absence of express words to that effect, its provisions must be so inconsistent with those of the will as to exclude any other legitimate inference than that of a change in the testator's intention."

68 C.J., p. 810. See also *Baker v. Edge, supra; Rhyne v. Torrence,* 109 N.C. 652, 14 S.E. 95; *Hallyburton v. Carson, supra; Boyd v. Latham, supra;* 57 Am. Jur., Wills, Sec. 485, p. 339.

True, where there is a will it is presumed that the testator intended not to die intestate as to any part of his estate. *Trust Co. v. Waddell,* 234 N.C. 454, p. 460, 67 S.E. 2d 651; *Seawell v. Seawell,* 233 N.C. 735, 65 S.E. 2d 369; *Van Winkle v. Berger,* 228 N.C. 473, 46 S.E. 2d 305; *Holmes v. York,* 203 N.C. 709, 166 S.E. 889.

However, this presumption against partial intestacy will not prevail where the language of the will, fairly construed, discloses a contrary intention, the rule being that the presumption may not be invoked to alter the plain meaning of simple, unambiguous language, nor to include in the will property not comprehended by its terms. 57 Am. Jur., Wills, Sec. 1159.

And it should be kept in mind that the presumption against partial intestacy is applied only as an aid in construction. *Seawell v. Seawell, supra; Van Winkle v. Berger, supra;* 69 C.J., p. 95.

Accordingly, "a construction based on such presumption will not be made where it is apparent from the language of the will that it would be contrary to the intention of the testator, or where intestacy is effected by the plain and unambiguous language of the will." 69 C.J., pp. 95 and 96. See also *Rigsbee v. Rigsbee,* 215 N.C. 757, p. 761, 3 S.E. 2d 331; *McCallum v. McCallum,* 167 N.C. 310, 83 S.E. 250.

In the instant case, by the terms of Item 7 of the will the testator devised to his son Woodie C. Armstrong the entire tract of 38½ acres (less 5 acres to be cut off for another devisee), whereas by the terms of the codicil the devise to Woodie is cut down to "ten (10) acres of the remainder . . . to be cut off from the land adjoining Rufus Shipman, Seth L. Smith, and J. M. Shipman estate."

This provision of the codicil may not be reconciled with the previous item of the will. Clearly the two provisions are inconsistent and repugnant. This being so, the codicil prevails and the cognate provision of the will is repealed by implication.

Here the presumption against partial intestacy yields to the plain meaning of the codicillary provision indicating a contrary intent of the testator.

This conclusion is not at variance with the decisions in *Jenkins v. Maxwell,* 52 N.C. 612, and *Rhyne v. Torrence, supra,* cited by the appellant. The facts in those cases are distinguishable.

There is no merit in the contention that the fourth paragraph of the codicil is void for uncertainty. The ten acres devised to Woodie are directed to be cut off on the side "adjoining Rufus Shipman, Seth L. Smith and J. M. Shipman." This designation is sufficiently definite to

support the devise. See *Freeman v. Ramsey,* 189 N.C. 790, 128 S.E. 404; *Blanton v. Boney,* 175 N.C. 211, 95 S.E. 361; *Wright v. Harris,* 116 N.C. 462, 21 S.E. 914; *Harvey v. Harvey,* 72 N.C. 570; *Grubb v. Foust,* 99 N.C. 286, 6 S.E. 103; *Jones v. Robinson,* 78 N.C. 396; Anno. 157 A.L.R. 1129, p. 1135.

The record and appeal entries indicate that all plaintiffs appealed. However, the plaintiff Woodie C. Armstrong appears to be the only party aggrieved by the decision below, and the appeal as presented on brief challenges the validity of the judgment below only as it affects him. Therefore, he is treated as the sole appellant, with direction that the costs be taxed against him.

Affirmed.

KINSTON TOBACCO BOARD OF TRADE, INC., ET AL., v. LIGGETT & MYERS TOBACCO COMPANY, A CORPORATION; AMERICAN SUPPLIERS, INC.; IMPERIAL TOBACCO COMPANY (OF GREAT BRITAIN & IRELAND), LIMITED; EXPORT LEAF TOBACCO COMPANY, A CORPORATION; AND KINSTON TOBACCO COMPANY, INC.

(Filed 11 June, 1952.)

1. Injunctions § 1b—

A mandatory injunction is the proper remedy in appropriate instances to restore a *status quo* but is not available to establish an entirely new *status.*

2. Same—

A mandatory injunction is never available as a temporary writ pending the final determination of the facts raised by the pleadings.

3. Same: Agriculture § 11—

A mandatory injunction will not issue at the instance of a tobacco board of trade to compel buyers of tobacco, who had theretofore been participating in a four-sale market, to participate in a like manner in a fifth sale established by resolution of the tobacco board of trade.

4. Constitutional Law § 8c: Agriculture § 9—

While the General Assembly has authority within constitutional limitations to regulate the sale of leaf tobacco upon the auction markets of the State as a business affected with a public interest, it may delegate such power to an administrative agency only to the extent of "filling in the details" within the general scope and express purpose of a statute which prescribes the standards.

5. Same—

A tobacco board of trade is without authority to require purchasers of tobacco, who had been participating in a four-sale market, to participate in like manner in a fifth sale established by resolution of such board in the absence of statutory provision prescribing a standard by which the

number of sales at tobacco auction warehouses may be determined. G.S. 106-465.

APPEAL by defendants from *Stevens, J.,* 6 and 13 October, 1951, LENOIR. Reversed.

This suit was instituted by the Kinston Tobacco Board of Trade, Inc., for the purpose of obtaining a mandatory injunction which would require each of the defendants to provide buyers or other purchasing agencies upon a fifth sale established by the plaintiff for the 1949 and subsequent seasons of the Kinston tobacco auction market.

The Kinston Tobacco Board of Trade, Inc., hereinafter referred to as the corporate plaintiff, is a corporation organized under authority of G.S. 106-465 for the purpose of making reasonable rules and regulations for the economic and efficient handling of the sales of leaf tobacco at auction on the warehouse floors of the Kinston tobacco market. The membership is composed of tobacco warehousemen and purchasers of leaf tobacco. The corporate plaintiff adopted and maintained a constitution and bylaws, under which it maintained a sales committee which annually prepared a sales card or schedule and otherwise regulated in a reasonable fashion the sale of leaf tobacco upon said market.

The corporate plaintiff, through its appropriate committee, created a five-sale market for the 1949 and subsequent seasons, and directed that each buyer or purchaser of leaf tobacco upon the Kinston market should participate upon the fifth sale in substantially the same manner each was then participating upon the four-sale market. The defendants for reasons satisfactory to themselves failed to place buyers or other purchasing agencies upon the fifth sale in compliance with this regulation, although each of the defendants has for many years maintained a satisfactory purchasing agency upon the four-sale market.

Thereafter on 24 September 1951, in order to force the defendants to comply with its rule and regulation with respect to the fifth sale so established, the corporate plaintiff adopted a resolution, which, after reciting the details relating to the establishment of the fifth sale and the reason and necessity therefor, directed that the defendants and other buyers of leaf tobacco upon the Kinston market should participate in the fifth sale as they had theretofore done on the four-sale market. This resolution demanded that each of the defendants, within 24 hours from receipt of notice thereof, place a buyer or other purchasing agent or agency upon each of the five sales in operation on the Kinston market, with instructions and authority to engage in the competitive bidding on each grade or type of tobacco reasonably comparable to the participation, bidding and purchasing of leaf tobacco on the four sales on which the said defendants are now participating in the operation of said market, and so

as not to indicate any discrimination against either of the five sales conducted by the corporate plaintiff in the operation of the Kinston market.

The defendants failed to observe and obey the mandate of said resolution, and this suit was instituted for the purpose of securing a mandatory injunction requiring the defendants to comply with the rules of the corporate plaintiff and its said resolution.

On 28 September, 1951, the summons was issued, the verified complaint filed, a temporary mandatory injunction issued, and a rule to show cause entered. The hearing upon the temporary mandatory injunction was set for 13 October, 1951. The fiat of the mandatory injunction was in substantially the language of the said resolution and required each of the defendants to comply strictly with the terms of said resolution.

The defendants failed to comply with the temporary order of the court with respect to the fifth sale, in the belief that the court is without power to compel them to participate upon said fifth sale. On 1 October, 1951, each of the defendants were cited for contempt for failure to comply with said order. This citation was returnable on 6 October, 1951, and was dismissed at the hearing.

A volume of pleadings were filed by the defendants, all directed toward a dismissal of the suit and relief from the effects of the mandatory injunction. Upon the return date of the show cause order, all of the defendants appeared and demurred *ore tenus* to the complaint and with the permission of the court later filed written demurrers.

At the conclusion of the evidence and the arguments, all special appearances of the defendants were overruled, the demurrers *ore tenus* denied, and an order made continuing the temporary mandatory injunction to the final hearing.

From this order, each of the defendants appealed, assigning errors.

Jones, Reed & Griffin and John G. Dawson for plaintiffs, appellees.

Fuller, Reade, Umstead & Fuller for defendant, appellant, Liggett & Myers Tobacco Company.

Victor S. Bryant for defendant, appellant, American Suppliers, Inc.

Of Counsel: Robert I. Lipton, Ralph N. Strayhorn, and Victor S. Bryant, Jr.

Lucas & Rand and Z. Hardy Rose for defendant, appellant, The Imperial Tobacco Company (of Great Britain & Ireland), Limited.

Albion Dunn for defendants, appellants, Export Leaf Tobacco Company and Kinston Tobacco Company, Inc.

Harrison M. Robertson, of Counsel for defendant, appellant, Export Leaf Tobacco Company.

James Mullen, of Counsel for defendant, appellant, Kinston Tobacco Company, Inc.

VALENTINE, J. The primary relief sought in this action is a mandatory injunction requiring the defendants to comply with the rules promulgated by the corporate plaintiff and its resolution of 24 September, 1951. This raises two questions: (1) Does a mandatory injunction lie, under the facts in this case? (2) Is the Kinston Tobacco Board of Trade, Inc., authorized by law to establish a fifth sale on the Kinston market and require that each of the defendants assign buyers, with instructions to bid and purchase, on the fifth sale substantially the same quantity of tobacco at substantially the same price as each had theretofore purchased upon each of the four sales theretofore conducted upon said market?

A mandatory injunction has a proper and necessary place in the administration of justice when the necessity is urgent and the right is clear, but an examination of the available authorities fails to disclose any case wherein such a process has been used to establish an entirely new status. Such a remedy is available and useful to restore a *status quo,* but nowhere employed to force an individual or private corporation to do something entirely beyond the scope of his business judgment and beyond the range of his own volition. *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; *Keys v. Alligood,* 178 N.C. 16, 100 S.E. 113.

Furthermore, it is never available as a temporary writ pending the final determination of the facts raised by the pleadings. *Hospital v. Wilmington, ante,* 597.

In the case at bar, the defendants have participated in a satisfactory manner over a long period of time in the four-sale market, but for reasons satisfactory to themselves have declined to participate in the fifth sale. If the corporate plaintiff can, by the process here employed, require the defendants against their judgment to place buyers upon the fifth sale and thereby be forced to purchase a fifth more tobacco than they are now purchasing, then there is no reason why the same procedure could not be extended indefinitely and over the entire Bright Leaf Belt. This is revolutionary in principle and strikes at the heart of our system of free enterprise.

We therefore reach the conclusion that a mandatory injunction cannot properly be used upon the facts presented by this record.

The business of operating auction warehouses for the public sale of leaf tobacco is undoubtedly affected with a public interest and subject to reasonable public regulations, *Gray v. Warehouse Co.,* 181 N.C. 166, 106 S.E. 657; *Warehouse Assn. v. Warehouse,* 231 N.C. 142, 56 S.E. 2d 391; but this fact alone does not clothe the Kinston Tobacco Board of Trade, Inc., with the power to establish a five-sale market and invade private rights to the extent of requiring individuals or private corporations to participate on the fifth sale. The corporate plaintiff has no authority

to legislate. It cannot create a duty where the law creates none. The Legislature has the authority to regulate, within constitutional limits, the sale of leaf tobacco upon the auction markets of this State, and in doing so may prescribe standards of conduct to be observed by those who conduct auction warehouses as well as others participating in the sales. But this is a nondelegable power. *Motsinger v. Perryman,* 218 N.C. 15, 9 S.E. 2d 511, and cases cited; *S. v. Harris,* 216 N.C. 746, 6 S.E. 2d 854. The power to regulate may be delegated to an administrative agency only to the extent of "filling in the details" within the general scope and expressed purpose of the statute prescribing the standards. *Motsinger v. Perryman, supra.*

The statute under which the corporate plaintiff is organized is silent upon the question of the number of sales and prescribes no standard by which the number of sales may be determined. Therefore, in the absence of an agreement, either expressed or implied, the plaintiff has no right to establish a fifth sale and require the defendants to purchase thereon. *Hospital v. Joint Committee* (concurring opinion by *Barnhill, J.*), 234 N.C. 673, 68 S.E. 2d 862. Its authority is limited to the regulation of hours of sale, size of piles, and like details. Neither the statute, G.S. 106-465, nor its charter vests it with the authority it here seeks to exercise. In no event was the bylaw adopted by it relating to a fifth sale binding on defendants by virtue of their nonparticipating membership in the corporation or otherwise.

The large number of tobacco producers who were made parties plaintiff by order of the court are not members of the corporate plaintiff and certainly have no greater right to control the internal and private affairs of an individual or private corporation than the corporate plaintiff, and their presence in this litigation is therefore without effect upon the final determination of the questions here presented.

It follows, therefore, that the mandatory injunction was improvidently entered and that the demurrers *ore tenus* should have been sustained.

Reversed.

NELLO L. TEER COMPANY v. THE HITCHCOCK CORPORATION.

(Filed 11 June, 1952.)

1. Venue § 3—

Venue is not jurisdictional and may be waived by either party, and therefore when a plaintiff brings a suit in an improper county he waives his right to have the action removed to the county of his residence. G.S. 1-83.

2. Venue § 4a—

Where an action on contract between two domestic corporations is instituted in a county in which neither maintains its principal place of business, motion of defendant for change of venue to the county of its residence, when the motion is made in apt time and without waiver by defendant of its rights, is properly allowed as a matter of right, and plaintiff's subsequent motion to remove to the county of its residence is properly disregarded.

3. Venue § 4b—

The fact that an action is removed to the county of defendant's residence as a matter of right upon its motion, does not preclude plaintiff from thereafter moving in the county to which the cause is removed for change of venue for convenience of witnesses, but such motion would be addressed to the discretion of the court. G.S. 1-83 (2).

APPEAL by plaintiff from *Crisp, Special Judge,* February Term, 1952, of ALAMANCE.

This is a civil action to recover damages for an alleged breach of contract. The action was instituted in the Superior Court of Alamance County by the issuance of summons on 23 November, 1951, and a copy of the summons and complaint were served on the defendant 26 November, 1951. The complaint alleged a breach of contract by the defendant in failing to perform *in toto* a contract for the delivery of gravel and crushed stone in stated grades from a quarry site on land leased by the plaintiff and situate in Alamance County. The defendant, according to the complaint, agreed to operate the quarry and produce for the plaintiff certain quantities of crushed stone in stated grades or classifications as set out in the contract.

The plaintiff is a North Carolina corporation with its principal office in Durham County, and the defendant is a North Carolina corporation with its principal office in Buncombe County.

On 30 November, 1951, the defendant filed its written motion for the removal of the cause to Buncombe County for trial for the reason that Alamance County was not the proper venue for the trial of the action. Thereafter, on 4 December, 1951, the plaintiff filed a motion to the effect that if it should be determined that Alamance County was not the proper county for the trial of the action, that the action be removed to Durham County in which the plaintiff, a North Carolina corporation, maintains its principal office.

His Honor held, as a matter of law, (1) that Alamance County was not the proper county for the purpose of venue; (2) that Buncombe County was the proper venue of the action; and (3) that the defendant was entitled to have its motion allowed and the action removed to Buncombe County. Judgment was entered accordingly. The plaintiff appeals, and assigns error.

Brooks, McLendon, Brim & Holderness and W. P. Farthing for plaintiff, appellant.

Harkins, Van Winkle, Walton & Buck and Smith, Leach & Anderson for defendant, appellee.

DENNY, J. The question for determination is whether, upon the facts as disclosed by the present record, the defendant was entitled, as a matter of law, to have the action removed to Buncombe County for trial. The answer must be in the affirmative.

G.S. 1-83 reads as follows: "If the county designated for that purpose in the summons and complaint is not the proper one, the action may, however, be tried therein, unless the defendant, before the time of answering expires, demands in writing that the trial be conducted in the proper county, and the place of trial is thereupon changed by consent of parties, or by order of the court.

"The court may change the place of trial in the following cases:

"1. When the county designated for that purpose is not the proper one.

"2. When the convenience of witnesses and the ends of justice would be promoted by the change.

"3. When the judge has, at any time, been interested as party or counsel.

"4. When motion is made by the plaintiff and the action is for divorce and the defendant has not been personally served with summons."

Under our practice venue is not jurisdictional, but is only ground for removal to the proper county, if objection thereto is made in apt time and in the proper manner. G.S. 1-83; *Wiggins v. Trust Co.*, 232 N.C. 391, 61 S.E. 2d 72; *Wynne v. Conrad*, 220 N.C. 355, 17 S.E. 2d 514; *Clark v. Homes*, 189 N.C. 703, 128 S.E. 20; *Rector v. Rector*, 186 N.C. 618, 120 S.E. 195; *Roberts v. Moore*, 185 N.C. 254, 116 S.E. 728; *Sugg v. Pollard*, 184 N.C. 494, 115 S.E. 153; *Davis v. Davis*, 179 N.C. 185, 102 S.E. 270.

McIntosh, in discussing removal of actions for wrong venue, in his North Carolina Practice and Procedure, section 295, at page 279, said: "If the demand for removal is properly made, and it appears that the action has been brought in the wrong county, the court has no discretion as to removal. It is a right which the defendant may assert and which the court cannot deny, if properly asserted. The word 'may' is construed 'must,' and from a refusal of the right to remove the defendant may appeal," citing *Jones v. Town of Statesville*, 97 N.C. 86, 2 S.E. 346; *Falls of Neuse Mfg. Co. v. Brower*, 105 N.C. 440, 11 S.E. 313; *Brown v. Cogdell*, 136 N.C. 32, 48 S.E. 515; *Roberts v. Moore, supra.* Likewise, the same authority, in discussing procedure for removal, section 296, page 279, said: "This demand must be made (a) by the defendant; (b) it

must be in writing; (c) it must be before the time of answering expires; (d) and before the answer is filed."

Venue not being jurisdictional may be waived by any party, including the government. 56 Am. Jur., Venue, section 38, page 42, *et seq.; Panhandle Eastern Pipe Line Co. v. Federal Power Commission,* 324 U.S. 635, 89 L. Ed. 1241, 65 S. Ct. 128; *Industrial Ad. Asso. v. Commissioner of Int. Rev.,* 323 U.S. 310, 89 L. Ed. 260, 65 S. Ct., 289; *Wiggins v. Trust Co., supra; Wynne v. Conrad, supra; Clark v. Homes, supra.* Therefore, where an action has been brought against a defendant in an improper county, the defendant will lose his right to have such action removed to a proper county unless he demands in writing before the time for answering has expired, that the trial be conducted in the proper county. *Roberts v. Moore, supra.* Filing an answer in such action, before making a motion to remove, will constitute a waiver of any right of removal. *Trustees v. Fetzer,* 162 N.C. 245, 78 S.E. 152. Likewise, an agreement to allow the defendant additional time for filing an answer is an acceptance of jurisdiction and a waiver of the right to a removal. *Garrett v. Bear,* 144 N.C. 23, 56 S.E. 479; *Calcagno v. Overby,* 217 N.C. 323, 7 S.E. 2d 557. See also *Oettinger v. Live Stock Co.,* 170 N.C. 152, 86 S.E. 957.

In view of the fact that a defendant will have his rights determined in an action instituted in an improper county, unless he seasonably asserts his right for removal to a proper one, we hold that where a plaintiff voluntarily institutes an action in an improper county and files his complaint and obtains service on the defendant, he thereby waives his right to have the action removed to the county of his residence. In our opinion this conclusion is supported by the provisions of G.S. 1-83 and our decisions, although the precise point seems not to have been expressly determined heretofore on a factual situation identical with that presented on this appeal. *Cf. Pushman v. Dameron,* 208 N.C. 336, 180 S.E. 578; and *R. R. v. Thrower,* 213 N.C. 637, 197 S.E. 191.

In *Pushman v. Dameron, supra,* the plaintiff instituted an action in Guilford County against E. P. Dameron, administrator of Barrur H. Serunian, deceased, to recover damages for personal injuries resulting from the reckless driving of an automobile by defendant's intestate. The accident occurred near Fletcher in Henderson County and the defendant's intestate was killed. After the action had been filed and the cause was at issue, the plaintiff made a motion to transfer the action to Buncombe County for trial on the ground that the convenience of witnesses and the ends of justice would be promoted thereby. The court found as a fact that the convenience of witnesses and the ends of justice would be promoted by removal of the action to Buncombe County for trial but held it to be mandatory under the statute C.S. 465 (G.S. 1-78) that the cause be retained in Guilford County for trial. The ruling was reversed on appeal.

This Court held that while the action had to be instituted against the administrator in Guilford County, it did not have to be tried there, citing *Latham v. Latham,* 178 N.C. 12, 100 S.E. 131. *Brogden, J.,* in speaking for the Court, said: "The plaintiff was compelled to institute his action in the Superior Court of Guilford County by reason of the mandate of the statute, and his act in so doing could not therefore be imputed to him as a voluntary choice of venue so as to prevent him from lodging a motion for removal."

In the case of *R. R. v. Thrower, supra,* the plaintiff was a corporation with its principal office in New Hanover County, and the defendant was a citizen and resident of Mecklenburg County. The action was instituted in Cumberland County to recover from the defendant the amount of an unpaid check delivered by the defendant to the plaintiff. In apt time the defendant filed his motion for removal of the cause to Mecklenburg County for trial. Thereupon, the plaintiff filed a motion that the court retain the cause in Cumberland County for the convenience of witnesses as provided in C.S. 470 (now G.S. 1-83, subsection (2)). The court granted the plaintiff's motion and upon appeal the ruling was reversed. This Court held that Mecklenburg County was the proper venue for the trial of the action. In speaking for the Court, *Barnhill, J.,* said: "When the defendant duly and in proper time filed his motion in writing for the removal of this cause to Mecklenburg County it then became the duty of the court to pass upon and decide the question thus raised before proceeding further in the cause in any essential matter affecting the rights of the defendant. Pending a determination of this question the court was without authority to entertain the motion made by the plaintiff. On the admitted facts defendant's motion should have been allowed and an order removing the cause to Mecklenburg County should have been entered. By considering and allowing the plaintiff's motion in its discretion the court below, in effect, by the exercise of discretion, denied the defendant a substantial right to which he is entitled as a matter of law."

The General Assembly, by 1945 Session Laws, Chapter 141, added section 4 to G.S. 1-83, as above set out. This section gives a plaintiff the right to make a motion for removal in a divorce action, when such motion is made before the defendant has been personally served with summons. By adding this section, we think the Legislature construed the existing statute as not giving a plaintiff the right to have an action voluntarily instituted by him, in an improper county, removed to one of proper venue.

The order directing the removal of this cause to Buncombe County, as a matter of right, will be upheld.

The plaintiff, if it so elects, will have the right to file a motion in Buncombe County for removal of the cause for the convenience of witnesses under subsection (2) of G.S. 1-83, which motion, if interposed,

should be disposed of in the discretion of the court. *R. R. v. Thrower, supra.* The plaintiff, however, has no right, under its motion interposed below, either as a matter of law or in the discretion of the court, to have this cause removed to Durham County.

The judgment of the court below is

Affirmed.

MILLIGE RUPLEY POUNDS AND JOHN CLYDE POUNDS v. CONIE POUNDS LITAKER, JACOB ARCHIE POUNDS, ELLEN POUNDS PROPST, MARGARET LUCILLE POUNDS HOWARD, ELMA FLORENCE POUNDS SCHADT, ETHEL MAE POUNDS, FRANK POUNDS, CARL POUNDS AND EMILY POUNDS SWINK.

(Filed 11 June, 1952.)

1. Wills § 8—

While it is not required that a holographic will be dated or the place of its execution be stated therein, it is necessary that the testator's name be inserted in his own handwriting in some part of the instrument. G.S. 31-3, G.S. 31-18 (2).

2. Same—

Every word of a holographic will must be in the handwriting of testator, and while words printed on the paper will not invalidate the instrument but will be treated as surplusage if such printed words are not essential to the written words, printed words or letters may not be used to supply any essential part of the instrument.

3. Same—

Where dispositive words appears in the handwriting of deceased but her name is not written in any part of the instrument, her engraved monogram on the paper may not be used to supply the requisite signature, and the paper writing is ineffectual as a holographic will.

APPEAL by propounders from *Rousseau, J.,* March Term, 1952, of FORSYTH.

This is a proceeding instituted before the Clerk of the Superior Court of Forsyth County, North Carolina, to probate in solemn form a paper writing alleged to be the holographic will of Hattie Pounds Efird, deceased.

The purported will was written on the personal stationery of Hattie Pounds Efird, deceased. In the upper left-hand corner of the paper writing is an engraved monogram containing the letters "HEP," and the written portion thereof is as follows:

"It is my will and desire that the children of my brother Arthur B. Pounds do not participate in any way in the division of my estate—otherwise that my estate be divided according to the laws of the state of N. C.

"This the.....day of.....1950."

The paper writing was found in a sewing basket belonging to Mrs. Efird along with a list of her furniture, her glasses, hearing aid, and a little thread.

An objection to the probate of the paper writing was filed with the Clerk of the Superior Court of Forsyth County by two nephews and a niece of the deceased, which raised the issue of *devisavit vel non.* The Clerk, however, proceeded to hear the evidence and entered an order refusing to admit the will to probate. An appeal was taken from the Clerk's ruling to the Superior Court.

When the cause came on for hearing, the trial judge held that the paper writing was not a valid will and instructed the jury that if they were satisfied from the evidence they had heard, that the evidence was true, it would be their duty to answer the issue "No." It was so answered and judgment entered accordant therewith.

The propounders appeal and assign error.

Ratcliff, Vaughn, Hudson, Ferrell & Carter and Womble, Carlyle, Martin & Sandridge for propounders, appellants.

E. T. Bost, Jr., and H. W. Calloway, Jr., for caveators, appellees.

DENNY, J. This appeal involves the question whether or not the engraved monogram of Mrs. Efird, which appears on the paper writing under consideration, may be construed to be her signature. If such monogram is insufficient as a signature within the meaning of the statute with respect to the execution of holographic wills, then it will be unnecessary to consider the other exceptions presented and argued.

It is provided by statute G.S. 31-18 that wills must be admitted to probate only in the manner prescribed therein. Sub-section 2 of this statute, among other things, provides, "In case of a holograph will, on the oath of at least three credible witnesses, who state that they verily believe such will and every part thereof is in the handwriting of the person whose will it purports to be, and whose name must be subscribed thereto, or inserted in some part thereof."

It is not required by our statute that a holographic will be dated or the place of its execution be stated therein. *In re Will of Lowrance,* 199 N.C. 782, 155 S.E. 876.

It is likewise held in the above case that where the "words appearing on a paper writing in the handwriting of the deceased person are sufficient, as in the instant case, to constitute a last will and testament, the mere fact that other words appear thereon, not in such handwriting, but not essential to the meaning of the words in such handwriting, cannot be held to defeat the intention of the deceased, otherwise clearly expressed,

that such paper writing is and shall be his last will and testament. . . . The words in print appearing on the sheets of paper propounded in the instant case are surplusage. They are not essential to the meaning of the words shown by three credible witnesses to be in the handwriting of Mrs. S. A. Lowrance. These words, without the printed words, are sufficient to constitute a testamentary disposition of property, both real and personal." *In re Will of Parsons,* 207 N.C. 584, 178 S.E. 78; *In re Will of Smith,* 218 N.C. 161, 10 S.E. 2d 676; *In re Will of Wallace,* 227 N.C. 459, 42 S.E. 2d 520; *In re Will of Goodman,* 229 N.C. 444, 50 S.E. 2d 34.

An instrument, however, may not be probated as a holographic will where it contains words not in the handwriting of the testator if such words are essential to give meaning to the written words of the testator. *In re Will of Wallace, supra; In re Will of Smith, supra; In re Wall's Will,* 216 N.C. 805, 5 S.E. 2d 837.

Our decisions are in accord with what is said in 57 Am. Jur., Wills, section 634, page 433, *et seq.;* to wit, "The general rule under statutes validating holographic wills is that every word in such a will must be in the handwriting of the testator. . . . A will in the form of a holographic instrument is invalidated by the appearance therein of words inserted by a rubber stamp or in the handwriting of one other than the testator, which have been adopted by him as a part of his will. An instrument which contains printed matter is not entitled to probate as a holographic will where the printed matter aids in expressing the intention of the testator. . . . The mere fact the testator used a blank form whether of a will or some other instrument does not invalidate an otherwise valid will if the printed words may be entirely rejected as surplusage. . . . There is however authorities to the effect that a testamentary instrument is valid as a holographic will, although it contains words not in the handwriting of the testator, if such words are not necessary to complete the instrument in the holographic form, and do not affect the meaning."

In the present case, if we treat the engraved monogram, which is not in the handwriting of the testatrix, as surplusage, the propounders must fail.

In view of the statutory provisions with respect to the probate of a holographic will, and our decisions pertaining thereto, we hold that the engraved monogram of the testatrix, appearing on the instrument offered for probate in solemn form as her last will and testament, may not be considered as a part thereof. The monogram is not in her handwriting and may not be construed to be her signature within the meaning of G.S. 31-3 and G.S. 31-18, subsection 2.

The judgment of the court below is

Affirmed.

FLETCHER CHAMBERS, MRS. LUNA MAC HUNNICUTT, MRS. WM. IRA WILSON, M. T. CHAMBERS, J. R. CHAMBERS, GEORGE R. CHAMBERS, MRS. DEWEY SKINNER, P. L. CHAMBERS, H. W. CHAMBERS AND JAMES F. CHAMBERS, v. MYRLE CHAMBERS, GLADYS C. LONG AND HUSBAND MACK LONG, GARLAND CHAMBERS, JR., AND WIFE ALBERTA CHAMBERS, LANCE CHAMBERS AND WIFE LORINA M. CHAMBERS, JOYCE CHAMBERS WINN AND HUSBAND BILL WINN, MONTE CHAMBERS AND WIFE HILDA J. CHAMBERS, JOAN CHAMBERS, AND MYRLE CHAMBERS AND LANCE CHAMBERS, ADM. D. B. N. OF THE ESTATE OF J. E. CHAMBERS, DECEASED.

(Filed 11 June, 1952.)

1. Adverse Possession § 4k—Evidence of adverse possession by son against father held sufficient to take issue to jury.

Evidence tending to show that shortly after a father purchased a tract of land he divided it by a well defined boundary and put one of his sons in possession of one of the divisions, and that such son for a period of more than twenty years thereafter maintained exclusive dominion over the land in the character of owner, occupying it as a separate home for himself and family, cultivating it, receiving the rents therefrom, and listing and paying taxes thereon, *is held* sufficient to be submitted to the jury on the question of the son's acquisition of title by adverse possession and to overrule motion to nonsuit on the part of the heirs of another son upon their contention supported by evidence that the first son's possession was permissive. G.S. 1-40.

2. Adverse Possession § 9a—

Where a party claims under color of title of an asserted will, but does not show that the paper was ever probated and does not offer it in evidence, the trial court correctly declines to submit an issue as to adverse possession on the part of such party under color of title. G.S. 1-38.

APPEAL by defendants from *Bennett, Special Judge,* November Special Term, 1951, of PERSON. No error.

Action to recover land, and damages for wrongful withholding.

Title was admitted in a common ancestor, John E. Chambers, under a deed dated 4 December, 1899, describing 226 acres. The plaintiffs are heirs at law of Joe P. Chambers, son of John E. Chambers, and the defendants are heirs of Garland Chambers, another son of John E. Chambers.

The plaintiffs alleged and offered evidence tending to show that John E. Chambers, soon after he acquired title, divided the land into eastern and western portions of 113 acres each, and placed his son Joe P. Chambers in possession of the western division and his daughter Lula Bowles in possession of the eastern portion. It was alleged that Joe P. Chambers entered into possession of the western tract under the oral investiture of his father in 1900, and thereafter continued in the open, exclusive and adverse possession thereof until his death 3 May, 1930, and that this

possession under known and visible lines and boundaries vested a good title thereto in him, a title which descended to the plaintiffs, his heirs at law.

Joe P. Chambers died in May, 1930. John E. Chambers died in August, 1930. Thereafter Garland Chambers took possession of this land and remained in possession until his death in 1945, since when the defendants, his heirs, have continued in possession.

This action was instituted September, 1949.

The defendants denied that Joe P. Chambers had acquired title by adverse possession at the time of his death in 1930, and contended that whatever possession he had was permissive. Defendants further alleged that their possession was under color of title for more than seven years.

Defendants excepted to the denial of their motion for judgment of nonsuit, and also to the court's refusal to submit an issue as to defendants' allegation of adverse possession under color.

The jury for their verdict answered the issues submitted as follows:

"1. Were the plaintiffs, and those under whom they claim, in the open, notorious and continuous adverse possession of the property described in the complaint under known and visible lines and boundaries for a period of twenty years, as alleged in the complaint? Answer: Yes.

"2. If so, what damages, if any, are the plaintiffs entitled to recover of the defendants for the unlawful withholding of the lands described in the complaint? Answer: $1375.00."

From judgment on the verdict defendants appealed.

Melvin H. Burke and George L. Burke, Jr., for plaintiffs, appellees.

B. I. Satterfield, Fuller, Reade, Umstead & Fuller, and James L. Newsom for defendants, appellants.

DEVIN, C. J. The defendants' appeal presents two questions: (1) Was there error in denying defendants' motion for judgment of nonsuit? (2) Was there error in declining to submit an issue as to adverse possession on the part of defendants under color of title?

1. There was no controversy over the fact that Joe P. Chambers, under whom the plaintiffs claim, at the time of his death in 1930, had been in possession of the land described, cultivating it, receiving the rents therefrom, listing and paying taxes thereon, making improvements and occupying it as a separate home for himself and his family. There was also evidence that he laid out thereon a burial ground in which one of his wives was interred and in which he also was buried. One of the sons of Joe P. Chambers testified without objection that "Granddaddy bought the whole thing (226 acres) and said he was going to give Aunt Lula half the farm and my father the other half"; that there was a well defined line

between the two divisions, and that the outer boundaries were known and visible; that John E. Chambers, who lived elsewhere, referred to this land as "Joe's place," and did not list it for taxation. There was also evidence for plaintiffs that Joe P. Chambers' possession was continuous, exclusive and uninterrupted for thirty years. G.S. 1-40; *Locklear v. Savage,* 159 N.C. 236, 74 S.E. 347.

Defendants contended that Joe P. Chambers' possession was permissive and not adverse to John E. Chambers, his father, and offered evidence tending to support this view.

But considering plaintiffs' evidence in the light most favorable for them, as we must do on a motion to nonsuit, and the permissible inferences deducible from the facts shown, we think the evidence sufficient to carry the case to the jury and to present a question for their decision. *Battle v. Battle, ante,* 499, 70 S.E. 2d 492; *Grimes v. Bryan,* 149 N.C. 248, 63 S.E. 106. The judge's charge to the jury was not sent up, but presumably he instructed the jury properly on all matters of law arising on the evidence and applicable to the issues. *Riley v. Stone,* 174 N.C. 588, 94 S.E. 434. The jury has accepted the plaintiffs' view and found from the evidence that Joe P. Chambers' possession of the land under known and visible lines and boundaries was adverse, and that it had continued for twenty years at the time of his death in 1930.

2. Defendants' second position is that if it be determined that Joe P. Chambers had acquired title by adverse possession at the time of his death, the defendants' father Garland Chambers shortly thereafter entered into possession of the land under an alleged will of John E. Chambers and continued in possession thereunder for seven years, vesting in him a valid title which descended to his heirs, the defendants in this case, G.S. 1-38, and that the court erred in declining to submit an issue addressed to this contention. But we note that while there is an allegation in the answer that John E. Chambers left a will (which was denied in the reply), no will or other paper writing was offered in evidence to support the allegation of color. True, there appears as a defendants' exhibit a "purported" will of John E. Chambers, but this does not show that the paper was ever probated as the will of John E. Chambers, and was not offered in evidence. Hence the ruling of the court on the evidence presented, in the absence of any evidence of a colorable title and entry into possession thereunder, must be sustained. The evidence was insufficient to show adverse possession by defendants for twenty years. The entry of their ancestor was in August, 1930, and this suit was instituted in September, 1949. G.S. 1-40.

No exception other than those herein discussed was referred to in defendants' brief. Rule 28.

We conclude that the ruling of the trial court on the questions now presented was correct, and that in the trial there was

No error.

STATE v. JOHN L. WILLIAMS.

(Filed 11 June, 1952.)

1. Homicide § 6a—

In order to constitute murder in the second degree it is necessary not only that defendant inflict the wound which produces death but it is also required that he inflict such wound intentionally.

2. Homicide § 27d—

An instruction that the jury must find that defendant intentionally killed deceased before it could return a verdict of guilty of murder in the second degree, together with a statement of defendant's contentions, based on his evidence, that he did not intentionally kill deceased but that in the scuffle between the parties defendant's pistol went off, and that defendant had no intention or desire to shoot and kill deceased, *is held* sufficient, in the absence of request for special instructions, to present defendant's defense to the charge of murder in the second degree.

APPEAL by defendant from *Nettles, J.*, October Term, 1951, GUILFORD (High Point Division). No error.

Criminal prosecution under a bill of indictment charging that defendant did kill and murder one Jasper Sturdivant.

On 7 October, 1951, defendant and one Martha Hunt lived in a duplex or apartment house. She lived on one side and he on the other. Between 8 and 9 o'clock that night deceased went to the home of Martha Hunt to get her to attend his sick wife. As he left, he saw defendant standing on his porch and asked him what he was doing "signifying." In reply, defendant cursed deceased, walked out on the sidewalk four or five feet from the porch and struck deceased with a pistol. The evidence for the State tends to show that he knocked deceased down and then shot him while he was prone on the sidewalk. Defendant offered evidence tending to show that deceased accused him of eaves-dropping and cursed him; that then defendant drew his pistol and struck deceased, but did not knock him down; that deceased then grabbed the pistol and tried to take it away from the defendant, and that in the scuffle over the pistol, it accidentally fired and killed deceased.

The solicitor elected to put defendant on trial on the charge of murder in the second degree. The jury returned a verdict of guilty of murder in the second degree. The court pronounced judgment on the verdict and the defendant appealed.

Attorney-General McMullan, Assistant Attorney-General Bruton, and Robert B. Broughton, Member of Staff, for the State.

Gold, McAnally & Gold for defendant, appellant.

VALENTINE, J. On defendant's own statement, he voluntarily entered into an affray with the deceased, in the course of which deceased was fatally wounded. No element of self-defense is made to appear. Therefore, on his own statement, defendant is at least guilty of manslaughter. He contends, however, that he should not have been convicted of murder in the second degree and that the jury was led to render that verdict by the failure of the trial judge to give due emphasis to and clearly charge the jury on the law arising on his evidence tending to show that the homicide was not an intentional killing, but was the result of an accident. His exception directed to this alleged error is the only one in the record which merits discussion.

An intent to inflict a wound which produces a homicide is an essential element of murder in the second degree. *S. v. Lamm,* 232 N.C. 402, 61 S.E. 2d 188; *S. v. Chavis,* 231 N.C. 307, 56 S.E. 2d 678; *S. v. Payne,* 213 N.C. 719, 197 S.E. 573. Therefore, to convict a defendant of murder in the second degree, the State must prove that the defendant intentionally inflicted the wound which caused the death of the deceased.

When it is made to appear that death was caused by a gunshot wound, testimony tending to show that the weapon was fired in a scuffle or by some other accidental means is competent to rebut an intentional shooting. No burden rests on the defendant. He merely offers his evidence to refute one of the essential elements of murder in the second degree. If upon a consideration of all the testimony, including the testimony of the defendant, the jury is not satisfied beyond a reasonable doubt that the defendant intentionally killed deceased, it should return a verdict of not guilty of murder in the second degree.

In this case, the trial judge clearly instructed the jury that it must find that defendant intentionally killed deceased before it could return a verdict of murder in the second degree. In detailing the defendant's contention that the pistol was fired accidentally, the court sufficiently covered this phase of the case by saying: "On the other hand, the defendant says . . . that he did not intentionally kill him and that he had no idea of killing the deceased; . . . that the deceased grabbed the pistol and in the struggle the pistol went off and shot the deceased and he had no intent or desire to shoot and kill the deceased in any way . . ."

The court further charged the jury on the law of involuntary manslaughter, where a homicide unintentionally results from the commission of "some unlawful act not amounting to a felony."

Thus, it appears that the defendant was accorded the full benefit of his testimony. Of course, the charge would have been more complete had the court instructed the jury fully that if it found that while defendant and deceased were scuffling over the pistol, it accidentally fired and inflicted the wound which caused the death of the deceased, it should not return a verdict of guilty of murder in the second degree. Even so, that is simply another way of saying just what the charge did say. In the absence of any prayer for instructions amplifying the law in this respect, *S. v. McLean,* 234 N.C. 283, 67 S.E. 2d 75; *S. v. Gordon,* 224 N.C. 304, 30 S.E. 2d 43; we must hold that the charge met the requirements of the law.

In the trial below, we find

No error.

HORTENSE P. BOND v. CHARLES BOND.

(Filed 11 June, 1952.)

1. Appeal and Error § 6c (2)—

An exception to the judgment presents only the questions whether the facts found support the judgment and whether any error of law appears upon the face of the record.

2. Divorce and Alimony § 12—

Upon the hearing of plaintiff's motion for alimony and counsel fees *pendente lite* in her suit for subsistence without divorce, G.S. 50-16, the finding of the court that defendant had obtained a valid decree of absolute divorce in another state supports a denial of the motion for alimony *pendente lite,* but it is error for the court also to dismiss the action, since the cause was not before the court on final hearing on the merits and the court was without jurisdiction to dismiss it.

APPEAL by plaintiff from *Williams, J.,* October Term, 1951, ORANGE. Modified and affirmed.

Civil action for alimony without divorce and to recover the value of certain personal property, heard on motion for alimony and counsel fees *pendente lite.*

Plaintiff alleges a cause of action for subsistence without divorce under G.S. 50-16 and also for the recovery of the value of certain personal property belonging to plaintiff and appropriated by defendant to his own use. She prays an order for alimony without divorce and for judgment for the value of said personal property.

Defendant, answering, enters certain denials, pleads certain defenses, and specifically pleads a decree of divorce entered in the Circuit Court of Volusia County, Florida, a court of competent jurisdiction.

The cause came on for hearing in the court below on plaintiff's motion for alimony and counsel fees *pendente lite.* After hearing the motion on affidavits, the court below found as a fact that defendant is a resident of the State of Florida and that he obtained a valid decree of divorce in that State 1 September 1949. It thereupon concluded that "defendant's plea in bar of the plaintiff's right to proceed in this action should be sustained" and entered judgment dismissing the action at the cost of the plaintiff.

L. J. Phipps for plaintiff appellant.

Paul B. Edmundson, John S. Peacock, and Bonner D. Sawyer for defendant appellee.

BARNHILL, J. The exception to the judgment entered presents for decision only two questions: (1) Do the facts found support the judgment, and (2) does any error of law appear upon the face of the record? *Rader v. Coach Co.,* 225 N.C. 537, 35 S.E. 2d 609; *Simmons v. Lee,* 230 N.C. 216, 53 S.E. 2d 79, and cases cited; *Surety Corp. v. Sharpe,* 233 N.C. 642, 65 S.E. 2d 138; *S. v. Raynor, ante,* p. 184.

Upon the findings made, the court correctly denied the motion for alimony *pendente lite.* But the cause was before the court for hearing of that motion only. It is so recited in the judgment. "It was not before the court on final hearing on the merits. Hence the court was without jurisdiction to dismiss the action . . ." *Briggs v. Briggs,* 234 N.C. 450.

The judgment entered must be modified so as to limit it to a denial of alimony *pendente lite,* and the cause must be reinstated on the docket for trial. As so modified, the judgment is affirmed.

Modified and affirmed.

ELI HOYT ANGE, C. C. FLEMING AND ALBERT J. MARTIN, TRUSTEES OF THE JAMESVILLE CHRISTIAN CHURCH, v. L. W. ANGE.

(Filed 11 June, 1952.)

VALENTINE, J. This is a supplement to the opinion heretofore filed in this cause on 30 April, 1952, *ante,* 506.

When the case on appeal was docketed here, it included a judgment of the court below in which it was adjudged that the plaintiffs could not convey a fee simple title to the lands referred to in the pleadings, and that the defendant was, therefore, not required to accept the deed tendered. The opinion of this Court was written upon the judgment certified.

After the opinion was filed, it was discovered that there was a mistake in the certification of the judgment and that in the judgment actually signed in this cause by Judge Frizzelle it was adjudged that the Trustees of the Jamesville Christian Church owned the *locus in quo* in fee and had the right to convey the same in fee simple and that the defendant was therefore required to accept the deed tendered to him and pay the consideration therein expressed.

The correct judgment of the lower court has been substituted for the erroneous one, so that the record now speaks the truth. This does not, however, affect the opinion of the Court as originally written, but upon the record as it now stands, the opinion of this Court affirmed the court below rather than reversed it.

It is ordered that this supplemental opinion be appended to the original and published as a part of the original opinion of the Court.

IN THE MATTER OF MRS. E. R. GROVES.

(Filed 11 June, 1952.)

APPEAL by the respondent, the Board of Adjustment of Chapel Hill, from *Williams, J.*, at the October Term, 1951, of ORANGE.

Proceeding in the nature of *certiorari* to review refusal of permit to repair a building in a residential zone in Chapel Hill.

The applicant, Mrs. E. R. Groves, applied to the building inspector for a permit to repair a building in a residential zone in Chapel Hill. The permit was refused by him as not authorized by the zoning ordinance of the municipality, and the applicant appealed to the Board of Adjustment of Chapel Hill, which affirmed the decision of the building inspector. The Superior Court reviewed the decision of the Board of Adjustment by this proceeding in the nature of *certiorari*, and rendered a judgment reversing that decision and ordering the issuance of the permit sought by the applicant. The Board of Adjustment thereupon appealed to the Supreme Court, assigning the conclusions of law and the judgment of the Superior Court as error.

Emery B. Denny, Jr., and John T. Manning for the applicant, appellee.
J. Q. LeGrand for the respondent, appellant.

PER CURIAM. The appellant has failed to show that the Superior Court committed error in reviewing the decision of the Board of Adjust-

ment. *Nichols v. Trust Co.*, 231 N.C. 158, 56 S.E. 2d 429. Hence, the judgment is

Affirmed.

MEMORANDUM ORDER.

IN THE MATTER OF WAYLAND WHITE, JR.
(STATE *v.* WAYLAND WHITE, JR.)

(Filed 11 June, 1952.)

Habeas Corpus § 4: Courts § 5—

A Superior Court Judge has no jurisdiction to act upon a petition based upon the same facts upon which another Superior Court Judge has previously denied a motion for writ of *habeas corpus*.

PETITION for *certiorari* by Wayland White, Jr., to review writs of *habeas corpus* denied by *Williams, J.*, in Chowan County Superior Court, April Term, 1952, and *Carr, J.*, in Wake County Superior Court, April Term, 1952.

PER CURIAM. A Superior Court Judge has no jurisdiction to act upon a petition based upon the same facts upon which another Superior Court Judge has previously denied a motion for writ of *habeas corpus*.

Petition denied.

APPENDIX.

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 12 February, 1952.)

PETITION by defendant Dr. T. H. Joyner to rehear this cause, which is reported in 234 N.C. 222, 67 S.E. 2d 57.

Harkins, Van Winkle, Walton & Buck for petitioner.

WINBORNE and ERVIN, JJ. There is sufficient evidence in the record to repel the motion to nonsuit, and the error in the charge on the burden of proof supports the order for a new trial. This being true, any inadvertence in the original opinion in applying what petitioner asserts is the prevailing rule in respect to the exceptive assignment of error directed to the exclusion of the autopsy report is insufficient to warrant a reconsideration of defendant's appeal.

Petition denied.

KREEGER v. DRUMMOND.

(Filed 27 March, 1952.)

PETITION by plaintiffs to rehear this case as reported, *ante*, p. 8.

The Justices to whom the petition was referred filed the following memorandum in passing upon the petition:

Buford T. Henderson for petitioners.

DEVIN, C. J., and BARNHILL, J., considering the petition to rehear.

Consideration of the petition to rehear in connection with the opinion of this Court heretofore filed leads to the conclusion that the petition should be denied. It is not made to appear that any material fact or authority was overlooked. The opinion properly interpreted declares that the resolution adopted 18 July, 1950, by the Board of Education of Forsyth County, discontinuing the Old Richmond High School and transferring the high school students now residing in the Old Richmond District, was not in accord with the statute and is therefore void. But to the end that the Board might be free to proceed to remedy the alleged situation now existing in the Old Richmond District in respect to said high school, in the manner provided by statute and in accord with the opinion, the dissolution of the restraining order was affirmed. The result is that the defendant Board must abandon the action heretofore taken, but may proceed, if so advised, under the statute and in accord with the opinion, unfettered by the restraining order issued.

Petition denied.

Abandonment—Of contract to convey may be oral, *Scott v. Jordan*, 244.
Abatement—Action to abate public nuisance must be maintained *ex rel.* State, *Dare County v. Mater*, 179.
Abatement and Revival—For pendency of prior action, *Cameron v. Cameron*, 82; *St. Dennis v. Thomas*, 391.
Accessories—*S. v. Birchfield*, 410.
Accord and Satisfaction—See Compromise and Settlement.
Actions—Particular actions see particular titles of actions; joinder of actions and pleadings see Pleadings; trial of actions see Trial; abatement of action on ground of prior action pending, *Cameron v. Cameron*, 82; *St. Dennis v. Thomas*, 391; enjoining prosecution of action in another state, *Childress v. Motor Lines*, 522; party must elect between action for damages inducing sale of property and action for rescission or reformation, *Parker v. White*, 680; in action on conditional sales contract, plaintiff need not allege that he is owner of notes secured thereby, *Acceptance Corp. v. Pillman*, 295; venue of actions, see Venue.
Administration—See Executors and Administrators.
Administrative Law—Administrative interpretation of statutes not conclusive, *Watson Industries v. Shaw*, 203; exclusiveness of statutory remedy, *Ballard v. Charlotte*, 484.
Admissions—In pleadings, *Lindsey v. Leonard*, 100; *Royster v. Hancock*, 110; *Hodges v. Malone & Co.*, 512.
Adverse Possession—Acquisition of easement by, see Easements; hostile character of possession, *Battle v. Battle*, 499; *Duckett v. Harrison*, 145; *Williams v. Robertson*, 478; *Sprinkle v. Reidsville*, 140; *Chambers v. Chambers*, 749; tacking possession, *Brite v. Lynch*, 182; *Williams v. Robertson*, 478; *Battle v. Battle*, 499; color of title, *Trust Co. v. Parker*, 326; *Williams v. Robertson*, 478; *Chambers v. Chambers*, 749; disabilities, *Battle v. Battle*, 499; allegation of boundaries of land claimed must fit *locus in quo*, *Wilson v. Chandler*, 373.
Agency—See Principal and Agent; agent for service of process, *Lambert v. Schell*, 21; petition to discontinue agency at railroad station, *Utilities Com. v. R. R.*, 273.
Agriculture—Board of Trade may not require buyers to participate in fifth sale, *Board of Trade v. Tobacco Co.*, 737; liability for penalty for production in excess of quota, *Puckett v. Sellars*, 268.
Aider—Of complaint by answer, *Shuford v. Phillips*, 387.
Aiders and Abetters—*S. v. Birchfield*, 410.
Alibi—Nonsuit may not be entered on defendant's evidence of, *S. v. Sears*, 623.
Alienation—Restraint on, *Mangum v. Wilson*, 353.
Alimony—See Divorce and Alimony.
Allegata—Proof and allegation must correspond, *Wilson v. Chandler*, 373.
Alleys—Dedication of, to public, *Rowe v. Durham*, 158.
Ambulances—Liability of ambulance operator for injury to passenger, *Pemberton v. Lewis*, 188.
Amendment—To pleadings, *Cameron v. Cameron*, 82; *Anderson v. Atkinson*, 300; of process, *Boone v. Sparrow*, 396.
Anticipation of Negligence—Party is under duty to anticipate ordinary hazards of road, *Morris v. Transport Co.*, 568.
Anticipatory Judgments—Courts will not enter, *Trust Co. v. Schneider*, 446.
Anticipatory Order—Case on appeal may not be settled by anticipatory order when oral evidence is offered on trial, *Hall v. Hall*, 711.
Anti-Freeze — Agent's authority to modify dealer contract, *Commercial Solvents v. Johnson*, 237.
Apparent Authority—Of agent, *Commercial Solvents v. Johnson*, 237.

Appeal and Error—Appeal in criminal cases, see Criminal Law; appeal from clerk to Superior Court, *Woody v. Barnett*, 73; appeals from recorders' courts to Superior Courts, *S. v. Morris*, 393; appeal from orders of Utilities Com., *Utilities Com. v. R. R.*, 273; review of award of Industrial Commission, see Master and Servant; Supreme Court may decide question in supervisory power even though appellant is not party aggrieved, *Ange v. Ange*, 506; judgment and orders appealable, *Shelby v. Lockey*, 343; *Erickson v. Starling*, 643; necessity for and sufficiency of objections and exceptions in general, *Sprinkle v. Reidsville*, 140; *Jones v. Jones*, 390; *Dare County v. Mater*, 179; *Shuford v. Phillips*, 387; *Thompson v. Thompson*, 416; exceptions to signing of judgment, *Sprinkle v. Reidsville*, 140; *Childress v. Motor Lines*, 522; *Development Co. v. Parmele*, 689; *In re Hall*, 697; *Bond v. Bond*, 754; *Hall v. Hall*, 711; objections and exceptions to findings of fact, *Sprinkle v. Reidsville*, 140; exceptions to charge, *Hodges v. Malone & Co.*, 612; necessity that misstatement of evidence be brought to court's attention, *In re Will of McGowan*, 404; *Supply Co. v. Rozzell*, 631; necessity for renewal of motion to nonsuit, *Jones v. Jones*, 390; theory of trial in lower court, *In re Will of McGowan*, 404; *In re Housing Authority*, 463; necessity for case on appeal, *Hall v. Hall*, 711; settlement of case on appeal, *Hall v. Hall*, 711; *certiorari* to amplify record, *Hall v. Hall*, 711; jurisdiction of lower court after appeal, *Scott v. Jordan*, 244; necessary parts of record, *Allen v. Allen*, 554; failure to discuss exceptions in the brief, *Dillingham v. Kligerman*, 298; *In re Will of McGowan*, 404; *Thompson v. Thompson*, 416; *Williams v. Robertson*, 478; discretionary orders not reviewable, *Todd v. Smathers*, 123; *Lamm v. Lorbacher*, 728; burden of showing error, *Chesson v. Combs*, 123; *Hodges v. Malone & Co.*, 512; *Garland v. Penegar*, 517; harmless and prejudicial error, *Trust Co. v. Parker*, 326; *Hodges v. Malone & Co.*, 512; *Gaither v. Hospital*, 431; *Sprinkle v. Reidsville*, 140; *In re Housing Authority*, 463; *In re Will of McGowan*, 404; review of findings of fact, *Horner v. Chamber of Commerce*, 77; *Erwin Mills v. Textile Workers Union*, 107; *Gafford v. Phelps*, 218; *Thompson v. Thompson*, 416; *Ryan v. Trust Co.*, 585; *Gaither v. Hospital*, 431; *Murphy v. Smith*, 455; review of orders on motions to strike pleadings, *Lambert v. Schell*, 21; *Woody v. Barnett*, 73; *Neal v. Greyhound Corp.*, 225; review of judments on motions to nonsuit, *Sanderson v. Paul*, 56; *Sprinkle v. Reidsville*, 140; partial or general new trial, *Edwards v. Edwards*, 93; *Smith v. Hewett*, 615; remand, *Credit Corp. v. Saunders*, 369; construction of decisions of Supreme Court, *Poindexter v. Motor Lines*, 286.

Appraisers—Majority of board may act after death of one member, *Ballard v. Charlotte*, 484.

"Arbitrary"—Defined, *In re Housing Authority*, 463.

Argument of Solicitor—*S. v. McLamb*, 251.

Arrest and Bail—False arrest, see False Imprisonment; resisting arrest, *S. v. Raynor*, 184; right to bail, *In re Ferguson*, 121.

Arrest of Judgment—Motions in, *S. v. Raynor*, 184; *S. v. Morris*, 393.

Arson—*S. v. Cuthrell*, 173; *S. v. Needham*, 555.

Art Commission—Purchase of works of art by, *Art Society v. Bridges*, 125.

Asbestosis—Right to compensation for under Compensation Act, *Honeycutt v. Asbestos Co.*, 471.

Assault—*S. v. Birchfield*, 410; *S. v. Goodson*, 177.

"Assessed"—When taxes are, *Holt v. May*, 46.

Assessments—For public improvements, *Ballard v. Charlotte*, 484;

Cemetery Association v. Raleigh, 509.

Assignments of Error—Not discussed in brief deemed abandoned, *Dillingham v. Kligerman*, 298; *In re Will of McGowan*, 404; *Thompson v. Thompson*, 416; *Williams v. Robertson*, 478; *S. v. Roman*, 627; necessity for, *S. v. Williams*, 429; *Shuford v. Phillips*, 387; exception to signing of judgment, *Sprinkle v. Reidsville*, 140; *Development Co. v. Parmele*, 689; *In re Hall*, 697; *Bond v. Bond*, 754; in absence of case on appeal or case agreed exceptions are limited to record proper, *Hall v. Hall*, 711.

Athletic Field—Baseball diamond is essential part of physical plant of school, *Smith v. Hefner*, 1.

Attorney and Client—Right to counsel in criminal prosecution, *S. v. Wagstaff*, 69; attorney's fee not part of cost, *Trust Co. v. Schneider*, 446; error for court to order corporation to pay counsel specified fees, *Erickson v. Starling*, 643.

Automobiles—Liability of ambulance operator for injury to passenger, *Pemberton v. Lewis*, 188; accidents at grade crossings, *Cockrell v. R. R.*, 303; *Jones v. R. R.*, 640; automobile insurance, see Insurance; in action involving collision in another state, its laws govern substantive features, *Childress v. Motor Lines*, 522; liability of manufacturer and dealer for dangerous defects, *Harward v. General Motors Corp.*, 88; fraud of dealer in sale of used car, *Garland v. Penegar*, 517; due care in driving, *Adcox v. Austin*, 591; *Sowers v. Marley*, 607; parking, stopping and parking lights, *Morris v. Transport Co.*, 568; *Clark v. Lambreth*, 578; intersections, *Morrisette v. Boone Co.*, 162; *Howard v. Carman*, 289; lights, *Morris v. Transport Co.*, 568; speed, *Adcox v. Austin*, 591; *Sowers v. Marley*, 607; passing vehicles traveling in opposite direction, *Childress v. Motor Lines*, 522; prior judgment as bar, *Coach Co. v. Stone*, 619; verdict, *Edwards v. Motor Co.*, 269; guests and passengers, *Snyder v. Oil Co.*, 119; *Clark v. Lambreth*, 578; liability of owner for negligence of driver, *Lindsey v. Leonard*, 100; *Echard v. Johnson*, 538; *Hill v. Freight Carriers Corp.*, 705; hit and run driving, *S. v. Morris*, 393.

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Basement—Fall down basement steps by patron of rooming house, *Thompson v. DeVonde*, 520.

Betterments—*Haas v. Smith*, 341; *Edwards v. Edwards*, 93.

Bills and Notes—Defense that notes were for losses on "futures" contracts, *Royster v. Hancock*, 110.

Bingo—County may not enjoin operator of, *Dare County v. Mater*, 179.

Board of Appraisers—Majority of board may act after death of one member, *Ballard v. Charlotte*, 484.

Board of Education—Cannot convey land under navigable water, *Development Co. v. Parmele*, 689.

Boarding House—Fall down basement steps by patron of, *Thompson v. DeVonde*, 520.

Bonds—City bond election held effective notwithstanding void provision of charter allowing nonresidents to vote, *Wrenn v. Kure Beach*, 292; court has jurisdiction to provide that unclaimed funds be returned to surety upon surety's payment into court total liability as shown by clerk's records, *Hanson v. Yandle*, 542.

Briefs—Exception not discussed in brief deemed abandoned, *Dillingham v. Kligerman*, 298; *In re Will of McGowan*, 404; *Thompson v. Thompson*, 416; *Williams v. Robertson*, 478; *S. v. Roman*, 627.

Broadside Exception—*Thompson v. Thompson*, 416; *Hodges v. Malone & Co.*, 512.

"Building"—Within meaning of arson statute, *S. v. Cuthrell*, 173; radio tower is, *Watson Industries v. Shaw*, 203.
Building and Loan Associations—Joint deposits in, *Hall v. Hall*, 711.
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Bulldozer—Damage to house in felling tree, *Hodge v. McGuire*, 132.
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Cancellation of Instruments—Party must elect between action for damages inducing sale of property and action for cancellation or reformation, *Parker v. White*, 680.
"Capricious"—Defined, *In re Housing Authority*, 463.
"Car"—Farm tractor is not within coverage of policy, *Jernigan v. Ins. Co.*, 334.
Carriers—Duty to continue station agency, *Utilities Com. v. R. R.*, 273; "trip lease agreement in interstate commerce," *Eckard v. Johnson*, 538; *Hill v. Freight Carriers Corp.*, 705; grandfather clause in Bus Act, *Utilities Com. v. Fleming*, 660; liability for injury to passenger in ambulance, *Pemberton v. Lewis*, 188.
Case on Appeal—Dismissal of appeal for failure to file statement of case, *S. v. Miller*, 394; sole method to present exceptions relating to oral testimony, *Hall v. Hall*, 711.
Caveat—See Wills.
Cement Block—Action to recover for injury caused by cement block falling on patron at ball game, *Smith v. Hefner*, 1.
Cemetery—Trespass in taking flowers from grave, *Matthews v. Forrest*, 281; property of subject to assessment for public improvements, *Cemetery Asso. v. Raleigh*, 509.
Certiorari—Cannot be used to present new matter, *S. v. Simmington*, 612; *Hall v. Hall*, 711; review of judgment in *habeas corpus*, *In re Hickerson*, 716.
Chain of Title—Party must show that person under whom he claims was heir of person of same surname owning land in order to establish chain of title, *McDonald v. McCrummen*, 550.
Chamber of Commerce—Cannot be given money by municipality with unlimited discretion as to its expenditure, *Horner v. Chamber of Commerce*, 77.
Character Evidence—Character witness may voluntarily explain his testimony, *S. v. Mills*, 226; solicitor may not attack defendant's character when he does not go upon stand or put character in evidence, *S. v. McLamb*, 251.
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Charities—Ascertaining value of property donated to school for purpose of income tax deduction, *Mills Co. v. Shaw, Comr. of Revenue*, 14.
Charter Bus Carrier—*Utilities Com. v. Fleming*, 660.
Chattel Mortgages and Conditional Sales—Claim and delivery by mortgagee, *Credit Corp. v. Saunders*, 369; mortgagee suing on conditional sales contract need not allege that

he is holder of note secured thereby, *Acceptance Corp. v. Pillman*, 295.
Chickens—Larceny of, *S. v. Bryant*, 420.
Children—See Infants; when "heirs" will be construed "children," *Sprinkle v. Reidsville*, 140.
Church—Deed of property for church purposes only, *Ange v. Ange*, 506.
Circumstantial Evidence—Sufficiency of circumstantial evidence of guilt, *S. v. Needham*, 555; *S. v. Roman*, 627; sufficiency of circumstantial evidence of negligence, *Sowers v. Marley*, 607.
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Clerks of Court—Duties and authority in probate and caveat of wills, *In re Will of Ellis*, 27; jurisdiction to enter default judgments, *Boone v. Sparrow*, 396; appointment of guardian for orphan, *In re Hall*, 697; must sign summons, *Boone v. Sparrow*, 396; appeals to Superior Courts, *Woody v. Barnett*, 73; court has jurisdiction to provide that unclaimed funds be returned to surety upon surety's payment into court total liability as shown by clerk's records, *Hanson v. Yandle*, 532.
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Collateral Attack—Acts of *de facto* officers are not subject to, *Wrenn v. Kure Beach*, 292; where commissioners have no authority to establish county court, person appointed judge is not even *de facto*, and judgment may be collaterally attacked, *In re Hickerson*, 716.
Collateral Heirs—Must show want of direct descendant in order to be entitled to take, *Murphy v. Smith*, 455.
Collision Insurance—Breach of subrogation agreement by insured precludes recovery on collision policy, *Hilley v. Ins. Co.*, 544.
Color of Title—Commissioner's deed at foreclosure is, notwithstanding irregularity in foreclosure, *Trust Co. v. Parker*, 326; party must introduce asserted color in evidence, *Chambers v. Chambers*, 749.
Commerce—Sales tax on building material does not constitute burden, *Watson Industries v. Shaw*, 203; trip lease agreement of truck in interstate commerce, *Eckard v. Johnson*, 538; *Hill v. Freight Carriers Corp.*, 705.
Commissioners—Mayor and commissioners *held de facto* officers notwithstanding void charter provision that nonresidents might vote, *Wrenn v. Kure Beach*, 292.
Commissioner's Deed—At foreclosure is color of title notwithstanding irregularity in foreclosure, *Trust Co. v. Parker*, 326.
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ANALYTICAL INDEX.

ABATEMENT AND REVIVAL.

§ 5½. Abatement for Pendency of Prior Action in General.

The pendency of an action in a court of competent jurisdiction abates a subsequent action between the same parties for the same, either in the same court or in another court of the State having like jurisdiction. *Cameron v. Cameron*, 82.

§ 9. Identity of Actions for Purpose of Abatement.

Where the same plaintiff brings both actions against the same defendant, or where the parties are reversed in the second action but the plaintiff in the second action as defendant in the first actually pleads a counterclaim, the test for determining the identity of the actions for the purpose of abatement is whether there is a substantial identity as to parties, subject matter, issues involved, and relief demanded. *Cameron v. Cameron*, 82.

Where the parties in a second action appear in reverse order and plaintiff in the second action as defendant in the first does not plead a counterclaim, the first action will not abate the second even though plaintiff in the second action could obtain the same relief by counterclaim in the prior action unless judgment in the prior action would necessarily adjudicate the matters raised in the second and operate as a bar to it. *Ibid.*

Action by wife for divorce from bed and board on ground of abandonment abates husband's subsequent action for divorce on ground of separation. *Ibid.*

The test of identity of actions for the purpose of a plea in abatement is whether judgment in the prior action would support a plea of *res judicata* in the second. *St. Dennis v. Thomas*, 391.

An action to recover damages for deceit in the sale of certain real property and to restrain defendants from negotiating, transferring or pledging the note executed for the balance of the purchase price, *held* not to support a plea in abatement in a subsequent action by the grantors and trustee to recover on the note for the balance of the purchase price and foreclose the deed of trust securing it, since judgment in the prior action would not constitute *res judicata* in the second. *Ibid.*

ADMINISTRATIVE LAW.

§ 5. Exclusiveness of Statutory Remedy.

Failure to follow statutory procedure does not preclude party from independently attacking action of board when such action is void. *Ballard v. Charlotte*, 484.

ADVERSE POSSESSION.

§ 3. Hostile Character of Possession in General.

The owner of a lot invested her daughter and son-in-law with possession and thereafter attempted to convey the lot to them by deed which, through error, failed to include the lot in its description. *Held:* The daughter's and son-in-law's possession of the *locus* in the character of owners is adverse to the grantor and to all others. *Battle v. Battle*, 499.

§ 4a. Hostile Character of Possession—Tenants in Common.

Tenants in common hold adversely to each other when they go into possession of their respective tracts under a parol partition, but must so hold adversely for twenty years in order to ripen title. *Duckett v. Harrison*, 145.

ADVERSE POSSESSION—*Continued.*

A parol partition comes within the statute of frauds, G.S. 22-2, and in order to acquire title thereunder a tenant in common must show adverse possession thereunder for twenty years. *Williams v. Robertson*, 478.

The possession of one tenant in common is in law the possession of all his cotenants unless there has been an actual ouster or a sole adverse possession for twenty years, and adverse possession by a tenant in common, even under color of title, cannot ripen title in a shorter period as against the cotenants. *Ibid.*

But adverse possession of daughter against mother, continued for more than twenty years after mother's death, ripens title in daughter even though daughter was tenant in common as heir of mother. *Battle v. Battle*, 499.

§ 4d. Hostile Character of Possession—Landlord and Tenant.

The possession of the tenant is deemed the possession of the landlord until twenty years after the termination of the tenancy. *Williams v. Robertson*, 478.

§ 4i. Hostile Character of Possession—Life Tenants and Remaindermen.

The statute of limitations cannot begin to run against remaindermen until the death of the life tenant. *Sprinkle v. Reidsville*, 140.

§ 4k. Hostile Character of Possession—Parent and Child.

Evidence tending to show that shortly after a father purchased a tract of land he divided it by a well defined boundary and put one of his sons in possession of one of the divisions, and that such son for a period of more than twenty years thereafter maintained exclusive dominion over the land in the character of owner, occupying it as a separate home for himself and family, cultivating it, received the rents therefrom, and listing and paying taxes thereon, *is held* sufficient to be submitted to the jury on the question of the son's acquisition of title by adverse possession and to overrule motion to nonsuit on the part of the heirs of another son upon their contention supported by evidence that the first son's possession was permissive. G.S. 1-40. *Chambers v. Chambers*, 749.

§ 7. Tacking Possession.

Where father and son hold land successively, but title by adverse possession has not ripened in the father at the time of his death, the son's possession is not tacked to that of the father so as to ripen title in the father, but would serve only to vest title in the son as a new *propositus* from whom descent would be traced. *Brite v. Lynch*, 182.

Several successive possessions may be tacked for the purpose of showing a continuous adverse possession where there is privity of estate or connection of title between the several occupants. *Williams v. Robertson*, 478.

Daughter who is tenant in common as heir of mother may not tack adverse possession against her mother to her adverse possession against her cotenants. *Battle v. Battle*, 499.

§ 9a. What Constitutes Color of Title.

A commissioner's deed to the purchaser pursuant to decree of foreclosure of a deed of trust is color of title notwithstanding later adjudication that the foreclosure decree was defective because the trustee had not been made a party to the suit, and where the grantee in the commissioner's deed enters thereunder upon the land in good faith and holds same openly, adversely and continuously for more than seven years, title vests in him by adverse possession. G.S. 1-38. *Trust Co. v. Parker*, 326.

ADVERSE POSSESSION—*Continued.*

A paper writing which on its face professes to pass title to land but fails to do so because of want of title in the grantor or defect in the mode of conveyance, is color of title, and possession thereunder for seven years will ripen title in the grantee provided grantee's entry thereunder is made in good faith and he holds same openly, notoriously and adversely for the required period. *Ibid.*

§ 9c. Color of Title—Fitting Description to Land.

A party claiming under color of title must fit the description in the deed under which he claims to the land in controversy in some manner sanctioned by law. *Williams v. Robertson*, 478.

§ 9d. Necessity That Paper Constituting Color Be Introduced in Evidence.

Where a party claims under color of title of an asserted will, but does not show that the paper was ever probated and does not offer it in evidence, the trial court correctly declines to submit an issue as to adverse possession on the part of such party under color of title. *Chambers v. Chambers*, 749.

§ 13e. Disabilities.

Where the statute of limitations has begun to run against the ancestor, upon the ancestor's death, the statute continues to run against the ancestor's children notwithstanding that they are minors. *Battle v. Battle*, 499.

Where a person is *non compos mentis* at the time the statute of limitations begins to run against him, his interest cannot be barred during his diability. *Ibid.*

§ 18. Competency and Relevancy of Evidence.

Upon claim of title by adverse possession it is competent for claimant to introduce evidence tending to show that he had used the land for the only purpose of which it was susceptible, and also tax abstracts showing that he had listed and paid taxes on the land. *Trust Co. v. Parker*, 326.

Upon claim of adverse possession under color of a commissioner's deed, claimant may introduce opinion evidence as to the value of land at the time of sale for the purpose of showing that his entry under the deed was in good faith. *Ibid.*

Where defendant, in an action for trespass, pleads adverse possession of a tract of land, but the allegations of the boundaries of such tract do not cover the land in dispute, defendant is not entitled to introduce evidence of adverse possession of the land in dispute, since such evidence is not predicated upon allegation. *Wilson v. Chandler*, 373.

AGRICULTURE.

§ 9. Marketing Associations—Power to Control and Regulate.

Tobacco Board of Trade cannot require buyers to participate in fifth sale. *Board of Trade v. Tobacco Co.*, 737.

§ 16. Penalties for Production in Excess of Quota.

In construing 7 USCA sec. 1314 in the light of the evils sought to be eliminated, the remedies intended to be applied, and the objective to be attained, *it is held* that its provision that a warehouseman, in paying the producer for tobacco, "may" deduct the penalty assessed for production of tobacco in excess of the quota allotted to the producer's farm, means "shall," and imposes the

AGRICULTURE—*Continued.*

imperative duty on the warehouseman to deduct, in every instance, the penalty imposed. *Puckett v. Sellars*, 264.

And where through error warehouseman fails to deduct full penalty he may, upon paying same, recover from grower. *Ibid.*

APPEAL AND ERROR.

§ 2. Judgments and Orders Appealable.

An appeal does not lie to the Supreme Court from an interlocutory order of the Superior Court unless such 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. *Shelby v. Lackey*, 343.

In an action by a municipality to enforce a zoning ordinance, order of the court permitting certain property owners to become parties plaintiff and to adopt the complaint theretofore filed by the municipality, upon allegations that the value of their property would be impaired if the zoning ordinance were not upheld, does not deprive defendants of any substantial right and defendants' appeal therefrom is dismissed, the making of additional parties plaintiff being ordinarily within the discretion of the trial judge. G.S. 1-163. *Ibid.*

A decision upon a written demurrer is appealable by either party. *Erickson v. Starling*, 643.

An appeal lies from the granting of a motion for judgment on the pleadings, but if the motion is refused movant must note exception, proceed with the trial, and have the matter reviewed on appeal from final judgment. *Ibid.*

§ 3. Parties Who May Appeal.

Where appellant is not party aggrieved, Supreme Court may nevertheless determine the appeal in its supervisory power where property rights are affected. *Ange v. Ange*, 506. Corrected, *Ange v. Ange*, 755.

§ 6c (1). Necessity for, Form and Sufficiency of Objections and Exceptions in General.

Review is limited to those questions presented by appropriate exceptions duly taken and preserved. *Sprinkle v. Reidsville*, 140; *Jones v. Jones*, 390.

The Supreme Court will take notice *ex mero motu* of a fatal defect of party plaintiff. *Dare County v. Mater*, 179.

Questions not supported by an assignment of error will not be considered. *Shuford v. Phillips*, 387.

An assignment of error, based on a general exception to the order of confirmation, that the court confirmed the report of commissioners in partition notwithstanding that the commissioners failed to follow directions in the judgment for partition, *is held* ineffectual as a broadside exception in failing to point out in what particulars the commissioners failed to follow the judgment, and presents at most whether error of law appears on the face of the record. *Thompson v. Thompson*, 416.

An assignment of error to judgment confirming report of commissioners in partition proceedings on the ground that the delay of the commissioners in bringing in the report resulted in prejudice to the rights of appellant, *is held* ineffectual as a broadside exception in failing to point out in what particular the delay resulted in injury. *Ibid.*

APPEAL AND ERROR—*Continued.*

§ 6c (2). Exception to Judgment or to Signing of Judgment.

An exception to the signing of the judgment does not bring up for review the findings of fact or the evidence upon which they are based, but only whether error appears on the face of the record. *Sprinkle v. Reidsville*, 140.

An exception to the signing of an order is insufficient to bring up for review the findings of fact upon which the order is predicated, and the order will be upheld when it is supported by the findings. *Childress v. Motor Lines*, 522.

An assignment of error to the signing of the judgment presents the sole question of whether the facts agreed support the judgment rendered. *Development Co. v. Parmele*, 689; *Hall, In re*, 697; *Bond v. Bond*, 754.

Where there is no case on appeal or case agreed, review is limited to exceptions presented by the record proper and the judgment must be affirmed if it is supported by the findings of fact. *Hall v. Hall*, 711.

§ 6c (3). Sufficiency of Objections and Exceptions to Findings of Fact.

The sufficiency of the evidence to support the court's findings of fact is not presented when there are no exceptions to any of the findings. *Sprinkle v. Reidsville*, 140.

§ 6c (5). Objections and Exceptions to Charge.

An exception to the charge on the ground that it failed to comply with G.S. 1-180, without specifying and pointing out in what particular the charge was deficient, is ineffectual as a broadside exception. *Hodges v. Malone & Co.*, 612.

§ 6c (6). Necessity That Misstatement of Evidence or Contentions Be Brought to Trial Court's Attention.

Misstatement of the contentions of a party must be brought to the trial court's attention before the case is finally given to the jury so that it may be corrected. *In re Will of McGowan*, 404.

While ordinarily a misstatement of a fact in evidence must be called to the trial court's attention in apt time, where the misstatement is of material fact not shown in evidence it constitutes reversible error. *Supply Co. v. Rozzell*, 631.

§ 7. Necessity of Motion to Nonsuit and Renewal to Present Sufficiency of Evidence.

Where motion for nonsuit is not made at the close of plaintiff's evidence nor renewed at the close of all the evidence, the question of the sufficiency of the evidence to be submitted to the jury is not presented. *Jones v. Jones*, 390.

§ 8. Theory of Trial in Lower Court.

An appeal will be determined in accordance with theory of trial in the lower court. *In re Will of McGowan*, 404.

Where, in the trial, the contentions and exceptions of the parties relate solely to the form of the issue to be submitted to the jury, appellant may not contend on appeal that the matter involved a question of fact determinable by the judge alone and that the submission of any issue to the jury was error, since the appeal must follow the theory of trial in the lower court. *In re Housing Authority*, 463.

§ 10a. Necessity for Case on Appeal.

A "case on appeal" or a "case agreed" is the sole statutory method of vesting the Supreme Court with jurisdiction to review exceptions which point out

APPEAL AND ERROR—*Continued.*

errors occurring during the progress of a trial in which oral testimony is offered or which challenge the sufficiency of the evidence to support the facts found by the trial court, and unless so presented such exceptions are mere surplusage and are without force and effect and must be treated as a nullity. *Hall v. Hall*, 711.

§ 10e. Settlement of Case on Appeal.

The trial court is without power to settle the case on appeal without notice to the adverse party or after the record has been certified to the Supreme Court. *Hall v. Hall*, 711.

The trial court has no power to settle the case on appeal until and unless there is a disagreement of counsel. G.S. 1-283. *Ibid.*

Where oral evidence has been offered, the trial court is without power to settle the case on appeal by an anticipatory order. *Ibid.*

§ 13c. Certiorari to Correct or Amplify Record.

Certiorari will not lie to bring up matter which was not a part of the record when it was certified to the Supreme Court. *Hall v. Hall*, 711.

§ 14. Powers of and Proceedings in Lower Court After Appeal.

An appeal from order of the court refusing defendant's motion to strike plaintiff's reply in an action to recover possession of realty does not preclude a Superior Court judge from thereafter granting plaintiff's motion for an increase in the defense bond. *Scott v. Jordan*, 244.

§ 19. Necessary Parts of Record.

Appeal from judgment of the Superior Court dismissing action in summary ejectment for want of jurisdiction in the justice of the peace will be dismissed in the Supreme Court when the record fails to contain summons, pleadings or affidavit required by G.S. 42-28. *Allen v. Allen*, 554.

§ 29. Abandonment of Exceptions and Assignments of Error by Failing to Discuss Same in Brief.

An exception not discussed in appellant's brief and in support of which no authority is cited, will be deemed abandoned. Rule of Practice in the Supreme Court No. 28. *Dillingham v. Kligerman*, 298.

Assignments of error not brought forward and argued in the brief will be taken as abandoned. *In re Will of McGowan*, 404; *Thompson v. Thompson*, 416.

Exceptions and assignments of error not discussed in the brief and in support of which no argument or reason is stated are deemed abandoned. *Williams v. Robertson*, 478.

§ 31b. Dismissal for Failure of Case on Appeal.

Where there is no case on appeal or case agreed, appellee's motion to dismiss must be allowed in respect to all exceptions and assignments of error other than those to the conclusions of law made on the facts found and to the judgment entered, but does not require a dismissal of the appeal, since appellants are entitled to be heard on the exceptions presented by the record proper. *Hall v. Hall*, 711.

§ 31g. Dismissal for Insufficiency of Record.

Appeal from judgment of the Superior Court dismissing action in summary ejectment for want of jurisdiction in the justice of the peace will be dismissed

APPEAL AND ERROR—*Continued.*

in the Supreme Court when the record fails to contain summons, pleadings or affidavit required by G.S. 42-28. *Allen v. Allen*, 554.

§ 37. Matters Reviewable.

Discretionary refusal of motion for continuance not reviewable in absence of showing of abuse. *Todd v. Smathers*, 123.

Refusal to set aside verdict for inadequate award not reviewable in absence of abuse of discretion. *Lamm v. Lorbacher*, 728.

Error in the refusal of defendants' motion for judgment on the pleadings invalidates all subsequent proceedings in the trial court. *Credit Corp v. Saunders*, 369.

§ 38. Presumptions and Burden of Showing Error.

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. *Chesson v. Combs*, 123.

The burden is upon appellant not only to show error but also that the alleged error was prejudicial. *Hodges v. Malone & Co.*, 512; *Garland v. Penegar*, 517.

§ 39a. Harmless and Prejudicial Error in General.

A new trial will not be awarded for error which is not prejudicial to some substantive right of appellant. *Trust Co. v. Parker*, 326; *Hodges v. Malone & Co.*, 512.

§ 39c. Error Harmless Because Appellant Not Entitled to Relief on Any Aspect.

Where plaintiff is entitled to the relief sought upon his original complaint irrespective of allegations contained in his amended complaint, the order of the trial court allowing the filing of the amended complaint cannot be prejudicial even though the amendment be beyond the discretionary power of the court to allow. *Gaither v. Hospital*, 431.

§ 39c. Harmless and Prejudicial Error in Admission or Exclusion of Evidence.

An exception to certain testimony of a witness is lost when the witness thereafter gives virtually the same testimony without objection. *Sprinkle v. Reidsville*, 140.

The admission of evidence over objection is rendered harmless when similar testimony is admitted without objection. *In re Housing Authority*, 463.

§ 39f. Harmless and Prejudicial Error in Instructions Generally.

An error in discussing law not pertinent to the case *held* cured under doctrine of invited error because of argument of counsel. *In re Will of McGowan*, 404.

In an action for fraud in the sale of an automobile, error in the charge in failing to specifically instruct the jury that the measure of damages is the difference between the real value of the car at the time it was purchased and the value it would have had if it had been as represented, *held* not prejudicial in view of the fact that the parties agreed as to the value of the car if it had been as represented, and the fact that the rule for the measurement of damages was properly given in stating the contentions and was apparently fully understood by the jury. *Garland v. Penegar*, 517.

APPEAL AND ERROR—*Continued.*

Where the admissions in the pleadings establish that defendant's agent was acting in the course of his employment at the time in question, any error in the charge on the issue of *respondeat superior* could not be prejudicial to defendant. *Hodges v. Malone & Co.*, 512.

§ 40d. Review of Findings of Fact.

In determining whether the findings of the trial court are supported by evidence, and therefore binding, the Supreme Court will consider not only the facts in evidence favorable to the successful party, but also all reasonable inferences which may be drawn in his favor from such facts. *Horner v. Chamber of Commerce*, 77.

Where incompetent averments in affidavits are objected to and objection is overruled, it cannot be presumed that court did not consider such averments in finding the facts, and cause will be remanded. *Erwin Mills v. Textile Workers Union*, 107.

Findings of fact by the trial judge, when authorized by law or consent of the parties, are as conclusive as findings by the jury if there is any competent evidence to support them. *Gafford v. Phelps*, 218; *Thompson v. Thompson*, 416; *Ryan v. Trust Co.*, 585.

Findings of fact of the referee approved by the trial judge are conclusive on appeal when supported by any competent evidence. *Gaither v. Hospital*, 431; *Murphy v. Smith*, 455.

§ 40f. Review of Orders on Motions to Strike.

Refusal of motion to strike will be reversed when matter is clearly irrelevant and is prejudicial. *Lambert v. Schell*, 21.

Refusal to strike evidentiary allegations which are germane to the inquiry ordinarily is not prejudicial, certainly where the proceeding presents questions of fact for the court rather than issues of fact for a jury. *Woody v. Barnett*, 73.

The Supreme Court will not attempt to chart the course of the trial upon appeal from an order denying motion to strike, and will not disturb the order when it does not appear that the allegations attacked are not germane, certainly when appellant can fully protect its rights by objections to the evidence and to the issues. *Neal v. Greyhound Corp.*, 225.

§ 40i. Review of Judgments on Motions to Nonsuit.

Where testimony of a witness is excluded without proper predicate, and decision of the question of competency of the testimony materially affects the correctness of the judgment of nonsuit, the judgment will be reversed. *Sanderson v. Paul*, 56.

Where motion to nonsuit is not renewed at close of all the evidence, the question of the sufficiency of the evidence is not presented for review. *Sprinkle v. Reidsville*, 140.

§ 48. Partial or General New Trial.

Where error committed in respect to some of the issues does not affect the verdict on other issues, a partial new trial will be ordered. *Edwards v. Edwards*, 93.

Where error is committed in respect to some of the issues, and it is apparent that the rights of the parties may be more satisfactorily and properly adjudicated by a general new trial, it will be so ordered. *Smith v. Hewett*, 615.

APPEAL AND ERROR—*Continued.*

§ 50. Remand.

Where the trial court erroneously refuses defendant's motion for judgment on the pleadings, the cause will be remanded, and in the subsequent proceedings defendant may renew his motion, and plaintiff, if so advised, may move to amend, in which event defendant may withdraw his motion for judgment on the pleadings and prosecute his counterclaim. *Credit Corp. v. Saunders*, 369.

§ 51c. Interpretation of Decisions of Supreme Court.

Every opinion of the Supreme Court should be considered in the light of the facts of the case in which it was delivered. *Poindexter v. Motor Lines*, 286.

ARREST AND BAIL.

§ 3. Criminal Liability for Resisting Arrest.

A warrant charging that defendant "did resist arrest" neither charges the offense in the language of G.S. 14-223 nor specifically sets forth the acts constituting the offense created by the statute, and defendant's motion in the Supreme Court in arrest of judgment is allowed. *S. v. Raynor*, 184.

§ 5. Right to Bail.

Where a cause is remanded to the Superior Court for proper judgment because the sentence for the felony of which defendants were convicted was excessive, defendants are not entitled, as a matter of right, to their release on bail for their appearance at the next term of Superior Court of the county. *In re Ferguson*, 121.

ARSON.

§ 2. Structures Subject to Arson.

A "building" within the meaning of the arson statute (G.S. 14-62) is a structure which has arrived at such a stage of completion as to be usable for some useful purpose. *S. v. Cuthrell*, 173.

"Used" as employed in the arson statute (G.S. 14-62) means put to use in the occupation or business, and a single isolated instance may be sufficient. "Trade" as used in the arson statute embraces any ordinary occupation or business. *Ibid.*

§ 7. Sufficiency of Evidence and Nonsuit.

Circumstantial evidence of defendant's guilt of arson and murder *held* insufficient for jury. *S. v. Needham*, 555.

The State's evidence tending to show that defendant and deceased's wife had carried on illicit relations over a period of years, that defendant was displeased when deceased and his wife moved to a place some distance from defendant's residence, and stated that a good way to get them to move would be to burn the house, but that the statement was made some three or four years before the fire in question and that deceased and his wife had thereafter twice moved, *is held* of little probative force on the question of the identity of defendant as the incendiary of the house in which the parties last resided. *Ibid.*

Evidence that oil was found in the well and burned chips and paper found in the kitchen of the place in question, without any evidence tending to connect defendant therewith, is without probative force on the question of defendant's identity as the incendiary. *Ibid.*

ARSON—*Continued.*

Evidence of illicit relations between defendant and deceased's wife is without probative force on the question of defendant's identity as the incendiary of the fire in which deceased was burned to death when the evidence further shows that though deceased knew of the relations between his wife and defendant, he and defendant nevertheless remained in harmonious and friendly relations, and there is no evidence of a plan or scheme on the part of defendant to burn the house. *Ibid.*

§ 8. Instructions in Arson Prosecutions.

In a prosecution of defendant for willfully and feloniously procuring another to burn a building used in carrying on a trade, upon evidence permitting an inference that the structure had not been completed or used in the trade at the time of the fire, the court should submit to the jury the question of whether the structure had been completed within the meaning of the statute and whether it had been put to use in the occupation or business for which it was intended, and an instruction which assumes each of these facts must be held for prejudicial error. *S. v. Cuthrell*, 173.

ASSAULT.

§ 8d. Elements of Assault With Deadly Weapon With Intent to Kill.

In order to sustain conviction of defendant as a principal under G.S. 14-32, the State must prove that defendant committed an assault and battery upon another with a deadly weapon, with intent to kill the victim of his violence, and did thus inflict on the person of his victim serious injury not resulting in death. *S. v. Birchfield*, 410.

§ 12. Relevancy and Competency of Evidence.

Evidence that some six weeks prior to the occasion in question one of defendants shot at prosecuting witness, and that the prosecuting witness had all of defendants arrested on a charge of assault, *is held* competent for the purpose of showing intent and motive on the part of the defendants in making the later assault. *S. v. Birchfield*, 410.

§ 13. Sufficiency of Evidence and Nonsuit.

Held: The evidence is sufficient to be submitted to the jury on the question of the father-in-law's guilt as a principal in the first degree and the brothers-in-law's guilt as principals in the second degree in a prosecution under G.S. 14-32. *S. v. Birchfield*, 410.

§ 14b. Instructions on Self-Defense.

Evidence *held* to require submission of right of self-defense and defense of relatives. *S. v. Goodson*, 177.

ATTORNEY AND CLIENT.

§ 10. Compensation.

It is error for the court to order corporate parties to pay specified fees to their attorneys, the corporations being at liberty to contract in respect to this matter for themselves. *Erickson v. Starling*, 643.

AUTOMOBILES.

§ 6e. Liability of Manufacturer and Dealer for Dangerous Defects Without Express Warranty.

Evidence *held* insufficient to show that accident was caused by negligence in the manufacture or installation of steering assembly. *Harwood v. General Motors Corp.*, 88.

§ 6f. Fraud in Sale of Automobiles.

Evidence tending to show that the dealer represented the car to be in good condition and that it was a "new demonstrator" driven only a thousand miles, but that in fact the car had been sold to a person who drove it eight thousand miles and then turned it back to the dealer, and that it was not in good condition, *is held* sufficient to be submitted to the jury on the issue of actionable fraud and deceit in the sale of the car. *Garland v. Penegar*, 517.

§ 8a. Law of the Road—Due Care and Attention to Road in General.

The driver of a vehicle is under duty to maintain a proper lookout and to see that which he ought to see. *Adcox v. Austin*, 591.

The driver of a motor vehicle is under duty to maintain a proper lookout, to keep his vehicle under reasonable control, and not to drive it at an unlawful speed. *Sowers v. Marley*, 607.

§ 8d. Law of the Road—Parking and Parking Lights.

Uncontradicted evidence tending to show that the accident in suit occurred before the driver of defendant's truck had time to get out of the cab after the truck stopped because of motor failure does not show "a parking" within the meaning of G.S. 20-161 (a), and further fails to show a violation of the provision of the statute requiring the display of flares or warning signals around a disabled vehicle, since the statute contemplates that the driver should have a reasonable time within which to display such signals. *Morris v. Transport Co.*, 568.

While a driver is not under duty to anticipate negligence on the part of others traveling the highway, it is his duty to anticipate the presence of others and hazards of the road, such as a disabled vehicle, and to keep his automobile under such control in the exercise of due care as to be able to stop within the range of his lights. *Ibid.*

Negligence in parking truck on side of street at angle so that its rear protruded into lane of traffic *held*, in automobile guest's action, insulated by negligence of driver in hitting the parked vehicle. *Clark v. Lambreth*, 578.

§ 8i. Law of the Road—Intersections.

A driver on a servient highway before entering upon an intersection with a dominant highway is under duty to exercise due care to see that such movement can be made in safety, and it is not sufficient for him to stop and look at a point too distant from the intersection to see oncoming traffic if from a nearer point before entering the intersection he can see whether traffic is approaching along the dominant highway, since his looking must be timely so that his precaution may be effective. *Morrisette v. Boone Co.*, 162.

In an action involving a collision at an intersection upon conflicting evidence of the parties as to which vehicle was first in the intersection, it is error for the court to fail to explain the law as to the rights of the parties upon defendant's evidence that he was first in the intersection, even though plaintiff's car approached from defendant's right. *Howard v. Carman*, 289.

AUTOMOBILES—*Continued.*

§ 9b. Condition of and Defects in Vehicles—Lights.

Testimony of witnesses that no lights were burning upon a vehicle after it had had a violent collision with another vehicle on the highway has no probative force upon the question of whether such vehicle had lights burning at the time of the collision. *Morris v. Transport Co.*, 568.

§ 12a. Speed in General.

It is not only unlawful to operate a motor vehicle in excess of the statutory maximum, but it is also unlawful to operate a motor vehicle at a speed greater than is reasonable and prudent under the existing conditions because of special hazards with respect to pedestrians or other traffic, even though less than the statutory maximum. G.S. 20-141. *Adcox v. Austin*, 591; *Sowers v. Marley*, 607.

§ 13. Right Side of Road and Passing Vehicles Traveling in Opposite Direction.

In this collision between vehicles traveling in opposite direction on three lane highway evidence *held* sufficient for jury on question of defendant's negligence in invading traffic lane reserved exclusively for vehicles traveling in the opposite direction. *Childress v. Motor Lines*, 522.

§ 18a. Actions—Pleading of Prior Judgment as Bar to Action Based on Same Collision.

A bus and a tractor truck were in a collision. In an action by the administrator of a bus passenger against the bus company and the owner of the tractor truck, upon allegations of concurring negligence on the part of both defendants, consent judgment was entered that plaintiff recover of both defendants a stipulated sum. In a subsequent action by the bus company against the owner of the tractor truck to recover for damages to the bus, *held* defendant was entitled to set up the prior judgment as a bar, and plaintiff's demurrer and motion to strike such defense were properly denied. *Coach Co. v. Stone*, 619.

§ 18b. Proximate Cause.

Plaintiff's evidence to the effect that he was driving forty-two miles per hour on a rainy, misty night, was blinded by the lights of an oncoming vehicle and did not see defendant's truck, which was stopped on the highway, until within fifteen or eighteen feet of the truck, *is held* to show a want of proximate cause between the failure of the truck to have lights burning on its rear and the accident in suit, even if it be conceded that defendant's testimony that he saw no lights is sufficient for the jury on the question of violation of G.S. 20-129 (a). *Morris v. Transport Co.*, 568.

§ 18d. Intervening Negligence.

Negligence in parking truck at side of street so that its rear protruded into lane of traffic *held*, in automobile guest's action, insulated by negligence of driver in hitting the parked vehicle. *Clark v. Lambreth*, 578.

§ 18g (2). Actions—Relevancy and Competency of Evidence in General.

Testimony of spectator that, at time of accident, she exclaimed "that car hit the truck" *held* competent. *Adcox v. Austin*, 591.

§ 18g (4). Opinion Evidence as to Speed.

Testimony of a witness that she noticed defendant's car "was being driven fast" *held* competent to explain her previous testimony that she had given it

more than usual attention, and certainly was not prejudicial in view of her subsequent testimony estimating its speed. *Adcox v. Austin*, 591.

§ 18g (5). Physical Facts at Scene of Collision.

The physical facts at the scene of a collision are competent upon question as to the speed of the vehicle at the moment of impact. *Adcox v. Austin*, 591.

§ 18h (2). Actions—Sufficiency of Evidence and Nonsuit on Issue of Negligence.

Evidence *held* sufficient for jury on question of defendant's negligence in invading traffic lane reserved exclusively for vehicles traveling in opposite direction. *Childress v. Motor Lines*, 522.

Evidence that intestate was seen shortly before collision leading horse on highway, with defendant's statement that intestate and horse suddenly emerged from darkness from north of highway and dashed into path of his vehicle, *held* insufficient predicate for inference of negligence. *Sowers v. Marley*, 607.

§ 18h (3). Actions—Sufficiency of Evidence and Nonsuit on Issue of Contributory Negligence.

Plaintiff's own evidence tended to show that he was traveling along the servient highway, stopped at the stop-sign some thirty feet from the intersection and looked in both directions without seeing a vehicle approaching or hearing any warning, and then drove upon the intersection at the rate of ten or twelve miles per hour without again looking to either side, and struck the side of defendant's trailer-truck, which approached the intersection from plaintiff's right along the dominant highway. *Held:* Plaintiff's evidence discloses contributory negligence barring recovery as a matter of law. *Morrisette v. Boone Co.*, 162.

Plaintiff's evidence tended to show that he was traveling forty-two miles per hour on a rainy, misty night, that he was blinded by the lights of an oncoming vehicle and did not see defendant's truck, which was stopped on the highway in his lane of traffic, until within fifteen or eighteen feet thereof, that he immediately applied his brakes and swerved to the left but was unable to avoid colliding with the rear of the truck, *is held* to disclose contributory negligence on the part of plaintiff as a matter of law in outrunning the range of his lights and traveling at excessive speed under the existing conditions. *Morris v. Transport Co.*, 568.

Evidence tending to show that defendant was driving a car fifty-five miles per hour in approaching a Y-shaped intersection on a rainy day, that a tractor-trailer had jack-knifed, skidded and come to rest on the concrete apron between the intersecting highways immediately before defendant's car reached the scene, and that defendant's car hit the right rear wheel of the tractor with such force as to spin it around and completely demolish her car, *is held* to justify the submission of the issue of contributory negligence to the jury. *Adcox v. Austin*, 591.

§ 18i. Instructions in Auto Accident Cases.

Charge *held* for error in failing to instruct jury on right of parties at intersection upon conflicting evidence as to which vehicle was first in the intersection. *Howard v. Carman*, 289.

Where plaintiff's evidence is to the effect that he was driving his car at a speed of about ten miles per hour and could have stopped in about two feet, and that plaintiff, as he was entering the intersection, saw defendant's car

some twenty-five yards away approaching the intersection from plaintiff's left at a rapid speed, but that plaintiff did not stop, *is held* to require the court to charge the jury as to the law of contributory negligence arising on the evidence, and a mere statement of the contentions of the parties is insufficient. *Ibid.*

It is error for the court to read to the jury the reckless driving statute in force in the state in which the accident occurred without charging the jury in regard to the maximum speeds referred to in the statute, and when all the evidence tends to show that defendant's vehicle was not exceeding the speed limit of that state, although its speed was in excess of the maximum allowable speed for such vehicles in this State, the error must be held prejudicial. *Childress v. Motor Lines*, 522.

It is error for the court to instruct the jury in regard to safety statutes relating to principles of law which are not based upon or pertinent to any facts in evidence. *Ibid.*

§ 18j. Issues and Verdict.

A verdict to the effect that the driver and passengers in the first car were not injured by the negligence of the driver of the second car, and that the driver of the second car was injured by the negligence of the driver of the first car but was guilty of negligence contributing to his injury, *is held* reconcilable under a permissive application of the doctrine of proximate cause and not essentially inconsistent, and the trial court was without power, as a matter of law, to refuse to accept such verdict. *Edwards v. Motor Co.*, 269.

§ 21. Actions by Guests and Passengers—Liabilities of Parties.

In automobile guest's action against driver of truck, driver of car, brought in for contribution, may plead settlement of claim with truck driver, but not settlement of claim of other passengers. *Snyder v. Oil Co.*, 119.

In automobile guest's action against truck owner for negligence in parking truck on side of street at angle so that its rear protruded into lane of traffic, *held* negligence of driver in hitting parked vehicle insulated any negligence of defendant in parking truck. *Clark v. Lambreth*, 578.

§ 24a. Liability of Owner for Negligence of Agents and Employees in General.

The driver must be the agent or employee at the time of and in respect to the very transaction out of which the injury arose in order to hold the principal or employer liable for his negligent operation of the vehicle. *Lindsey v. Leonard*, 100.

§ 24b. Agents and Employees Within Meaning of Rule of Respondeat Superior.

Lessee of truck for trip in interstate commerce may not be held liable for accident occurring after interstate trip had been completed. *Eckard v. Johnson*, 538.

Under a "trip lease agreement" for the operation of a vehicle under the franchise and license plates of lessee in fulfillment of lessee's contracts for transportation of freight in interstate commerce, *held* in those instances in which the lessor owner elects to drive the vehicle himself, he is an employee of the franchise carrier in regard to the consignor, the consignee, and third parties generally, and also in regard to the franchise carrier as far as his personal operation of the vehicle is concerned, but in regard to damage to his

AUTOMOBILES—*Continued.*

vehicle he is a bailor operating under a contract which makes him an independent contractor. *Hill v. Freight Carriers Corp.*, 705.

In an action by the owner-lessor of a vehicle under a "trip lease agreement" in interstate commerce to recover for damages to his vehicle from a collision caused by the negligence of the driver of another vehicle of the franchise carrier, *held* the fellow servant doctrine has no application and cannot constitute a defense. *Ibid.*

A provision in a "trip lease agreement" of a vehicle for a trip in interstate commerce that lessor-owner should assume all loss through fire, theft, and collision to his vehicle, *held* no defense to an action by the lessor-owner to recover for damages to the vehicle caused by the negligence of an employee operating another vehicle of the franchise carrier. *Ibid.*

§ 24½c. Declarations of Agents or Employees.

Evidence that shortly after the accident, merchandise of defendant was found in the car of the alleged agent who stated that he was selling the articles for defendant, *held* properly excluded. *Lindsey v. Leonard*, 100.

§ 24½e. Sufficiency of Evidence on Issue of Respondeat Superior.

Evidence tending to show a contract under the terms of which goods of defendant were consigned to an individual to be sold on a commission basis, that the individual owned and used his own automobile, that the defendant furnished no transportation and paid no expenses incident to the operation of the car and had no control over the individual or his employees, *held* insufficient to show the existence of the relationship of principal and agent between defendant and the individual, and nonsuit was proper upon the issue of *respondeat superior*. *Lindsey v. Leonard*, 100.

Admission in answer that at time in question truck was being driven by named person as employee of defendant establishes that truck was being driven by employee in course of employment. *Hodges v. Malone & Co.*, 512.

§ 31b. "Hit and Run" Driving—Prosecutions.

A warrant charging that defendant was involved in an automobile accident and left the scene without complying with the statute, but failing to charge damage to property or injury to or death of any person in the accident, fails to charge any offense under G.S. 20-166. *S. v. Morris*, 393.

BAILMENT.

§ 1. Nature and Requisites.

Ordinarily one who receives a specific fund for safekeeping may not be classed as an agent, but rather as a bailee. *Crow v. McCullen*, 380.

BANKRUPTCY.

§ 10. Debts Discharged.

Whether an indebtedness scheduled by a bankrupt is within the statutory exceptions of debts dischargeable must be determined by the original character of the debt rather than the particular form of the judgment by which the debt is established. *Crow v. McCullen*, 380.

An uncle delivered to his nephew an envelope containing a sum of money with direction to the nephew to place it in a safety deposit box in the nephew's name, and if any of the money was needed by the uncle to use it for that purpose, and "if anything happened" to the uncle and any money was left, to

BANKRUPTCY—*Continued.*

divide it among the nephew and another nephew and his wife. Upon the death of the uncle the money was divided as directed. Thereafter the uncle's administrator recovered a judgment for the money as having been appropriated and converted by those among whom it was divided. This judgment was listed in the schedule of indebtedness in the nephew's petition in bankruptcy. *Held:* The debt evidenced by the judgment was barred by the discharge in bankruptcy, since the original character of the debt lacked the elements of fraudulent conversion or willful and malicious injury or such unconscionable conduct as would bring it within the category of a debt excepted by the Bankruptcy Act. *Ibid.*

BETTERMENTS.

§ 2. Claim by Purchaser Under Contract to Convey.

A person making improvements upon land under a parol agreement of the owner to convey same is not entitled to assert claim for betterments as against the purchaser for value under a duly registered deed from the owner. G.S. 47-18. *Haas v. Smith*, 341.

§ 8. Assessment of Value of Improvements.

In ascertaining the reasonable rental value of the land as an offset against claim for betterments, the court should instruct the jury that its rental value should be ascertained without taking into consideration the improvements placed upon the land, G.S. 1-341. *Edwards v. Edwards*, 93.

BILLS AND NOTES.

§ 1. Requisites and Validity in General.

A promise to pay a sum definite "as per our agreement" does not affect the validity of the note. G.S. 25-9. *Royster v. Hancock*, 110.

§ 32. Presumptions and Burden of Proof.

The fact that a note is under seal raises the presumption of good and sufficient consideration. *Royster v. Hancock*, 110.

The presumption of good and sufficient consideration arising from the seal on a note is rebuttable, and the maker may show by parol evidence want of consideration, such as that the consideration was a gambling loss and therefore illegal. *Ibid.*

Where the note sued on is executed long after the repeal of C.S. 2146, and there is no allegation that the note was a renewal of notes executed prior to the repeal of the statute, the burden of proving the defense that the consideration of the note was an illegal gambling transaction (G.S. 16-3) is upon the maker, since the repealed statute does not apply. *Ibid.*

§ 34. Sufficiency of Evidence, Nonsuit and Directed Verdict.

The introduction in evidence of a note payable to plaintiff, together with defendant's admission of its execution and delivery, makes out a *prima facie* case even though the note is not negotiable. *Royster v. Hancock*, 110.

CARRIERS.

§ 1½. Duty to Operate and Furnish Facilities.

Each application by a common carrier to be permitted to discontinue services or facilities must be determined in accordance with the facts and circumstances

of the particular case, weighing the benefit to the carrier against the inconvenience to the public which would result from such discontinuance, and the fact that the particular service is maintained at a loss is not determinative when such service is a part of over-all operations which result in a profit. *Utilities Com. v. R. R.*, 273.

Evidence *held* to support finding of Utilities Commission that public convenience required continuance of station agency. *Ibid.*

§ 5. Licensing and Franchise.

As a matter of public policy operator of truck under trip lease agreement covering trip in interstate commerce is employee of lessee as regards public generally, but this rule does not apply to collision occurring after truck had been returned to lessor's place of business upon completion of trip. *Eckard v. Johnson*, 538.

Lessor driving own truck under trip lease agreement is employee as far as public is concerned and as to lessee in his operation of truck, but is independent contractor as far as truck is concerned. *Hill v. Freight Carriers Corp.*, 705.

Permit for both charter and contract carrier business should be issued upon proper showing under grandfather clause of Bus Act. *Utilities Com. v. Fleming*, 660.

An applicant seeking to preserve rights confirmed to him by the grandfather clause of the Bus Act of 1949 is required to show neither public convenience and necessity nor public need. *Ibid.*

Rates filed and published by a contract carrier under the provisions of G.S. 62-121.66 (1) are "tariffs" within the meaning of G.S. 62-121.65, so as to form the basis for the granting of a permit to such applicant as a charter carrier. *Ibid.*

§ 21a. Degree of Care Required in Regard to Safety of Passengers.

A person transporting passengers for hire in an ambulance is a contract carrier and owes his passengers the duty (1) to exercise ordinary care to provide a vehicle reasonably safe for the carriage of passengers, (2) to subject his vehicle to reasonable inspection, (3) to warn his passengers of nonapparent dangers involved in the use of his vehicle, including latent defects of which he has constructive notice, and (4) to operate the vehicle in a careful and prudent manner in compliance with statutory rules of the road. *Pemberton v. Lewis*, 188.

§ 21b. Injuries to Passengers by Accidents in Transit.

Res ipsa loquitur does not apply to the injury of a passenger in an ambulance resulting from the sudden opening of the door while the vehicle is in motion when the passenger's evidence itself undertakes to point out reasons why the door suddenly opened. *Pemberton v. Lewis*, 188.

Evidence *held* insufficient to show that defect in or nonuse of additional automatic locking device was proximate cause of accident resulting from sudden opening of ambulance door. *Ibid.*

CHATTEL MORTGAGES AND CONDITIONAL SALES.

§ 17. Actions.

A complaint alleging that plaintiff is entitled to recover a stipulated sum as the holder in due course of a conditional sales contract executed by defendant

CHATTEL MORTGAGES AND CONDITIONAL SALES—*Continued.*

is not demurrable for failure of the complaint to allege that plaintiff is also the owner of the note or notes secured thereby. *Acceptance Corp. v. Pillman*, 295.

CLAIM AND DELIVERY.

§ 14½. Liabilities of Parties and Distribution of Proceeds of Sale.

A mortgagee seizing a chattel under claim and delivery is required to account to the mortgagor for the value of the property as of the time of seizure. G.S. 1-475. *Credit Corp. v. Saunders*, 369.

Where the mortgagee in claim and delivery alleges in his complaint and also in his reply, filed some four months after he had obtained possession of the property, that the value of the property was in a certain sum and the debt in a less amount, defendant mortgagor is entitled to recover on the pleadings the difference between the alleged debt and the alleged value of the property, but the mortgagor's motion for judgment on the pleadings is based upon plaintiff's allegations as to the value of the property and the amount of the debt, and precludes him from asserting on his counterclaim that the value of the property was in excess of that alleged in the complaint, or that the debt should be reduced by the amount of alleged usury, G.S. 1-510. *Ibid.*

Ordinarily the value of the property at the time it is seized in claim and delivery must be determined by the jury. *Ibid.*

COMMON LAW.

So much of the common law as has not been abrogated or repealed by statute is in full force and effect in this State. *Elliott v. Elliott*, 153; *Development Co. v. Parmele*, 689.

Common law rule that quorum of municipal board is a majority of its whole membership applies. *Edwards v. Board of Education*, 345; *Board of Education v. Dickson*, 359.

Common law rule that child may not sue parent for tort obtains in this State. *Redding v. Redding*, 638.

COMPROMISE AND SETTLEMENT.

§ 2. Operation and Effect of Agreement.

A completed settlement of a claim arising out of a collision bars either party from thereafter asserting any liability against the other arising out of any negligence proximately causing the collision. *Snyder v. Oil Co.*, 119.

CONSTITUTIONAL LAW.

§ 8a. Legislative Powers and Functions in General.

The determination of public policy within limitations imposed by the constitution is the exclusive province of the Legislature, and its exercise poses no judicial question. *Art Society v. Bridges*, 125.

§ 8c. Delegation of Powers by Legislature.

General Assembly cannot delegate power unless it prescribes standards for exercise of power. *Board of Trade v. Tobacco Co.*, 737.

CONSTITUTIONAL LAW—*Continued.*

§ 10a. Nature and Extent of Judicial Powers in General.

The Supreme Court does not make the law, this being the province of the General Assembly. *Elliott v. Elliott*, 153.

§ 10d. Supervisory Power of Supreme Court.

Where appellant is not the party aggrieved but the judgment operates *in rem* in affecting title to real property, the Supreme Court in the exercise of its supervisory power will take jurisdiction for the purpose of correcting an error in the judgment. Constitution, Art. IV, sec. 8. *Ange v. Ange*, 506. Corrected, *Ange v. Ange*, 755.

§ 11. Scope of State Police Power in General.

State court has inherent police power to restrain acts of violence at strike bound plant notwithstanding Taft-Hartley Act. *Erwin Mills v. Textile Workers Union*, 107.

§ 21. Due Process—Notice and Hearing.

A person claiming an interest in the subject matter of an action and whose rights would be purportedly adjudicated by a judgment therein should be allowed to intervene, since the judgment cannot affect his rights unless he comes in or is brought before the court in some way sanctioned by law. Constitution of North Carolina, Art. I, sec. 17. *Scott v. Jordan*, 244.

Notice and opportunity to be heard are prerequisites of jurisdiction. *Boone v. Sparrow*, 396.

§ 22. Right to Trial by Jury.

The constitutional right to trial by jury in controversies at law respecting property may be waived. *Bartlett v. Hopkins*, 165.

A compulsory reference does not deprive a litigant of his constitutional right to trial by jury, but he may waive such right by failing to follow the procedural requirements to preserve it. *Ibid.*

§ 28. Full Faith and Credit to Foreign Judgments.

Foreign decree awarding custody of child is not binding when child was not within jurisdiction of foreign court. *Gafford v. Phelps*, 218.

§ 31. Burdens on Interstate Commerce.

The imposition of a sales tax on parts or materials used in the erection of radio towers, even though such parts are shipped from out of State, is not a burden upon interstate commerce, since at the time the tax is assessed the property has reached the end of its interstate transportation and has become a part of the common mass of property within the State. *Watson Industries v. Shaw*, 203.

§ 34a. Constitutional Guarantees to Persons Accused of Crime in General.

A person charged with crime is entitled to a fair trial before an unprejudiced jury in an atmosphere of judicial calm. *S. v. Wagstaff*, 69.

§ 34d. Constitutional Guarantees to Persons Accused of Crime—Right to Counsel.

Ordinarily, in offenses less than capital, the presiding judge is not required to assign counsel to represent defendant, but where an inexperienced youth is charged with a serious felony it is proper for the court to assign counsel for him, and failure to do so may be held for error. *S. v. Wagstaff*, 69.

CONTEMPT OF COURT.

§ 2a. Direct Contempt.

The trial judge has power to order anyone, either witness or spectator, into custody for what the court finds is a contempt committed in his presence. *S. v. Wagstaff*, 69.

But ordering defendant's father into custody in presence of jury *held* prejudicial to defendant's right to fair trial under facts of this case. *Ibid.*

§ 4. Orders to Show Cause.

While an order to show cause why respondents should not be held in contempt should advise them of the specific charges alleged against them, its failure to do so does not render the proceeding void where their counsel appears and is furnished copies of the affidavits containing the charges in time to present their defense and they subsequently file counter affidavits in detail. *Erwin Mills v. Textile Workers Union*, 107.

§ 5. Hearings on Orders to Show Cause.

In a suit to restrain unlawful picketing at a strike bound plant, the filing by defendants of a petition for removal to the U. S. District Court subsequent to the institution of proceedings as for contempt does not prevent a State court from continuing the proceedings in order to maintain respect for its orders and to punish contemptuous violation thereof. *Erwin Mills v. Textile Workers Union*, 107.

Where incompetent averments in affidavits are objected to and objection is overruled, it cannot be presumed that court did not consider such averments in finding the facts, and cause will be remanded. *Ibid.*

CONTRACTS.

§ 7e. Contracts Against Public Policy.

Contracts which seek to exculpate one of the parties from liability for his own negligence are not favored by the law, and will be strictly construed against the party asserting it. *Hill v. Freight Carriers Corp.*, 705.

A common carrier cannot contract against its own negligence in the regular course of its business or in performing one of its duties of public service, and therefore provision in a "trip lease agreement" that lessee, a franchise carrier in interstate commerce, should not be liable for damage resulting to the vehicle through negligence cannot exculpate the carrier from liability for such damage if caused by negligence of itself or one of its employees while transporting goods in interstate commerce. *Ibid.*

§ 8. General Rules of Construction.

Where the language of the written contract is not ambiguous, its legal effect is a question of law for the court. *Hilley v. Ins. Co.*, 544.

§ 19. Parties Who May Sue.

Where a contract is made for the benefit of a third party, such third party may maintain an action thereon. *Cain v. Corbett*, 33.

CONVERSION.

§ 3. Reconversion.

Sole heir who is also sole legatee has absolute right as against administrator to reconvert into realty land under executory contract of deceased to convey, the sale of the land not being necessary to pay debts of the estate. *Scott v. Jordan*, 244.

COSTS.

§ 5. Elements of Cost.

Except as otherwise provided by G.S. 6-21 attorney's fees are not a part of the cost of litigation. *Trust Co. v. Schneider*, 446.

COURTS.

§ 2. Jurisdiction of Courts in General.

Where it appears upon the face of the complaint that the court has no jurisdiction of the subject matter of the action, the action should be dismissed. *Anderson v. Atkinson*, 300.

Jurisdiction cannot be conferred by amending pleading. *Ibid.*

Jurisdiction cannot be conferred by consent. *Hansen v. Yandle*, 532.

Notice and an opportunity to be heard are prerequisites to jurisdiction. *Boone v. Sparrow*, 396.

§ 4c. Appeals from Clerk to Superior Court.

A proceeding instituted before the clerk to have an abandoned section of State highway declared a neighborhood public road is not subject to demurrer on appeal to the Superior Court even if it be conceded that the proceeding is one under the Declaratory Judgment Act, since if the clerk exceeded his authority the Superior Court would nevertheless obtain jurisdiction, the clerk being but a part of the Superior Court and the Superior Court having the right to proceed as though no action had been taken by the clerk other than to transfer the cause to the civil issue docket. *Woody v. Barnett*, 73.

§ 5. Jurisdiction After Orders or Judgment of Another Superior Court Judge.

Superior Court Judge has no jurisdiction to act upon petition for *habeas corpus* based upon same facts upon which another Superior Court Judge had previously denied the petition. *In re White*, 757.

§ 8. Establishment of General County Courts.

Chap. 896, Session Laws of 1949, *held* to repeal G.S. 7-285 only in regard to Surry County, and therefore Wilkes County is still excluded from the provisions of the general county court act and the Wilkes County Board of Commissioners is without authority to establish a general county court in said county. *In re Hickerson*, 716.

§ 12. Conflict of Laws—State and Federal.

While the regulation of peaceful strikes in industries engaged in interstate commerce is in the exclusive jurisdiction of the Federal Government, 29 USCA, sec. 141, *et seq.*, our State court in the exercise of the State's inherent police power has jurisdiction to restrain acts of violence in connection with a strike to protect the rights of its citizens. *Erwin Mills v. Textile Workers Union*, 107.

§ 15. Conflict of Laws—Actions in Tort.

In an action instituted in this State involving a collision in the State of Virginia, the substantive law of Virginia applies while the adjective law of North Carolina, including the rules of evidence and the *quantum* of proof necessary to make out a *prima facie* case, controls. *Childress v. Motor Lines*, 522.

In an action instituted in this State to recover damages resulting from a collision which occurred in another state, the substantive law of such other state controls. *Hill v. Freight Carriers Corp.*, 705.

CRIMINAL LAW.

§ 8a. Principals in First Degree.

A principal in the first degree is one who actually commits the offense with his own hand. *S. v. Birchfield*, 410.

§ 8b. Aiders and Abettors.

Principal in second degree defined. *S. v. Birchfield*, 410.

In determining whether a person is guilty as a principal in the second degree, evidence of his relationship to the actual perpetrator, of motive tempting him to assist in the crime, his presence at the scene, and his conduct before and after the crime, are circumstances to be considered. *Ibid.*

§ 14. Appeals to Superior Court From Recorder's Court.

Where warrant is issued by a justice of the peace, returnable before the recorder's court, and there is nothing in the record to show how the case came to be on the Superior Court docket, the record fails to show jurisdiction in the Superior Court, and appeal to the Supreme Court must be dismissed. *S. v. Morris*, 393.

§ 21. Former Jeopardy—Same Offense.

Acquittal on a charge of possession of intoxicating liquor in Recorder's Court upon a warrant issued subsequent to the institution of a prosecution for possession of intoxicating liquor for the purpose of sale in the Superior Court will not support a plea of former acquittal. *S. v. Parker*, 302.

§ 23. Former Jeopardy—Prosecutions Under Void Warrants or Indictments.

If defendant is tried under a fatally defective warrant the solicitor may proceed to prosecute under new pleadings, if so advised. *S. v. Morris*, 393.

§ 28. Presumptions and Burden of Proof.

Defendant's plea of not guilty puts in issue every element of the offense charged. *S. v. McLamb*, 251.

§ 29b. Evidence of Guilt of Other Offenses.

Evidence that prosecuting witness had defendants arrested for assault *held* competent to show motive in later prosecution for assault. *S. v. Birchfield*, 410.

§ 33. Confessions.

An extrajudicial confession of guilt by an accused is admissible against him when, and only when, it is in fact voluntarily made. *S. v. Warren*, 117.

Where the uncontradicted evidence on the *voir dire* tends to show that defendant was arrested for theft without a warrant by an officer having no reasonable ground to believe her guilty, that she was taken to the police station, twice searched without finding any incriminating property, badgered with accusations and questions for five hours, during all of which time she consistently denied her guilt, but that after she was told she could not go back to her job or her home until she acknowledged her guilt, she confessed, *is held* to show that the confession was involuntary, and the admission of the confession in evidence upon the court's finding that it was freely and voluntarily made entitles defendant to a new trial. *Ibid.*

§ 34b. Admissions and Declarations by State.

Defendant was charged with possession of whiskey for the purpose of sale, selling whiskey, and operating a public nuisance. *Held:* Under the facts of

CRIMINAL LAW—*Continued.*

this case, the solicitor's statement to the effect that defendant's premises had been padlocked which restricted the charge "to the sale of whiskey," construed in its setting, eliminated the nuisance charge, but preserved both the charges relating to whiskey, and did not amount to an acquittal on the charge of possession for the purpose of sale. *S. v. Murphy*, 503.

§ 34e. Silence as Implied Admission of Guilt.

Where defendant denies an accusation of guilt against him, testimony as to the accusation is incompetent. *S. v. Bryant*, 420.

§ 35. Hearsay Evidence.

Where hearsay evidence is not objected to, it is properly considered in determining the sufficiency of the evidence to be submitted to jury. *S. v. Bryant*, 420.

§ 40a. Character Evidence of Defendant in General.

The witness, in reply to a question as to the defendant's general character, stated that it was good "with the exception of dealing in whiskey." *Held:* The answer is not a proper subject of exception, since a witness may voluntarily qualify and explain his character testimony. *S. v. Mills*, 226.

§ 44. Time of Trial and Continuance.

A motion for a continuance ordinarily is addressed to the discretion of the trial court, and his refusal of such motion will not be disturbed on appeal unless the record discloses abuse of discretion or that the refusal of the motion deprived defendant of his fundamental right to an adequate and fair trial. *S. v. Birchfield*, 410.

§ 50d. Expression of Opinion by Court During Progress of Trial.

An altercation between defendant and his father was brought out on cross-examination. Upon the second protest of defendant's father to the court in asking for a continuance so that he could get counsel for his son, the court, in the presence of the jury, ordered the father taken into custody for contempt. *Held:* Under the facts and circumstances of this case, the deprivation of defendant of the aid and advice of his father, the only person present who could explain the previous altercation between them, must be held for error as prejudicing defendant in the eyes of the jury, there being nothing in the record to indicate that the conduct of defendant's father was engaged in for the purpose of causing a mistrial. *S. v. Wagstaff*, 69.

It appeared that during lengthy testimony, the judge, in response to the witness' request, was handing him water from the only pitcher available, and so did not hear the solicitor's question but only the objection of defendant's counsel, and that thereupon the court inquired whether the objection was to his giving the witness a drink of water. *Held:* The incident was not prejudicial. *S. v. Birchfield*, 410.

It appeared that the witness volunteered a statement and that the judge admonished him "to keep quiet until (counsel) ask you questions." *Held:* The court was merely requiring the witness to observe the rules of evidence, and the incident was not prejudicial. *Ibid.*

§ 50f. Argument of Solicitor.

Defendant did not testify, but his wife, three other women, and several men testified in his behalf. *Held:* Argument of the solicitor to the effect that defendant was "hiding behind his wife's coattail" is tantamount to comment on

CRIMINAL LAW—*Continued.*

defendant's failure to testify in his own behalf, and upon the court's overruling of objections thereto, must be held for prejudicial error. *S. v. McLamb*, 251.

When defendant does not go upon the stand and does not put his character in evidence, the solicitor is not entitled to attack or make adverse comment on defendant's character in the argument to the jury. *Ibid.*

§ 51. Province of Court and Jury in General.

It is the exclusive province of the court to determine the competency and admissibility of evidence and in no instance may this duty be imposed upon the jury. *S. v. Harper*, 62; *S. v. Harper*, 67.

While the weight and credibility of circumstantial evidence, as well as whether the facts in evidence are so connected or related as to exclude every reasonable hypothesis of innocence, are all questions of fact for the jury, it is for the court to determine in the first instance whether the evidence considered in the light most favorable to the State is of sufficient probative force to justify the jury in drawing the affirmative inference of guilt. *S. v. Needham*, 555.

§ 52a (1). Consideration of Evidence on Motion to Nonsuit.

On motion to nonsuit, the evidence must be considered in the light most favorable to the State. *S. v. Reeves*, 427.

Defendant's evidence favorable to the State or which explains or makes clear the State's evidence is properly considered in passing upon defendant's motion to nonsuit. G.S. 15-173. *S. v. Bryant*, 420.

On motion to nonsuit in a criminal action, defendant's evidence, except so much as may tend to explain or clarify the State's evidence, is not to be considered. *S. v. Sears*, 623.

Unobjected to hearsay evidence may be considered on motion to nonsuit. *S. v. Bryant*, 420.

§ 52a (2). Sufficiency of Evidence to Overrule Nonsuit in General.

Where the State's evidence is sufficient to establish each element of the offense and that defendant was the perpetrator thereof, defendant's motion to nonsuit upon his evidence of alibi is correctly denied. *S. v. Sears*, 623.

§ 52a (3). Sufficiency of Circumstantial Evidence to Overrule Nonsuit.

While circumstantial evidence is an accepted instrumentality in the ascertainment of truth, it must establish facts so connected and related as to point unerringly to defendant's guilt and exclude any other reasonable hypothesis in order to withstand defendant's motion to nonsuit, and when the facts are consistent with innocence and raise a mere inference or conjecture or possibility of guilt, nonsuit should be entered. *S. v. Needham*, 555.

Circumstantial evidence of defendant's guilt of murder in the first degree *held* to exclude any reasonable hypothesis of innocence, and sufficient for jury. *S. v. Roman*, 627.

§ 52a (4). Nonsuit—Conflicting Evidence.

Reconciliation of apparent discrepancies in the testimony, the weight of the evidence, and the credibility of the witnesses, are all matters for the jury and not the court. *S. v. Reeves*, 427.

Testimony that prosecutrix had made contradictory exculpatory statements out of court is insufficient ground for nonsuit, even in a prosecution based solely

CRIMINAL LAW—*Continued.*

upon her testimony, since whether a witness has been successfully impeached is a matter for the jury alone, and the court, in passing upon the motion, must consider only the evidence favorable to the State and assume it to be true. *S. v. Wood*, 636.

§ 53a. Form and Sufficiency of Instructions in General.

A party desiring more specific instructions on a subordinate phase of the case must make timely request therefor. *S. v. Reeves*, 427.

§ 53b. Instructions on Presumptions and Burden of Proof.

An instruction that a reasonable doubt may arise out of the evidence or the insufficiency of the evidence in the case is without error. *S. v. Wood*, 636.

§ 53c. Instructions—Applicability to Courts and Evidence.

In prosecution for first degree murder committed after rape, court is not required to define rape. *S. v. Roman*, 627.

§ 53f. Expression of Opinion by Court in Charge.

An instruction to the jury may not assume as true the existence or nonexistence of any material fact in issue. *S. v. Cuthrell*, 173.

In this prosecution in which defendant offered no evidence, the charge of the court *is held* not subject to the criticism that it gave the State's evidence in too great detail so as to amount to a statement of the State's contentions. *S. v. Roman*, 627.

§ 54b. Form and Sufficiency of Verdict.

Where warrants charge larceny of chickens from specified persons on specified dates, verdict of "guilty of larceny of chickens" is sufficiently definite to support judgment, especially where sentences run concurrently. *S. v. Bryant*, 420.

Any ambiguity in a verdict will be construed in favor of defendant. *S. v. Williams*, 429.

In this prosecution for possession of whiskey for sale, selling whiskey, and operating a nuisance, the solicitor elected not to proceed on the charge of operating a public nuisance. *Held:* The jury's verdict "guilty of possession for the purpose of sale and operating a public nuisance" supports judgment on the verdict for possession of whiskey for sale, and the verdict of "operating a public nuisance" will be disregarded as surplusage. *S. v. Murphy*, 503.

In this prosecution for rape, the solicitor announced that the State would not seek conviction for the offense charged but only of assault with intent to commit rape. The jury rendered a verdict of "guilty as charged." *Held:* The court properly explained to the jury that the capital crime was not in issue and properly inquired of the jury if they intended as their verdict guilty of assault with intent to commit rape, and upon their assent, judgment was properly entered upon the verdict. *S. v. Sears*, 623.

§ 54d. Special Verdicts.

A special verdict must incorporate a finding by the jury of all essential facts upon which the guilt or innocence of defendant must follow as a conclusion of law, and while it should not contain the evidence to prove such essential facts, it may not submit for the determination of the jury the competency of evidence offered by the State. *S. v. Harper*, 62; *S. v. Harper*, 67.

CRIMINAL LAW—*Continued.*

§ 56. Motions in Arrest of Judgment.

Motion in arrest of judgment allowed in Supreme Court as to count of resisting arrest because of fatally defective warrant; disallowed as to charge of public drunkenness. *S. v. Raynor*, 184.

Warrant charging possession of property for purpose of manufacturing illegal whiskey *held* not fatally defective, and motion in arrest of judgment is denied. *S. v. McLamb*, 251.

Motion in arrest must be allowed on warrant charging driver with leaving scene of accident, but not charging damage to property or injury to person. *S. v. Morris*, 393.

§ 57b. Motions for New Trial for Newly Discovered Evidence.

Motion for new trial for newly discovered evidence ordinarily addressed to discretion of trial court. *S. v. Parker*, 302.

§ 62a. Severity of Sentence.

Sentence *held* excessive upon conviction of robbery, and judgment is vacated. *S. v. Ferguson*, 121.

§ 62c. Concurrent and Consecutive Sentences.

The presumption that sentences imposed in the same jurisdiction to be served in the same place or prison run concurrently does not obtain when the intent that the sentences are to be served consecutively appears in the judgment without resort to evidence *aliunde*, provided the time of the commencement of the second sentence is sufficiently definite. *In re Smith*, 169.

Two sentences, in order to run concurrently, must be sentences to the same place of confinement. *Ibid.*

While serving a single sentence of confinement in the State Prison defendant was sentenced for another offense to be confined in the common jail of a county, "to take effect at the expiration of the sentence the defendant is now serving in the State Prison." *Held:* The intent that the second sentence should be served consecutively appears from the judgment itself and the time of the commencement of the second sentence is sufficiently definite, and further the two sentences are not to the same place of confinement, and therefore the sentences are to be served consecutively. *Ibid.*

§ 62f. Suspended Judgments and Executions.

A court has the inherent power to suspend judgment or stay execution of a sentence in a criminal case, which power was not withdrawn by the probation statute. The statute provides a cumulative and concurrent rather than an exclusive procedure. *S. v. Simmington*, 612.

While a court may not compel defendant to pay the damages inflicted by his unlawful act on penalty of imprisonment, it may suspend execution of sentence on condition defendant compensate those whom he has injured. *Ibid.*

Upon conviction of defendant for reckless driving, sentence was suspended on condition that he pay certain sums periodically for the benefit of those injured by his wrongful act. Defendant complied with a part of the conditions and then obtained *certiorari* on the ground that the court, in suspending the judgment pronounced, did not follow the procedure prescribed in the probation statute and that he was required to pay a certain sum on the date of his trial or go to jail. *Held:* The writ of *certiorari* was properly dismissed. Further, his imprisonment is for breach of the criminal law and not for failure to pay damages. *Ibid.*

CRIMINAL LAW—*Continued.*

§ 67a. Jurisdiction of Supreme Court on Appeal in General.

Where the Superior Court has no jurisdiction, the Supreme Court acquires no jurisdiction by appeal. *S. v. Morris*, 393.

§ 67b. Right of Defendant to Appeal.

Defendant may now appeal from an order executing a suspended sentence for condition broken. *S. v. Simmington*, 612.

§ 76a. Certiorari to Preserve Right to Review.

Certiorari lies only to review judicial or *quasi*-judicial action to correct errors of law, and cannot be used to present new matter. *S. v. Simmington*, 612.

§ 78b. Appeal and Review—Theory of Trial or Hearing.

Judgment entered upon the hearing on a writ of *certiorari* will be reviewed solely on the grounds set forth in the lower court. *S. v. Simmington*, 612.

§ 78c. Necessity, Form and Requisites of Objections and Exceptions in General.

Where a youthful, inexperienced defendant is not represented by counsel, the State properly makes no point as to the time, manner, or form of an exception presenting defendant's contention that an incident during the trial unduly prejudiced him in the eyes of the jury. *S. v. Wagstaff*, 69.

The rule that an exception to the judgment does not bring up for review the evidence upon which the findings are based applies to criminal cases, and where the verdict of the jury establishes facts sufficient to support the judgment, the verdict is the finding of fact, and exception to the judgment cannot be sustained. *S. v. Raynor*, 184.

Where hearsay evidence is not objected to, it may be considered by the jury and taken into account in determining the sufficiency of the evidence to be submitted to the jury. *S. v. Bryant*, 420.

The Supreme Court will consider only questions presented by assignments of error based upon exceptions pointing out some alleged error appearing in the record and brought forward in the statement of case on appeal. *S. v. Williams*, 429.

Want of exceptions and assignments of error does not work dismissal, since appeal is exception to judgment. *Ibid.*

An appeal without any proper exception or assignment of error presents only the question of whether error appears on the face of the record, and where the record discloses that the trial court had jurisdiction, that the bill of indictment charges a criminal offense, and that the verdict is in due form and the sentence pronounced within the limit permitted by law, the record fails to disclose error. *Ibid.*

§ 78e. (2). Necessity of Calling Trial Court's Attention to Misstatement of Contentions or Evidence.

A misstatement of the contentions of a party must be brought to the trial court's attention in time to afford opportunity for correction. *S. v. Birchfield*, 410.

§ 79. The Brief.

Exceptions in support of which no reason or argument is stated or authority cited in the brief will be taken as abandoned, Rule of Practice in the Supreme Court No. 28, but where defendant is convicted of a capital felony, the Supreme

CRIMINAL LAW—*Continued.*

Court will nevertheless examine the matters to which such exceptions relate in its search for prejudicial error. *S. v. Roman*, 627.

§ 80b (3). Dismissal for Failure to Preserve Grounds for Review.

Failure of any proper exception or assignment of error does not work a dismissal of the appeal, since the appeal itself constitutes an exception to the judgment. *S. v. Williams*, 429.

§ 80b (4). Dismissal for Failure to Prosecute Appeal.

Where defendant files no statement of case on appeal within the time allowed and does not apply for writ of *certiorari*, the appeal will be dismissed upon motion of the Attorney-General, but where defendant has been convicted of a capital felony this will be done only after an inspection of the record fails to disclose error. *S. v. Miller*, 394.

§ 81a. Appeal—Matters Reviewable.

Discretional refusal of motion for new trial for newly discovered evidence is not reviewable in absence of abuse. *S. v. Parker*, 302.

§ 81b. Presumptions and Burden of Showing Error.

Where the only part of the charge set out in the record is that portion in which the court stated the contentions of defendant upon his evidence of alibi, and the statement of such contentions is correct and is not repugnant to a correct instruction upon the burden of proof, it will be assumed that the court gave full and correct instructions upon the point and an exception cannot be sustained. *S. v. Sears*, 623.

§ 81c (2). Harmless and Prejudicial Error in Instructions.

A new trial will not be awarded for error in the charge which is not prejudicial. *S. v. Birchfield*, 410.

§ 81c (3). Harmless and Prejudicial Error in Admission or Exclusion of Evidence.

The admission of evidence over objection is rendered harmless by the admission of similar testimony without objection. *S. v. Murphy*, 503.

§ 83. Determination and Disposition of Cause.

Where the fact of guilt follows as a conclusion of law upon the facts found in a special verdict, but it appears that the question of the competency of evidence was also submitted to the jury under the special verdict, *held* on the State's appeal from judgment of not guilty a new trial will be ordered, since it would be unfair to defendant to reverse the ruling on the special verdict and remand for sentence without giving him an opportunity to be heard upon the question of the competency of the evidence presented against him. *S. v. Harper*, 62.

Where the facts found in a special verdict clearly establish defendant's guilt, but it appears that the question of the competency of evidence was also submitted to the jury under the special verdict, the judgment of guilty cannot be allowed to stand, but a new trial will be ordered upon defendant's appeal. *S. v. Harper*, 67.

Where the court imposes a sentence in excess of the limit prescribed by law the judgment will be vacated and the cause remanded for proper sentence. *In re Ferguson*, 121.

DAMAGES.

§ 1a. Compensatory Damages.

Compensatory damages may be awarded to plaintiff for mental suffering endured by him as the natural and probable consequences of a trespass to his burial lot. *Matthews v. Forrest*, 281.

DEATH.

§ 1. Presumption of Death From Seven Years Absence.

Testimony to the effect that a missing person was last heard from some time during a particular year supports a finding that such person was not dead in February of the seventh year thereafter, there being no evidence that the full seven years had elapsed as of that date. *Murphy v. Smith*, 455.

The rebuttable presumption of death from seven years absence does not embrace any additional presumption that the missing person died without lineal descendants. *Ibid.*

§ 3. Nature and Grounds of Action for Wrongful Death.

Right of action for wrongful death is solely statutory and the statute also determines the basis and extent of recovery of damages therefor. *Lamm v. Lorbacher*, 728.

§ 8. Damages for Wrongful Death.

In an action for wrongful death, an instruction on the issue of damages to the effect that the jury was to determine the pecuniary worth of the deceased to her "family or estate" taking into consideration her age, habits, character, industry and skill, business, etc., and that the jury should not undertake to give the equivalent of human life or allow anything for punishment, *is held* without prejudicial error on plaintiff's appeal. *Lamm v. Lorbacher*, 728.

The value of the gratuitous labor performed by deceased as a housewife is not a proper element of damages in an action for wrongful death. *Ibid.*

DECLARATORY JUDGMENT ACT.

§ 1. Nature and Scope in General.

The Declaratory Judgment Act cannot be used for the purpose of having a part of a probated writing declared void under the guise of construction. *Farthing v. Farthing*, 634.

DEDICATION.

§ 3. Implied Dedication by Sale of Lots With Reference to Map or Plat.

Sale of lots by deeds referring to a registered plat showing streets is but an offer of dedication as far as the public is concerned and is not a completed dedication to the municipality until such offer is accepted. *Rowe v. Durham*, 158.

A municipality is without power to accept an offer of dedication of a street which lies beyond its territorial limits. *Ibid.*

Rule that sale of lots with reference to plat showing streets is dedication of streets to purchasers extends to dedication of riparian rights along navigable stream shown on plat. *Gaither v. Hospital*, 431.

§ 6. Withdrawal of Dedication.

An offer of dedication by sale of lots with reference to a registered plat may be withdrawn at any time before acceptance as far as the rights of the munici-

DEDICATION—*Continued.*

pality are concerned, and sale of the land by the dedicator without reference to streets or lots is a withdrawal. *Rowe v. Durham*, 158.

The owner of land subdivided same and sold lots therein with reference to a registered plat showing streets. Thereafter the owner sold a parcel of the land on the outskirts of the tract without reference to streets or the registered plat. Later all the land was incorporated into the city by an extension of its limits. *Held:* The offer of dedication as to the parcel sold without reference to streets was withdrawn by the dedicator before the dedication could have been accepted by the municipality, and therefore the municipality may not assert any rights in streets in such parcel. *Ibid.*

DEEDS.

§ 13b. Whether Rule in Shelley's Case Applies.

A deed to a married woman for life or widowhood, remainder in fee to the "heirs" of her husband does not convey a fee to the first taker, but only a life estate with remainder to the children of the marriage, theretofore and thereafter born, who become entitled to actual enjoyment immediately upon the death of the wife, G.S. 41-6, "heirs" being construed as children in such instance. *Sprinkle v. Reidsville*, 140.

§ 14b. Conditions Concurrent and Subsequent.

Ordinarily, a clause in a deed will not be construed as a condition subsequent unless it contain language sufficient to qualify the estate conveyed and provide that in case of breach the estate will be defeated. *Ange v. Ange*, 506.

Conditions subsequent are not favored by the law. *Ibid.*

Grantor conveyed land to a church by deed containing full covenants and warranties and in regular form except for the phrase at the end of the *habendum* "for church purposes only." *Held:* The phrase simply expressed the motive which induced grantor to execute the deed and does not have the effect of limiting the estate conveyed, and the church may convey the fee simple to the property in a sale to provide funds for the erection of another church at a different locality in keeping with the growth of the congregation and changing conditions. *Ibid.*

§ 16b. Restrictive Covenants.

Restrictive covenants create negative easements constituting vested interests in land. *Raleigh v. Edwards*, 671.

§ 17. Warranties and Covenants.

In an action involving title to land, a defendant asserting title under a deed, but praying for an alternative judgment against its grantor for damages for breach of covenant of title in the event the question of title is adjudicated against it, but not alleging that its grantor was without title or facts showing an ouster or a cross-action or counterclaim for breach of the covenant of warranty and without anything before the court indicating damages recoverable, may not complain, upon adjudication of title adverse to it, of the ruling of the trial court that its claim for breach of covenant of warranty could not be determined in the cause. *Sprinkle v. Reidsville*, 140.

A covenant of warranty is an agreement or assurance by the grantor that the grantee and his heirs and assigns shall enjoy the estate conveyed without interruption or eviction by a person claiming under a paramount title outstanding at the time of the conveyance. *Shuford v. Phillips*, 387.

DEEDS—*Continued.*

In an action on covenant of warranty, allegation of legal ouster by a person claiming under an outstanding title is sufficient, allegation that such claim was under better or paramount title being necessary only when possession has been surrendered without legal ouster. *Ibid.*

Complaint in an action on covenant of warranty alleging that grantee instituted action for the recovery of the premises and to establish his title against a third person asserting title to the *locus*, that notice of the action was given grantor, who actually participated in the prosecution of the action, and that judgment was entered in said cause adjudicating paramount title in such third person, *is held* sufficient as against demurrer, since, in such instance allegation of outstanding paramount title in such third person is not necessary. *Ibid.*

Right of action for breach of covenant of warranty does not arise until ouster or disturbance of the grantee's possession by virtue of superior title outstanding at the time the covenant was made, and therefore the statute of limitations does not run against the right of action on the covenant of warranty until there is an ouster under such outstanding title. *Ibid.*

DESCENT AND DISTRIBUTION.

§ 1. Rights and Titles of Heirs and Distributees in General.

Where the owner of land executes an executory contract to convey, his heirs take the land subject to the equities of the purchaser and the rights of the administrator and distributees under the doctrine of equitable conversion, and the administrator is entitled to the balance of the purchase price; but where the money is not necessary to pay debts of the estate, a sole heir at law who is also sole distributee has the absolute right as against the administrator to elect to reconvert and take the property in its original state. *Scott v. Jordan*, 244.

§ 3a. Persons Entitled to Take in General.

Collateral heirs must show that deceased died without descendants in order to be entitled to take. *Murphy v. Smith*, 455.

§ 10a. Collateral Heirs—Of Blood of Ancestor.

Father and son successively held the land in question. The son died intestate without issue, survived by a half-sister. *Held:* If title by adverse possession ripened in the father, then the son acquired title by descent, and upon his death the land would pass to his collateral heirs of the blood of his father; but if title by adverse possession ripened in the son, the son became a new *propositus* and upon his death without issue the land would pass to his half-sister. Canons of Descent, Rules 4 and 6. *Brite v. Lynch*, 182.

DISORDERLY CONDUCT.

§ 2. Prosecutions.

A warrant charging that defendant "unlawfully and wilfully did appear drunk on public highway" is substantially the language of G.S. 14-335 and is sufficient to repel a motion in arrest of judgment. *S. v. Raynor*, 184.

DIVORCE AND ALIMONY.

§ 1b. Divorce on Ground of Abandonment.

In a wife's action for divorce from bed and board on the ground of abandonment, G.S. 50-7 (1), she must prove as an essential part of her case that her husband had willfully abandoned her. *Cameron v. Cameron*, 82.

DIVORCE AND ALIMONY—*Continued.*

§ 2a. Divorce on Ground of Separation.

While it is not required that the husband in an action for divorce on the ground of two years separation be the injured party, the law will not permit him to take advantage of his own wrong, and the wife may defeat his action by showing as an affirmative defense that the separation was due to the husband's willful abandonment of her. *Cameron v. Cameron*, 82.

The prior institution by the wife of an action for divorce from bed and board on the ground of abandonment abates the husband's subsequent action for absolute divorce on the ground of separation, since adjudication in the first action that the husband had willfully abandoned her would bar his action for divorce on the ground of separation. *Ibid.*

§ 5e. Cross Actions.

Defendant in an action for divorce, either absolute or from bed and board, may set up a cross action for divorce, either absolute or from bed and board, as a counterclaim or cross demand, and such counterclaim or cross demand may be based, in whole or in part, upon facts occurring after institution of the action. *Cameron v. Cameron*, 82.

A husband will be allowed to amend his answer in his wife's action for divorce from bed and board to permit him to set up a cross action for divorce on the ground of separation so as to enable the parties to end the controversy in one and the same litigation. *Ibid.*

§ 12. Alimony Pendente Lite.

Upon the hearing of plaintiff's motion for alimony and counsel fees *pendente lite* in her suit for subsistence without divorce, G.S. 50-16, the finding of the court that defendant had obtained a valid decree of absolute divorce in another state supports a denial of the motion for alimony *pendente lite*, but it is error for the court also to dismiss the action, since the cause was not before the court on final hearing on the merits and the court was without jurisdiction to dismiss it. *Bond v. Bond*, 754.

§ 15. Alimony Upon Absolute Divorce.

Pending the husband's suit for absolute divorce on the ground of two years separation a consent judgment was entered awarding the wife a specified sum each month during her natural life or until she remarries. Thereafter decree of absolute divorce was entered. *Held:* The decree of absolute divorce terminated all rights arising out of the marital relationship, including defendant's right to alimony and counsel fees, and defendant may not seek to enforce the consent order as an alimony judgment. G.S. 50-11. *Livingston v. Livingston*, 515.

§ 19. Custody of Children—Determination and Decree.

Agreement of the parties to a divorce action in regard to the maintenance and custody of a child of the marriage is not binding upon the courts. *Gafford v. Phelps*, 218.

The welfare of the child is the paramount consideration which must guide the court in making an award of custody. *Ibid.*

Where the trial court finds that both the mother and the father are suitable persons to have the custody of their child, but further finds that the child had not been happy when in the custody of her nonresident mother and looked with dread upon returning to her mother's home, that the child was sensitive and that it was to the child's best interest to live in the home of her father,

DIVORCE AND ALIMONY—*Continued.*

the court properly awards the custody of the child to the father in furtherance of the welfare of the child. *Ibid.*

Where the court upon proper findings awards the custody of a child to its resident father as being in the best interests of the child, a provision in the order permitting the child's nonresident mother to have custody of the child in her home for a part of each year must be stricken, since the court should not permit the child to be removed from the State by a person to whom unqualified custody has not been awarded. The court may, in its discretion, make provision that the nonresident mother might visit the child in this State under such conditions and circumstances as the court may deem proper. *Ibid.*

§ 21. Validity and Attack of Foreign Decrees.

Where a resident of this State appears in his wife's action for divorce instituted in the state of her domicile, the decree of divorce is binding on our courts under the full faith and credit clause, but provision of the decree awarding custody of their child who was domiciled here and not present in that state at the time the decree was entered, is not binding on our courts, since the foreign court had no jurisdiction of the child. *Gafford v. Phelps*, 218.

DOMICILE.

§ 2. Change of Domicile.

As a general rule, an adult student does not acquire a legal domicile at the educational institution where he resides with the ultimate intention of returning to his home. *In re Hall*, 697.

§ 3. Domicile of Infants.

An unemancipated infant cannot select or change his domicile. *In re Hall*, 697.

A legitimate child at birth takes the domicile of its father, and its domicile so continues after the death of its father until its domicile is legally changed. As to whether its surviving mother upon remarriage may change the domicile of the child by changing her own domicile, *quaere? Ibid.*

Where the mother and father of an infant both die and its paternal grandfather takes the child to his home and actually stands *in loco parentis*, such grandfather is the natural guardian, and his domicile determines that of the child. *Ibid.*

EASEMENTS.

§§ 2, 3. Easements by Prescription and Implied Grant.

Where, in an action in trespass, defendants plead adverse user and an easement by implied grant to use the roadway across plaintiffs' land, the burden of proving these affirmative defenses is upon defendants and it is error for the court to direct a verdict in their favor upon these defenses. *McCracken v. Clark*, 186.

§ 5. Nature and Extent of Right.

Restrictive covenants in deeds to purchasers of land within a development create a negative easement constituting a vested interest in land. *Raleigh v. Edwards*, 671.

EJECTMENT.

§ 11. Common Source of Title.

Where plaintiffs claim as collateral heirs of a particular person and fail to show that the only child of such person died without surviving heirs, they fail to connect their claim of title with such person, and may not contend that such person was a common source of title. *Murphy v. Smith*, 455.

§ 14. Defense Bond.

An appeal from order of the court refusing defendant's motion to strike plaintiff's reply in an action to recover possession of realty does nt preclude a Superior Court judge from thereafter granting plaintiff's motion for an increase in the defense bond. *Scott v. Jordan*, 244.

§ 15. Burden of Proof.

Plaintiffs in an action to recover land must rely upon the strength of their own title, and where their title depends upon the person through whom they claim having acquired title by adverse possession at the time of his death, the court correctly places upon plaintiffs the burden of proving by the greater weight of the evidence that such person did so acquire title. *Brite v. Lynch*, 182.

In an action for the recovery of real property the burden is on plaintiff to make out a *prima facie* showing of title in himself, and he may not rely upon the weakness of defendant's title. *McDonald v. McCrummen*, 550.

§ 17. Sufficiency of Evidence and Nonsuit.

Where, upon the plea of sole seizin in a proceeding for partition, petitioners' title is made to depend upon the death of a missing person without surviving heirs, and petitioners' only evidence in reference to this matter raises at most only a presumption of the death of such missing person, *held* petitioners have failed to make good their allegation of tenancy in common and nonsuit was properly entered. *Murphy v. Smith*, 455.

In an action for the recovery of real property, plaintiff's evidence establishing a State grant to a certain person and a subsequent deed from another person with the same surname to plaintiff's predecessor in title, with testimony only that the persons of the same surname were kin, *is held* insufficient to make out a *prima facie* title, since the chain of title is not connected to the grantee of the State grant, and defendant's motion to nonsuit was properly allowed. *McDonald v. McCrummen*, 550.

ELECTION OF REMEDIES.

§ 2. Between Action for Damages for Fraud and Action for Reformation or Rescission.

A party who has been induced by fraud to enter into a contract of sale, either of real or personal property, must elect between an action for damages and an action for reformation or for cancellation and rescission, nor will he be allowed to affirm in part and rescind in part. *Parker v. White*, 680.

Complaint *held* to disclose election to affirm sale of realty and sue for fraud, and plaintiff could not assert remedies of rescission or reformation. *Ibid.*

ELECTRICITY.

§ 6. Degree of Care Required in Respect to Electricity in General.

An electric company is under duty to exercise that degree of care which an ordinarily prudent man would exercise in dealing with such a dangerous instru-

ELECTRICITY—*Continued.*

mentality, which care, in regard to high voltage wires carrying a lethal current, is the utmost care and prudence consistent with the practical operation of its business. *Rice v. Lumberton*, 227; *Mintz v. Murphy*, 304.

§ 7. Condition and Maintenance of Wires and Poles.

When an electric company has notice of a broken wire it is under duty to repair it within a reasonable time under the circumstances; but when the wire carries a high voltage and the circumstances are such that a reasonably prudent man would immediately cut off the current, it is under duty to do so and to keep the current off until proper precautions are taken to prevent danger to persons or property. *Rice v. Lumberton*, 227.

Evidence of negligence of electric company in failing to turn off current after notice of broken wire *held* sufficient for jury. *Ibid.*

An electric company is not required to maintain insulation on wires at places where it cannot be contemplated that any person could come in contact with them. *Mintz v. Murphy*, 304.

§ 10. Contributory Negligence of Person Injured.

The evidence tended to show that intestate came out of his house to help his father, who had been knocked down by current just after driving up in an automobile, that it was dark, that a high voltage wire had become entangled under the automobile, that intestate was not warned by a passenger in the car until he was "right against the automobile," and that intestate was electrocuted when he came in contact with the car or wire. *Held:* The evidence does not show contributory negligence as a matter of law on the part of intestate. *Rice v. Lumberton*, 227.

§ 11. Intervening Negligence of Third Persons.

The evidence tended to show that in the construction of a highway it became necessary for defendant municipality to move its poles, that the municipality was co-operating with the Highway Commission to this end, but that before the question of right of way had been settled, plaintiff's employer began work in the construction of a culvert, and that in the progress of the work plaintiff was injured by an electric shock when current from defendant's uninsulated wires jumped a gap of some twelve inches to the beam of the derrick in connection with which plaintiff was working. *Held:* The evidence discloses that the injury resulted from the independent intervening act of those in control of and operating the derrick, over which defendant had no control, and nonsuit was properly entered. *Mintz v. Murphy*, 304.

EMINENT DOMAIN.

§ 1. Nature and Extent of Power in General.

That operation of elevated water storage tank would constitute nuisance *held* no defense to condemnation proceedings by city, since such tank is not nuisance *per se* and claim for damages in operation is premature. *Raleigh v. Edwards*, 671.

§ 2. Necessity of Compensation.

The exercise of the power of eminent domain is always subject to the principle that there must be definite and adequate provision made for reasonable compensation to the owner. *Mount Olive v. Cowan*, 259.

EMINENT DOMAIN—*Continued.*

§ 3. Acts Constituting "Taking."

Where a municipality condemns land for the erection of an elevated water storage tank in a development which is subject to covenants restricting the use of the land to private dwelling purposes alone, *held* the violation of the negative easements constitutes a taking of vested interests in property for which the owners are entitled to compensation commensurate with any loss they may sustain. *Raleigh v. Edwards*, 671.

§ 4½. Selection of Route or Land to Be Taken.

The selection of a site for public housing rests in the broad discretion of a housing authority and its action in this regard may be challenged only by a charge of abuse of discretion, but allegations of arbitrary or capricious conduct are sufficient, it not being necessary to allege malice, fraud or bad faith. *In re Housing Authority*, 463.

Evidence *held* sufficient to raise issue of whether housing authority acted arbitrarily and capriciously in selecting site for housing project. *Ibid.*

Evidence of the availability of other suitable sites is relevant and competent upon the issue of whether a housing authority acted arbitrarily or capriciously in selecting the particular site objected to. *Ibid.*

§ 5. Delegation of Power in General.

The power of eminent domain is inherent in the State, and the power can be delegated by the General Assembly only when the purposes for which it may be exercised are enumerated and the procedure for such exercise prescribed. *Mount Olive v. Cowan*, 259.

§ 6. Delegation of Power to Municipal Corporations and State Boards.

A municipal corporation can exercise the right of eminent domain only when and to the extent authorized by its charter or by general law. *Mount Olive v. Cowan*, 259.

A municipality is given the right to condemn land for street purposes by general law, G.S. 160-205, and such right is not limited by the provisions of G.S. 40-10, which applies to those corporations named in the preceding sections of that statute in exercising the power of eminent domain under that act, and therefore that the land sought to be condemned for street purposes by the city was a part of respondents' premises, consisting of yard and garden, and upon which their dwelling is located, is not a bar to the proceedings by the municipality. *Ibid.*

In a proceeding by a municipality to condemn land for an elevated water storage tank, intervening property owners may not defend on the ground that the erection of the tank would amount to a partial taking of their dwelling property in contravention of G.S. 40-10, since the provisions of that statute have no application in proceedings by the city to acquire land for water purposes. *Raleigh v. Edwards*, 671.

The State Highway and Public Works Commission has the power to take private property for public highway purposes under the power of eminent domain. G.S. 136-19. *Moore v. Clark*, 364.

Power of eminent domain has been delegated to housing authorities. *In re Housing Authority*, 463.

§ 18b. Condemnation Proceedings—Parties and Pleadings.

In a proceeding by a municipality to condemn land for an elevated water storage tank, intervening property owners claiming that the erection of the

EMINENT DOMAIN—*Continued.*

tank would be a partial taking of their vested property rights for which compensation should be paid *held* entitled to join the additional defense that the erection of the tank would constitute a nuisance amounting to a partial taking of their dwelling property in contravention of G.S. 40-10. *Raleigh v. Edwards*, 671.

EQUITY.

§ 3. Laches.

Laches will not bar a party when the adverse party has not been prejudiced by any delay. *Holt v. May*, 46.

Where the action is barred by the applicable statute of limitations, the question of laches does not arise. *Trust Co. v. Parker*, 326.

ESCHEAT.

§ 1. Funds and Property Subject to Escheat.

Where surety on clerk's bond pays into court total liability as shown by clerk's records, court has jurisdiction to provide that unclaimed funds be returned to surety, and such funds do not escheat. *Hanson v. Yandle*, 532.

ESTATES.

§ 16. Estates in Personalty—Survivorship.

Upon his marriage, a husband had his deposit in a building and loan association changed to the names of himself or wife. The fact that he also signed a written subscription for blank shares of stock which when issued were to be held for the account of himself and wife with right of survivorship *held* not to warrant the Supreme Court in overruling the conclusion of law of the trial judge that there was no right of survivorship in the account, there being nothing on the face of the exhibit in conflict with the finding of the court that the subscription agreement was not executed for the purpose of transferring the account into a joint account, and there being no evidence of record that the agreement related to the existing account. *Hall v. Hall*, 711.

ESTOPPEL.

§ 1. Estoppel by Deed.

Where land is conveyed to a person for life, remainder to her children, a deed in fee with full warranty executed by the life tenant does not bar the claim of the remaindermen who, in such instance, take by purchase and not by descent. G.S. 41-8. *Sprinkle v. Reidsville*, 140.

EVIDENCE.

§ 5. Judicial Notice—Matters Within Common Knowledge.

It is a matter of common knowledge that consignors ordinarily adjust their complaints with the initial carrier and that consignees ordinarily do so with the delivering carrier. *Lambert v. Schell*, 21.

§ 7a. Burden of Proof in General.

Ordinarily in civil matters the burden of proof is by the preponderance or greater weight of the evidence, and burden of proving arbitrariness of housing authority in selection of site for housing project comes within this rule. *In re Housing Authority*, 463.

EVIDENCE—*Continued.*

§ 7e. Burden of Proof—Prima Facie Case and Burden of Going Forward With Evidence.

When plaintiff makes out a *prima facie* case the defendant is put to the election of going forward with proof or taking his chance of an adverse verdict. *Royster v. Hancock,* 110.

§ 17. Rule That Party Is Bound by Own Evidence.

Introduction of photostatic copy does not preclude party from attacking original instrument. *McGowan, In re Will of,* 404.

Plaintiff, by offering in evidence an uncontradicted extrajudicial declaration of defendant, is bound thereby. *Sowers v. Marley,* 607.

§ 30a. Photographs and Photostats.

Where defendants introduce a photostatic copy of an instrument introduced by plaintiff and such photostatic copy is admitted by the court, not as substantive evidence, but merely for the purpose of illustrating the testimony of a witness, defendants are not estopped from attacking the authenticity or due execution of the original instrument. *In re Will of McGowan,* 404.

§ 32. Transactions or Communications With Decedent.

In order for testimony of transactions or communications with a decedent to be incompetent it is necessary that the witness (1) be a party or interested in the event, (2) that his testimony relate to a personal transaction or communication with decedent, (3) that the testimony be against the deceased's personal representative or person deriving title through or under the deceased, (4) that the witness be testifying in his own behalf or interest. G.S. 8-51. *Sanderson v. Paul,* 56.

A witness is competent to testify against his interest in regard to a transaction or communication with decedent, and where such witness has alternative interests the competency of the testimony depends upon which interest predominates or is the more immediately valuable. *Ibid.*

The interest which affects the competency of a witness under G.S. 8-51 is a present pecuniary interest existing at the time the witness is examined, and mere sentimental reasons or personal predilections do not affect the question of qualification. *Ibid.*

The party asserting that a witness is disqualified under G.S. 8-51 to testify as to transactions or communications with a decedent has the burden of showing the disqualifying interest of the witness. *Ibid.*

As grantee in the deed attacked, the witness would take a one-half interest, defeasible upon her death without issue; as heir at law of grantor she would take a one-half undivided interest in the land in fee, subject to the dower right of grantor's widow. *Held:* It is error to exclude her testimony of transactions or communications with deceased grantor offered for the purpose of attacking the deed for undue influence, without evidence or a finding as to which interest of the witness is of greater pecuniary value. *Ibid.*

§ 39. Parol Evidence Affecting Writings.

Parol evidence is competent to show that an obligation was assumed only under certain contingencies, certainly upon allegation that the delivery of the paper writing attacked was produced by fraudulent misrepresentations. *Roberson v. Swain,* 50.

EVIDENCE—*Continued.*

§ 42b. Admissions or Declarations—Res Gestae.

Testimony of spectator that, at the time of the accident, she exclaimed "that car hit the truck" *held* competent. *Adcox v. Austin*, 591.

§ 42d. Admissions or Declarations of Agents.

Admission in answer of alleged agent that he was representative of codefendant *held* incompetent as against codefendant. *Lindsey v. Leonard*, 100.

§ 42f. Admissions in Pleadings.

Admission in answer of alleged agent that he was representative of codefendant *held* incompetent against codefendant. *Lindsey v. Leonard*, 100.

The admission in the answer of paragraphs of the complaint containing allegations of germane ultimate facts establishes such facts as effectively as a jury's verdict even though defendant attaches qualifications to his admissions. *Royster v. Hancock*, 110.

§ 46a. Subjects of Opinion Evidence in General.

Whether a particular disbursement of tax moneys is authorized by statute is not a proper subject for opinion evidence. *Horner v. Chamber of Commerce*, 77.

§ 46b. Handwriting Testimony.

A handwriting expert may give his opinion as to the genuineness of a signature upon an instrument, based upon comparison of such signature with the signature appearing on various checks identified by witnesses as being genuine, without offering the checks in evidence. This rule was not altered by G.S. 8-40. *In re Will of McGowan*, 404.

EXECUTORS AND ADMINISTRATORS.

§ 8. Title and Right to Assets of Estate.

Sole heir and distributee has absolute right to reconversion into realty as against administrator when sale is not necessary to pay debts. *Scott v. Jordan*, 244.

§ 11. Executory Contracts of Deceased to Convey Realty.

Heir claiming abandonment of contract to convey should be allowed to intervene in purchaser's action for specific performance. *Scott v. Jordan*, 244.

§ 15d. Claims for Services Rendered Deceased.

Plaintiff was paid allowance by order of the clerk for taking care of intestate during the period plaintiff was intestate's guardian. Plaintiff instituted this action to recover the reasonable value of his services upon the written authorization of intestate, later found, stating that intestate wanted plaintiff to have a reasonable amount for taking care of him. *Held:* It appearing that the period of guardianship did not cover the entire time during which services were rendered, the payment of the allowances under the clerk's order does not bar the action, but such payments are properly credited to the judgment. *Jones v. Jones*, 390.

§ 15g. Claims for Support of Family.

Father's disposition of estate by will without providing for support of minor children cannot be made basis of claim against his estate. *Elliott v. Elliott*, 153.

EXECUTORS AND ADMINISTRATORS—*Continued.*

§ 29. Commissions and Compensation of Personal Representative.

In the absence of testamentary provision, the right of the personal representative to compensation is controlled by G.S. 28-170. *In re Ledbetter*, 642.

Where a claim against an estate is reduced by the amount of credits or offsets existing in favor of the estate against claimant, the administrator is not entitled to commissions on the credits and offsets so deducted, since he neither received nor actually expended same. *Ibid.*

FALSE IMPRISONMENT.

§ 2. Actions for False Imprisonment.

Plaintiff may sue sheriff, deputy sheriff, sureties on their bonds, and private employer of deputy for false arrest committed by deputy under color of office and also in course of employment. *Cain v. Corbett*, 33.

Where the complaint states a cause of action for false imprisonment and also alleges malicious prosecution in connection with other matters on the question of punitive damages, but does not attempt to state them as separate causes (G.S. 1-123) and seeks no actual damages on account of malicious prosecution, it states but a single cause of action for false arrest, and any doubt in this respect is removed by plaintiff's declaration, constituting an election of remedies, that the action was for "false arrest and damages." *Ibid.*

FRAUD.

§ 1. Definition of Fraud.

Fraud is the representation of a definite and specific fact, which representation is materially false, made with knowledge of its falsity or in culpable ignorance of its truth, with fraudulent intent, which is reasonably relied on by the other party to his deception and damage. *Foster v. Snead*, 338.

§ 3. Past or Subsisting Fact.

A promissory misrepresentation may constitute the basis of fraud when it is made to mislead the promisee, and the promissor, at the time of making it, has no intent to comply therewith, since in such instance the state of mind of promissor is a subsisting fact. *Roberson v. Swain*, 50.

§ 9. Pleadings in Actions or Counterclaims for Fraud.

The complaint alleged an agreement under which plaintiff was to sell certain real and personal property to defendant for a stated consideration to be evidenced by notes executed by defendant and his wife, with only that part of the agreement required to be in writing to be written. Plaintiff further alleged that defendant tendered notes representing the entire purchase price signed by defendant alone, but that, upon plaintiff's objection, defendant, or his agent, promised that defendant would take the notes and have them signed by defendant's wife also, and return same to plaintiff, that thereupon plaintiff executed and delivered that part of the agreement in writing, but that defendant returned only those notes referred to in the writing, and fraudulently failed and refused to deliver the notes representing the balance of the purchase price. *Held:* The complaint is sufficient to state a cause of action for fraud. *Roberson v. Swain*, 50.

Allegations to the effect that defendant by fraudulent misrepresentations induced plaintiff to execute and deliver an agreement for the sale of real property, and thereafter had title to same transferred to a corporation in which

FRAUD—*Continued.*

defendant owned the majority of stock, and alleging facts sufficient to support the inference that transfer of title to the corporation was a part of the scheme to deprive plaintiff of property by fraud, and that the corporation had actual knowledge thereof, *is held* sufficient to state a cause of action against the corporation, and the corporation may be joined as a party defendant. *Ibid.*

§ 10. Burden of Proof.

The party asserting fraud has the burden of proving each of the essential elements of actionable fraud. *Foster v. Snead*, 338.

§ 12. Sufficiency of Evidence and Nonsuit.

Defendant alleged that he was induced to sign the lease of the filling station in question by plaintiff's representation that the filling station did a thousand dollars worth of business per month. On cross-examination, plaintiff admitted that he kept books from which it could be ascertained what volume of business had been done by him at the station and that he was willing to bring the books into court, but defendant did not have plaintiff produce the books at the trial. *Held:* Nonsuit on defendant's cross action for fraud should have been sustained for failure of proof that the representation was in fact false. *Foster v. Snead*, 338.

FRAUDS, STATUTE OF.

§ 3. Pleading the Statute.

The defense of the statute of frauds must be pleaded by (1) admitting the contract and pleading the statute as a bar, (2) denying the contract and pleading the statute as a bar, (3) general denial of the contract and objection to parol testimony to prove it, and the defense of the statute may not be taken advantage of by demurrer or motion to strike. *Weant v. McCanless*, 384.

§ 4. Estoppel and Waiver of Defense—Part Performance.

The doctrine of part performance is not recognized in this jurisdiction. *Duckett v. Harrison*, 145.

§ 9. Contracts Affecting Realty in General.

The statute applies to a parol partition by tenants in common. *Duckett v. Harrison*, 145; *Williams v. Robertson*, 478.

Statute does not apply to oral abandonment of contract to convey. *Scott v. Jordan*, 244.

GIFTS.

§ 1. Gifts Inter Vivos.

Husband's changing deposit in building and loan from his name to names of himself or wife *held* not gift *inter vivos* to her. *Hall v. Hall*, 711.

GUARDIAN AND WARD.

§ 3. Appointment of Guardian.

The clerk of the Superior Court in the county in which an infant resides has jurisdiction to appoint a guardian for such infant. *In re Hall*, 697.

The parents and grandparents of the child in question resided in Alamance County. Upon the death of the child's father the child and its mother resided with the child's paternal grandparents. The mother of the child later remarried. Upon the death of its mother the child was taken to the home of its paternal grandparents in Alamance County and resided with them. *Held:*

GUARDIAN AND WARD—*Continued.*

Irrespective of any change in residence by the child's mother during the period of her second marriage, upon her death the domicile of its grandfather became the child's domicile, and the clerk of the Superior Court of Alamance County had jurisdiction to appoint such grandfather the guardian of the person of the child. Later order of such clerk striking out the appointment for want of jurisdiction was erroneous, and order of the clerk of another county appointing the child's maternal aunt its guardian is void. *Ibid.*

There may be separate appointments of guardian of the person and of the estate of an orphan. G.S. 33-6. *Ibid.*

§ 14. Collection of Assets.

A successor guardian may maintain suits to renew judgment against the former guardian and to renew judgment on a note secured by deed of trust executed by the former guardian and his wife to secure money borrowed from the ward's estate, included in the recovery under the first judgment, care being given in entering credits on the judgments and in the charging of interest so that no injury results to either party. *Trust Co. v. Parker*, 326.

HABEAS CORPUS.

§ 2. To Obtain Freedom From Unlawful Restraint.

Where the county commissioners of a county are without authority to establish a general county court, the person named in their resolution to be judge of such court is without any actual or apparent authority to so act, and therefore a person sentenced by him may attack the validity of his imprisonment at any time in any proceeding. *In re Hickerson*, 716.

§ 4. Jurisdiction.

A Superior Court judge has no jurisdiction to act upon a petition based upon the same facts upon which another Superior Court judge has previously denied a motion for writ of *habeas corpus*. *In re White*, 757.

HIGHWAYS.

§ 4c. Construction of Highway—Injury to Contiguous Property.

A highway contractor cannot be held liable by the owner of land for damages to the land resulting from the construction of a highway in strict compliance with his contract with the State Highway and Public Works Commission, but he may be held liable for damages to the land resulting from negligence in the manner in which he performs the contract. In neither event is the contractor entitled to have the State Highway and Public Works Commission joined as a party defendant, since if the work is done in strict compliance with the contract the owner's sole remedy is a proceeding for compensation under G.S. 136-19, and if the damages are the result of negligence, the contractor has no right against the State Highway and Public Works Commission for contribution or indemnity. *Moore v. Clark*, 364.

§ 8d. Actions Against Commission.

The State Highway and Public Works Commission is an agency of the State and is subject to suit only in the manner prescribed by G.S. 136-19, and in the exercise of its governmental functions in the supervision of construction and maintenance of State and county public roads may not be restrained or sued in tort for trespass. *Moore v. Clark*, 364.

HIGHWAYS—*Continued.*

§ 15. Nature and Grounds for Establishment of Neighborhood Public Roads.

Each section of State highway which has been abandoned but which remains open and in general use as a necessary means of ingress to and egress from the dwelling house of one or more families is established as a neighborhood public road by G.S. 136-67. *Woody v. Barnett*, 73.

§ 16. Proceedings to Establish Neighborhood Public Roads.

A proceeding to have a section of abandoned State highway "declared" a neighborhood public road is properly instituted before the clerk, G.S. 136-67, the prayer that the section of road be "declared" a neighborhood public road meaning "judicially determined" rather than a request for a declaration of the rights of the parties under the Declaratory Judgment Act. *Woody v. Barnett*, 73.

In a petition to have a section of abandoned State highway declared a neighborhood public road, allegations to the effect that a school was situated at each end of the abandoned section of road and that the road constituted the most direct route between the two institutions, though evidentiary, are germane as tending to show that the road remained open and in general use, and the refusal of respondents' motion to strike such allegations will not be held prejudicial. *Ibid.*

HOMICIDE.

§ 6a. Murder in Second Degree.

In order to constitute murder in the second degree it is necessary not only that defendant inflict the wound which produces death but it is also required that he inflict such wound intentionally. *S. v. Williams*, 752.

§ 25. Sufficiency of Evidence and Nonsuit.

Circumstantial evidence of defendant's guilt of arson and murder *held* insufficient for jury. *S. v. Needham*, 555.

Circumstantial evidence of defendant's guilt of murder in the first degree *held* to exclude any reasonable hypothesis of innocence, and sufficient to take the case to the jury and support a verdict of guilty of the offense charged. *S. v. Roman*, 627.

§ 27a. Instructions—Form and Sufficiency in General.

The evidence tended to show that defendant raped his victim and also inflicted stab wounds and abrasions causing death. *Held:* In a prosecution for first degree murder the court was not required to define rape. *S. v. Roman*, 627.

§ 27d. Instructions on Second Degree Murder.

An instruction that the jury must find that defendant intentionally killed deceased before it could return a verdict of guilty of murder in the second degree, together with a statement of defendant's contentions, based on his evidence, that he did not intentionally kill deceased but that in the scuffle between the parties defendant's pistol went off, and that defendant had no intention or desire to shoot and kill deceased, *is held* sufficient, in the absence of request for special instructions, to present defendant's defense to the charge of murder in the second degree. *S. v. Williams*, 752.

HUSBAND AND WIFE.

§ 14. Creation of Estates by Entireties.

A husband owned land and conveyed it, with the joinder of his wife, in consideration of the grantees' supporting and maintaining grantors for life. Thereafter the grantees reconveyed the land to the husband and wife upon consideration of one dollar and the further consideration to restore the *status quo*, with warranty to defend title against claims of all persons "in so far as they are obligated under the premises, and to restore the *status quo*." *Held:* The second deed conveyed an estate by entireties to the husband and wife, and upon the husband's death, the wife is the sole owner. *Swaim v. Swaim*, 277.

§ 15d. Estates—Survivorship.

Evidence *held* to support finding that there was no joint account of husband and wife with right of survivorship. *Hall v. Hall*, 711.

Changing building and loan account from name of husband to names of husband or wife not gift of account and does not render it joint account. *Ibid.*

INCEST.

§ 1. Nature and Elements of the Offense.

A father is guilty of incest if he has sexual intercourse, either habitual or in a single instance, with a woman or girl whom he knows to be his daughter in fact, regardless of whether she is his legitimate or his illegitimate child. *S. v. Wood*, 636.

§ 2. Prosecutions.

It is not required that the testimony of the daughter be corroborated in a prosecution for incest, and her testimony alone will take the case to the jury if it establishes each element of the offense and defendant's guilt thereof. *S. v. Wood*, 636.

INDEMNITY.

§ 2a. Construction and Operation of Contract in General.

A contract indemnifying a party for damage to property caused by negligence will be strictly construed, and will not indemnify him for damages caused by his own negligence or the negligence of his employees unless the language of the contract clearly indicates that the parties so intended, taking into consideration the circumstances surrounding the parties and the object in view which induced them to make the agreement. *Hill v. Freight Carriers Corp.*, 705.

INDICTMENT AND WARRANT.

§ 9. Charge of Crime.

An indictment or warrant for a statutory offense must charge the offense in the language of the statute or specifically set forth the acts constituting same, and nothing can be taken by intendment. *S. v. Raynor*, 184.

INJUNCTIONS.

§ 1b. Nature and Grounds—Mandatory Injunctions.

A mandatory injunction to compel a board or public official to perform a duty imposed by law is identical in its function and purpose with that of a writ of *mandamus* and is governed by the rules applicable to *mandamus*. *Hospital v. Wilmington*, 597.

INJUNCTIONS—*Continued.*

A mandatory injunction is the proper remedy in appropriate instances to restore a *status quo* but is not available to establish an entirely new *status. Board of Trade v. Tobacco Co.*, 737.

A mandatory injunction is never available as a temporary writ pending the final determination of the facts raised by the pleadings. *Ibid.*

§ 4d. Abatement of Nuisances.

An action to abate a public nuisance may not be maintained by the County, though the members of the Board of Commissioners may, as individuals, be relators in an action prosecuted in the name of the State. G.S. 19-2. *Dare County v. Mater*, 179.

§ 4f. Enjoining Institution or Prosecution of Action.

While the courts of this State will not seek to restrain the prosecution of an action in the court of another state by order directed to such court or any of its officers, our courts may restrain a party from prosecuting an action in another state when it is made to appear that such action will unduly and inequitably interfere with the progress of litigation here or with the establishment of rights properly justiciable in our courts, particularly where the parties are residents of this State. *Childress v. Motor Lines*, 522.

Subsequent to the institution of an action here involving the rights of the parties growing out of a collision in another state, defendant in the action here instituted suit against plaintiff in a court of such other state to determine the liabilities of the parties arising out of the same collision. *Held:* Our State court, upon supporting findings, properly issued an order restraining defendant from prosecuting such other suit. *Ibid.*

§ 4g. Enjoining Violation of Criminal Law.

Injunction will not lie to restrain a defendant from carrying on a business upon allegation that he is unlawfully operating the business without a license, since there is an adequate remedy at law by indictment, and injunction ordinarily will not lie to enjoin a commission of a crime. *Dare County v. Mater*, 179.

§ 11. Disposition of Cause When Injunctive Relief Is Denied.

Where a suit is solely for the purpose of obtaining a restraining order and defendants' demurrer on the ground that the complaint failed to state facts sufficient to constitute a cause of action is properly sustained and the injunctive relief sought denied, *held* dismissal of the action is proper, only questions of law being presented. *Lamb v. Board of Education*, 377.

INSANE PERSONS.

§ 8. Collection of Assets by Guardian.

A successor guardian may maintain suits to renew judgment against the former guardian and to renew judgment on a note secured by deed of trust executed by the former guardian and his wife to secure money borrowed from the ward's estate, included in the recovery under the first judgment, care being given in entering credits on the judgments and in the charging of interest so that no injury results to either party. *Trust Co. v. Parker*, 326.

INSANE PERSONS—*Continued.*

§ 15. Actions Against Incompetent—Representation by Guardian.

An admission by a guardian *ad litem* does not adversely affect the rights of the person *non compos mentis* which are existent upon the admitted facts. *Battle v. Battle,* 499.

INSURANCE.

§ 13a. Construction of Insurance Contracts in General.

Ordinary words in a policy will be given their commonly understood and popular meaning in the absence of language in the policy indicating an intent to use them in a special sense. *Jernigan v. Ins. Co.,* 334.

Where the agreements of the parties are in writing and are clear and unambiguous, the legal effect of the writings is a question of law for the court and not for the jury. *Hilley v. Ins. Co.,* 544.

§ 43½. Auto Insurance—Collision Policies.

Insured's car was struck by a locomotive at a grade crossing. The policy of collision insurance in suit provided that upon payment of loss, insurer should be subrogated to the rights of insured against any third party, and that insured should do nothing after loss to prejudice such rights. Before payment of loss by insurer, insured paid the railroad company for damage to the engine and executed a release of any rights insured might have had against the railroad company. *Held:* The breach of the subrogation provisions of the policy, established by unambiguous writings, precludes insured from maintaining an action against insurer for the loss, and insurer's motion to nonsuit should have been allowed. *Hilley v. Ins. Co.,* 544.

§ 45¾. Automobile Fire Insurance.

A policy of fire insurance issued to a garage owner on "automobiles owned by insured and held for sale or used in repair service" does not cover a farm tractor purchased by insured for resale, there being no definitions in the policy giving the term "automobile" any meaning other than its ordinary and popular sense. "Car" and "automobile" are synonymous. *Jernigan v. Ins. Co.,* 334.

INTOXICATING LIQUOR.

§ 5b. Possession of Property Designed to Manufacture Liquor.

Possession of property designed and intended for the illegal manufacture of intoxicating liquor may be actual or constructive. "Designed" means fashioned according to a plan for that purpose. *S. v. McLamb,* 251.

A warrant charging defendant with the unlawful possession of property for the purpose of manufacturing illegal whiskey, instead of with possession of property designed and intended for that purpose, *held* not fatally defective, and motion in arrest of judgment is denied. *Ibid.*

§ 9c. Competency of Evidence.

Where an officer of the law sees and recognizes intoxicating liquor in defendant's car without a search thereof, it becomes his duty to act, either with or without a search warrant. G.S. 18-6. *S. v. Harper,* 67.

Testimony tending to show the drunken demeanor of groups of persons seen loitering around defendant's place of business is competent as corroborative evidence of the State's witnesses to the effect that defendant sold one of them liquor. *S. v. Murphy,* 503.

INTOXICATING LIQUOR—*Continued.*

§ 9d. Sufficiency of Evidence and Nonsuit.

Evidence in this case *held* sufficient to support a verdict of guilty of unlawful possession of intoxicating liquor for the purpose of sale. *S. v. Mills*, 226.

Evidence that officers in searching defendant's house and barn, found jars, some with small amounts of whiskey in them, kegs and barrels, and a worm or condenser barrel, with testimony that it was of a type used in the manufacture of whiskey, *is held*, considered in the light most favorable to the State, sufficient to be submitted to the jury in a prosecution for possession of property designed and intended for the illegal manufacture of whiskey. *S. v. McLamb*, 251.

Testimony of one witness that he bought a quantity of nontax-paid whiskey from defendant, and of another witness that she saw defendant sell the whiskey to the first witness, is sufficient to take the case to the jury on the charges of possession of whiskey for the purpose of sale and selling whiskey. *S. v. Murphy*, 503.

JUDGMENTS.

§ 2. Consent Judgments.

If the court is without jurisdiction of the subject matter of a judgment, such judgment can attain no validity because entered by consent of the parties, since jurisdiction may not be conferred upon a court by consent. *Hanson v. Yandle*, 532.

§ 9. Judgments by Default.

The clerk has jurisdiction to enter a default judgment only in those instances enumerated by statute, G.S. 1-209, and he may not enter such judgment if issues of fact are raised by the pleadings either by express denial or denial by implication of law arising from failure to serve a cross action upon the party sought to be charged. *Boone v. Sparrow*, 396.

§ 17a. Form and Requisites in General.

The judgment of a court draws its life and vitality from the judgment roll. *Boone v. Sparrow*, 396.

§ 17b. Conformity to Verdict, Proof and Pleadings.

Where issues of fact are raised by the pleadings and trial by jury is not waived, the court is without power to enter a final judgment until the issues of fact are determined by the verdict of the jury. *Erickson v. Starling*, 643.

§ 18. Validity—Process, Notice, Service and Jurisdiction.

Notice and an opportunity to be heard are prerequisites of jurisdiction, and jurisdiction is a prerequisite of a valid judgment. *Boone v. Sparrow*, 396.

If the court is without jurisdiction or power to enter an order contained in a paragraph in its judgment, such paragraph is void and may be attacked whenever and wherever it is asserted, without any special plea. *Hanson v. Yandle*, 532.

§ 27b. Void Judgments.

Where the court entering a judgment is without jurisdiction, the judgment is void and a nullity, and may be attacked in any proceeding. *Boone v. Sparrow*, 396; *Hanson v. Yandle*, 532.

JUDGMENTS—*Continued.*

§ 29. Parties Concluded.

Sole heir and distributee not made party in purchaser's action against administrator for specific performance of deceased's executory contract to convey would not be bound by judgment and his right to reconversion could not be precluded thereby. *Scott v. Jordan*, 244.

§ 32. Judgment as Bar to Subsequent Action.

A judgment is conclusive upon the parties and their privies as to all rights, questions, and facts in issue in the action, whenever such matters are in issue between them in a subsequent action, regardless of whether the subject matter is the same, and regardless of whether the prior judgment was by consent or based on the verdict of a jury. *Coach Co. v. Stone*, 619.

§ 39. Actions on Judgments.

Action may be maintained to renew primary judgment and also judgment on security for amount included in primary judgment. *Trust Co. v. Parker*, 326.

JUDICIAL SALES.

§ 10. Distribution of Proceeds—Payment of Taxes.

Taxes which have been levied at time of confirmation of sale should be paid out of proceeds of sale. *Holt v. May*, 46.

Where the purchaser at a judicial sale states at the time he accepts deed that he will continue to insist that taxes then levied should be paid out of the proceeds of sale, his acceptance of deed, even though the commissioners state at that time that they would not pay the taxes, cannot constitute a waiver. *Ibid.*

LARCENY.

§ 7. Sufficiency of Evidence and Nonsuit.

The State's evidence implicating a person in the larceny of chickens, with testimony, unobjected to, of a statement of such person to the effect that he stole the chickens in company with defendant, together with defendant's statement that he was with such person on the nights in question, except for a short time, *is held* sufficient to be submitted to the jury in a prosecution for larceny. *S. v. Bryant*, 420.

§ 9. Verdict and Judgment.

Where each of several warrants charges the larceny of chickens from different people on specified dates, a verdict of guilty "of larceny of chickens" is not too indefinite to support judgment, and cannot be held prejudicial when sentence on each count runs concurrently. *S. v. Bryant*, 420.

A verdict establishing that defendant stole property of the value of more than fifty dollars is a conviction of nothing more than a misdemeanor notwithstanding anything to the contrary in the charge. *S. v. Williams*, 429.

LIS PENDENS.

§ 2. Actions Affecting Realty.

Lis pendens is authorized only in actions affecting the title to real property. *Parker v. White*, 680.

Where it is apparent from the pleadings that grantor has elected to sue for damages for fraud inducing him to execute deed, such election precludes him

LIS PENDENS—*Continued.*

from asserting the relief of cancellation and rescission or reformation, and therefore the action does not involve title to realty so as to justify the filing of *lis pendens*, and the trial court properly grants defendants' motion for cancellation of such notice. *Ibid.*

MANDAMUS.

§ 1. Nature and Grounds of Writ in General.

Mandamus is a writ issuing from a court of competent jurisdiction commanding an inferior tribunal, board, corporation, or person to perform a purely ministerial duty imposed by law. The party seeking such writ must have a clear legal right to demand it, and the party to be coerced must be under a present, clear, legal duty to perform the act. *Hospital v. Wilmington*, 597.

Mandamus is not a preventive remedy to be used as a restraining order to preserve the *status quo*, but is a coercive writ which is final in its nature. *Ibid.*

In an action by an eleemosynary corporation against a municipality and a county to ascertain defendants' statutory liabilities for contributions for indigent patients of the city and county treated at the hospital, it is error for the court to issue the mandatory writ of *mandamus* against defendants prior to the adjudication of the cause on its merits. *Ibid.*

MASTER AND SERVANT.

§ 4b. Distinction Between Employees and Independent Contractors.

Lessee of truck under trip lease agreement for trip in interstate commerce *is held* liable to public generally under doctrine of *respondeat superior* as matter of public policy notwithstanding that under agreement lessor is independent contractor; but this rule does not apply to accident occurring after truck had been returned to lessor's place of business upon completion of trip. *Eckard v. Johnson*, 538.

Lessor driving own truck under trip lease agreement in interstate commerce is employee as far as public is concerned and in operation of vehicle as far as lessee is concerned, but is independent contractor in regard to negligent injury to truck. *Hill v. Freight Carriers Corp.*, 705.

§ 22d. Liability of Employer for Injury to Third Persons—Determination of Which Party Is Employer.

Where a mechanical instrumentality is rented with operator for the performance of a particular job, the question of whether the operator is the employee of the owner of the machine or the person renting it is to be determined by whether the owner retains the right to direct and control the manner in which the work shall be performed, and it is immaterial whether such right of control is actually exercised or not. *Hodge v. McGuire*, 132.

Evidence *held* for jury on question of whether operator of bulldozer rented to plaintiff was employee of owner of machine. *Ibid.*

§ 40f. Occupational Diseases.

An employee who has become affected by silicosis to such extent that, though not actually disabled, his continued employment in an occupation subjecting him to silica dust would be hazardous to his health, and who has therefore been ordered removed from such hazardous employment by the Industrial Commission, is not entitled to compensation under G.S. 97-61 when he has not been exposed to inhalation of silica dust for as much as two years in this State within ten years prior to his last exposure. *Midkiff v. Granite Corp.*, 149.

Medical expert evidence to the effect that claimant was suffering from advanced silicosis prior to the termination of his employment, together with testimony by claimant that less than two years after his last injurious exposure to the hazards of silicosis in the employment, claimant was unable to work more than a few hours at a time because of shortness of breath, *is held* sufficient to support the finding of the Industrial Commission that claimant became disabled within the meaning of G.S. 97-54 within two years of his last injurious exposure to the hazards of the disease, G.S. 97-58 (a). The distinction between disablement as defined by G.S. 97-54 and ordinary disability as defined by G.S. 97-2 pointed out. *Singleton v. Mica Co.*, 315.

The existence of silcosis must be established by competent medical authority, but where the existence of the disease is established by medical expert evidence, the time at which claimant later became disabled therefrom may be established by non-medical testimony, it being competent for claimant to testify as to his lessened capacity to work, shortness of breath, and the effect that physical exertion had upon him. *Ibid.*

In making occupational diseases compensable under the Workmen's Compensation Act, the General Assembly, in recognition of the difference between the manner in which disability is brought about by an occupational disease and by an ordinary accident, has set up different tests of disability, which the courts must observe. *Honeycutt v. Asbestos Co.*, 471.

In cases of asbestosis and silicosis the legislative test of disability is the incapacity of an employee to perform normal labor in the last occupation in which remuneratively employed, G.S. 97-54, G.S. 97-55, while in all other cases the test is the incapacity of the employee to earn the wages he was receiving in the same or any other employment. G.S. 97-2 (i). *Ibid.*

Where an employee in an asbestos plant becomes disabled by reason of asbestosis from performing normal labor in his occupation, as distinguished from being merely affected by asbestosis and subject to rehabilitation, G.S. 97-61, such employee has suffered disablement as defined by G.S. 97-54, and this result is not affected by the fact that the employee thereafter actually earns more money in another employment than he was earning at the time the existence of his disability was determined. *Ibid.*

§ 41. Compensation Act—Action Against Third Person Tort-Feasor.

In an action by the personal representative of a deceased employee against the third person tort-feasor, defendant is entitled to set up actual negligence of the employer, as distinguished from imputed negligence under the doctrine of *respondeat superior*, as a bar *pro tanto* to plaintiff's right to recover in behalf of the employer, G.S. 97-10, but contributory negligence on the part of the employee is a complete bar to the entire action, without reference to any rights of the employer to share in the recovery. *Poindexter v. Motor Lines*, 286.

Where defendant sets up the contributory negligence of intestate as a bar to plaintiff's right to recover for his intestate's death, defendant is not entitled to set up the further defense that compensation had been paid for intestate's death by his employer and that intestate's negligence was a bar *pro tanto* to the action in so far as the employer is entitled to share in the recovery under G.S. 97-10, since negligence of intestate may be presented as a complete bar under the plea of contributory negligence, and the further defense was properly stricken on motion as being mere repetition and surplusage. *Ibid.*

MASTER AND SERVANT—*Continued.*

§ 43. Notice and Filing of Claim for Compensation.

Evidence *held* to support finding that claim for disablement from silicosis was filed within one year from time claimant was advised by competent medical authority that he had silicosis, and therefore claim was timely filed. *Singleton v. Mica Co.*, 315.

§ 45. Jurisdiction of Industrial Commission.

The Industrial Commission has exclusive original jurisdiction of all Workmen's Compensation proceedings and is the sole fact finding agency in such cases. *Thomason v. Cab Co.*, 602.

§ 52. Findings of Fact and Conclusions of Industrial Commission.

The findings of fact of the Industrial Commission must be sufficiently positive and specific to enable the court on appeal to determine whether they are supported by the evidence and whether the law has been properly applied to them, and when the commission fails to find the determinative facts, the cause is properly remanded. *Thomason v. Cab Co.*, 602.

§ 53b. Amount of Recovery Under Workmen's Compensation Act.

Claimant was employed by one company as foreman in its asbestos plant for thirty-seven weeks during the fifty-two weeks immediately preceding the date he became disabled from asbestosis. The plant was bought by another company and claimant was employed by the new owner at much smaller wages for the last ten weeks of his employment. *Held:* His wages during the entire fifty-two weeks were properly taken into account in determining the amount of compensation. *Honeycutt v. Asbestos Co.*, 471.

§ 55d. Review of Award of Industrial Commission.

The Superior Court has appellate jurisdiction to review an award of the Industrial Commission only for errors of law, and the findings of fact of the Industrial Commission are conclusive upon it when supported by evidence, G.S. 97-86, and may be reviewed solely to determine whether there was any competent evidence before the Commission to support them and whether the findings justify the Commission's legal conclusions and decision. *Thomason v. Cab Co.*, 602.

§ 60. Right to Unemployment Compensation.

Testimony to the effect that claimant was discharged because she was not keeping up with her work as she should, although she was doing the best she could, *is held* to support a finding of the Employment Security Commission that she was fired for inefficiency, notwithstanding other evidence tending to show that she was fired for misconduct. *Employment Security Com. v. Smith*, 104.

§ 62. Appeals From Employment Security Commission.

The findings of fact of the Employment Security Commission in a proceeding for unemployment compensation are conclusive when supported by any competent evidence. *Employment Security Com. v. Smith*, 104.

MONEY PAID.

§ 1. Nature and Essentials of Right of Action.

Because of error in figuring by the agent of the Government, an amount less than the penalty due was deducted by the warehouseman in paying defendant

for his tobacco. Upon later demand by the Government, the warehouseman paid the balance due on the penalty. *Held:* The warehouseman is entitled to recover from defendant the additional sum paid. *Puckett v. Sellars*, 264.

MUNICIPAL CORPORATIONS.

§ 8d. Municipal Housing Authorities.

The power of eminent domain has been delegated to commissioners of housing authorities. *In re Housing Authority*, 463.

The selection of a site for public housing rests in the broad discretion of a housing authority and its action in this regard may be challenged only by a charge of abuse of discretion, but allegations of arbitrary or capricious conduct are sufficient, it not being necessary to allege malice, fraud or bad faith. *Ibid.*

Even though the question of whether a housing authority acted arbitrarily or capriciously in the selection of a site may be a question of fact reviewable by the judge on appeal from the clerk, nevertheless the judge has the discretionary power to submit the question to a jury. *Ibid.*

Evidence *held* sufficient to raise issue of whether housing authority acted arbitrarily and capriciously in selecting sit for housing project. *Ibid.*

Burden of proof on the issue is greater weight of evidence and not clear, strong and convincing proof. *Ibid.*

§ 10. Meetings and Proceedings of Municipal Boards.

Majority of members of municipal board may act. *Edwards v. Board of Education*, 345.

§ 11a. Elections.

Although provision of a municipal charter that nonresident freeholders should be entitled to vote in its elections, is void, Art. VI of the Constitution of North Carolina, where only voters possessing the qualifications prescribed by the Constitution actually vote in a bond election in the municipality, the election is valid, and approval of the issuance of bonds by the voters in such election is effective. *Wrenn v. Kure Beach*, 291.

§ 11b. De Facto Officers.

Where the offices of mayor and commissioners of a municipality are created by the General Assembly, and in accordance with the town charter, the Governor appoints to these offices men selected by an election in which nonresident freeholders were allowed to vote under the charter provisions of the town, and such officers are recognized as such and their acts acquiesced in by the residents of the town and the public generally, such officers are at least *de facto* officers of *de jure* offices. *Wrenn v. Kure Beach*, 291.

§ 12. Liability of Municipality for Torts.

A municipal corporation in distributing electricity for profit is regarded as a private corporation, and in such capacity is liable to persons injured by the actionable negligence of its servants, agents and officers. *Rice v. Lumberton*, 227; *Mintz v. Murphy*, 304.

§ 32. Property Subject to Assessment for Public Improvements.

Property held by nonprofit cemetery association not exempt from assessments for street improvements. *Cemetery Asso. v. Raleigh*, 509.

MUNICIPAL CORPORATIONS—*Continued.*

§ 38. Validity and Attack of Assessments for Public Improvements.

Death of member of board of appraisers does not preclude survivors for functioning as a board. *Ballard v. Charlotte*, 499.

The failure to follow statutory procedure to contest the levy of assessments for public improvements does not preclude the landowner from maintaining an independent action to vacate the assessments or to enjoin their enforcement if such assessments are void. *Ibid.*

§ 41. Municipal Charges and Expenses.

Evidence *held* to support finding that chamber of commerce did not expend tax moneys as agency of municipality for purposes specified in G.S. 158-1. *Horner v. Chamber of Commerce*, 77.

Good faith in the expenditure of tax moneys does not affect the question of whether such expenditure is authorized. *Ibid.*

While ordinarily a municipality may not expend public funds for improvements and construction outside its corporate limits unless specifically authorized by statute or its charter, where the building of underpasses and overpasses along a cross-line railroad track within the city would be greatly in excess of the cost of relocating the cross-line outside the city limits, the city may contribute funds for the construction of such cross-line outside its limits under the principle of compensation by way of substitution. *Austin v. Shaw*, 722.

The power of a city to compel a railroad company at its own expense to eliminate grade crossings within the city is subject to the limitation that such power may not be exercised arbitrarily or unreasonably, and therefore the existence of such power does not preclude the municipality from contributing public funds in good faith under a comprehensive plan for the elimination of grade crossings within the city in the public interest. *Ibid.*

Where a comprehensive over-all plan for the elimination of grade crossings within the limits of a populous city requires alterations and constructions near the railroad company's passenger station, the city may lawfully expend its funds in contribution of such alterations and structures as expenses incidental to the over-all plan for the elimination of the grade crossings. *Ibid.*

NEGLIGENCE.

§ 1. Acts and Omissions Constituting Negligence in General.

Negligence is the want of care commensurate with the existing circumstances. *Harwood v. General Motors Corp.*, 88.

Actionable negligence is the failure to exercise proper care in the performance of some legal duty which the defendant owes plaintiff under the circumstances, which proximately causes injury to plaintiff. *Mintz v. Murphy*, 304; *Morris v. Transport Co.*, 568.

Negligence is the failure to exercise that degree of care which a reasonably prudent person would exercise under like circumstances, under conditions from which the resulting or similar injury could have been reasonably foreseen, which proximately causes the injury. *Mills v. Waters*, 424.

§ 2. Sudden Emergency.

In a sudden emergency a person is not held to the duty of selecting the wisest choice of conduct but only to such choice as a person of ordinary care and prudence, similarly situated, would have selected. *Mills v. Waters*, 424.

NEGLIGENCE—*Continued.*

§ 3½. Res Ipsa Loquitur.

Res ipsa loquitur does not apply to the injury of a passenger in an ambulance resulting from the sudden opening of the door while the vehicle is in motion when the passenger's evidence itself undertakes to point out reasons why the door suddenly opened. *Pemberton v. Lewis*, 188.

§ 4a. Condition and Use of Lands and Buildings in General.

The heating of a filling station by an open gas heater within the room some distance from the outside gas tanks and pumps is not negligence *per se*. *Mills v. Waters*, 424.

§ 4f. Injury to Patrons and Invitees.

The evidence disclosed that a customer at a filling station purchased a jug of gasoline and followed the attendant into the station with the jug to receive his change, that in some accidental manner the jug became broken, that the attendant grabbed a broom and attempted to sweep the loose gasoline out the door, but that during the sweeping motion some gasoline came in contact with an open gas stove which was in the station for the purpose of heating the room, resulting in a fire in which plaintiff was injured. *Held:* The emergency was not brought about by defendants or their agents, and nonsuit was properly entered. *Mills v. Waters*, 424.

Evidence *held* for jury on issues of negligence and contributory negligence in action by roomer to recover for fall down basement stairs of boarding house. *Thompson v. DeVonde*, 520.

§ 5. Proximate Cause.

Proximate cause is that cause which produces the result in continuous sequence and from which a man of ordinary prudence could have foreseen that such result was probable under the facts as they existed. *Mintz v. Murphy*, 304.

§ 9. Anticipation of Injury.

The operator of a filling station heated by an open gas heater cannot be held to the duty of foreseeing that a customer purchasing a jug of gasoline would bring the jug into the station and that the jug would become broken accidentally so as to set the premises afire. *Mills v. Waters*, 424.

§ 11. Contributory Negligence in General.

A person *sui juris* is under the duty to exercise that degree of care for his own safety which is commensurate with the obvious danger. *Rice v. Lumberton*, 227.

§ 17. Presumptions and Burden of Proof.

There is no presumption of negligence from the mere fact of an accident or injury, but plaintiff has the burden of establishing not only negligence but that such negligence was the proximate cause of the injury complained of. *Harwood v. General Motors Corp.*, 88.

Plaintiff in an action based on negligence has the burden of producing evidence, either direct or circumstantial, sufficient to establish negligence on the part of defendant and that such negligence proximately caused the injury. *Sowers v. Marley*, 607.

NEGLIGENCE—*Continued.*

§ 19a. Questions of Law and of Fact.

Negligence is a question of law, and when the facts are admitted or established the court may say whether there has been a negligent breach of duty and also whether it was a proximate cause. *Mintz v. Murphy*, 304.

§ 19b (1). Sufficiency of Evidence and Nonsuit on Issue of Negligence in General.

Evidence that merely raises a conjecture as to the existence of negligence or proximate cause is insufficient to be submitted to the jury. *Harwood v. General Motors Corp.*, 88.

Nonsuit is proper in an action for negligence when all the evidence taken in the light most favorable to plaintiff fails to show any one of the elements of actionable negligence. *Mintz v. Murphy*, 304.

In order for circumstantial evidence to be sufficient to be submitted to the jury in an action for negligence, the facts presented must reasonably warrant the inference that the injury was the result of actionable negligence on the part of defendant, and such inference must rest upon facts in evidence and cannot rest on conjecture or surmise from the evidential facts. *Sowers v. Marley*, 607.

§ 19c. Nonsuit on Issue of Contributory Negligence.

Nonsuit on the ground of contributory negligence is proper only when the plaintiff's own evidence, considered in the light most favorable to him, establishes contributory negligence as the only reasonable conclusion deducible therefrom. *Morrisette v. Boone Co.*, 162.

§ 19d. Nonsuit for Intervening Negligence.

Nonsuit is proper in a negligence action when it clearly appears from the evidence that the injury complained of was independently and proximately produced by the wrongful act, neglect, or default of an outside agency or responsible third person. *Mintz v. Murphy*, 304; *Clark v. Lambreth*, 578; *Jones v. R. R.*, 640.

§ 21. Issues and Verdict.

A verdict to the effect that the driver and passengers in the first car were not injured by the negligence of the driver of the second car, and that the driver of the second car was injured by the negligence of the driver of the first car but was guilty of negligence contributing to his injury, *is held* reconcilable under a permissive application of the doctrine of proximate cause and not essentially inconsistent, and the trial court was without power, as a matter of law, to refuse to accept such verdict. *Edwards v. Motor Co.*, 269.

A finding by the jury that plaintiff was not injured by the negligence of defendant, that defendant was injured by the negligence of plaintiff, but that defendant by her own negligence contributed to her injury, *is held* not inconsistent when measured by the applicable principles of law in this case. *Adcox v. Austin*, 591.

NUISANCES.

§ 3a. Acts and Conditions Constituting Nuisance.

In an action by a municipality to condemn land for an elevated water storage tank, allegations of intervening property owners that the operation of the tank would constitute a nuisance in the overflow of water from the tank on their premises and the increase in water pressure in the pipes in their dwellings

NUISANCES—*Continued.*

held no defense, and the city's demurrer thereto is properly sustained, since an elevated water storage tank is not a nuisance *per se* and the pleading of prospective damage in its operation is premature, since such damage cannot be recovered by interveners before they have occurred. *Raleigh v. Edwards*, 671.

PARENT AND CHILD.

§ 3b. Liability of Parent for Injury to Child.

Under the common law in force in this State a child may not maintain an action to recover for negligent injury against its parents or either of them. G.S. 4-1. *Redding v. Redding*, 638.

§ 3c. Liability of Third Persons to Parent for Injury to Child.

Ordinarily the father is entitled to the earnings of his child during the child's minority, and is liable for necessary medical treatment for his child, and his right to recover these elements of damages against a third person who has negligently injured the child cannot be defeated by the bringing of an action in the name of the child by his mother as next friend, even though all damages are sought in such action, and therefore it is error for the court, in the child's action instituted by its mother, to permit the jury to consider such elements of damage, the father having instituted action to recover same. *Smith v. Hewett*, 615.

Upon the death of the father, the father's administrator is entitled to continue the father's action against a tort-feasor who has negligently injured his child to recover for loss of services of the child up to the date of the father's death. *Ibid.*

§ 5. Liability for Support of Children.

The common law obligation of a father to support his minor children is not a property right but is a personal duty which is terminated by the death of the father, and cannot be made the basis of a claim against the estate of the father who has disposed of his property by will without providing for the support of his minor children. *Elliott v. Elliott*, 153.

PARTIES.

§ 3. Parties Who May Be Sued.

If plaintiff be in doubt as to the persons from whom he is entitled to redress, he may join two or more defendants to determine which is liable. *Cain v. Corbett*, 33.

§ 7. Interveners.

Person claiming interest in subject matter and whose rights would purportedly be affected by judgment should be allowed to intervene. *Scott v. Jordan*, 244.

§ 10. Joinder of Additional Parties Defendant.

The provisions of G.S. 1-73 do not authorize the court to bring in a party who cannot be held liable by either plaintiff or defendant upon the action as constituted. *Moore v. Clark*, 364.

A cause of action must stand or fall in accordance with the theory of liability set up in the complaint, and the original defendants are not entitled to the joinder of an additional party defendant upon allegations seeking to set

PARTIES—*Continued.*

up an entirely new theory of liability in substitution for that alleged in the complaint. *Ibid.*

PARTITION.

§ 1a. Nature and Extent of Right in General.

Tenancy in common in land is the basis for a petition for partition. *Murphy v. Smith*, 455.

§ 4d. Partition Proceedings—Actual Partition, Report and Confirmation.

Judgment confirming report for actual partition in accordance with the consent judgment theretofore entered will not be held for error on the ground that the commissioners failed to take into consideration the value of a structure erected on the land by one party and allotted to the other, even though the report makes no specific reference to the structure, when the record discloses that the value of the structure was, in fact, considered by the commissioners in the division of the land. *Thompson v. Thompson*, 416.

The mere fact that commissioners in partition failed to file their report within sixty days after notification does not vitiate the report or preclude confirmation. *Ibid.*

§ 5a. Proceedings Upon Plea of Sole Seizin—Effects of Plea.

A plea of sole seizin in a proceeding for partition converts the proceeding, in legal effect, into an action in ejectment, with the burden upon petitioners to prove their title. *Murphy v. Smith*, 455.

§ 5d. Plea of Sole Seizin—Sufficiency of Evidence and Nonsuit.

Where, upon the plea of sole seizin in a proceeding for partition, petitioners' title is made to depend upon the death of a missing person without surviving heirs, and petitioners' only evidence in reference to this matter raises at most only a presumption of the death of such missing person, *held* petitioners have failed to make good their allegation of tenancy in common and nonsuit was properly entered. *Murphy v. Smith*, 455.

§ 6. Parol Partition.

A parol partition among tenants in common comes within the statute of frauds and may not be enforced unless each tenant goes into possession of his share in accordance with the agreement and holds same under known and visible boundaries openly, notoriously and adversely for twenty years, and a holding for a shorter period, even though the respective tenants collect the rents from and pay taxes upon their respective shares, does not alter this result or create an estoppel. *Duckett v. Harrison*, 145; *Williams v. Robertson*, 478.

PARTNERSHIP.

§ 1a. Creation and Existence of Partnership.

A partnership is an association of two or more persons to carry on as co-owners a business for profit, but proof of division of profits is alone insufficient to establish a partnership and is not even *prima facie* evidence thereof in instances, among others, when payment of a share of the gross returns of the business is to discharge a debt by installments or as rental for real or personal property. *Johnson v. Gill*, 40.

Evidence tending to show merely that a person sold or leased a truck to partners for the conduct of the partnership business, with the purchase price

PARTNERSHIP—*Continued.*

or rental to be paid in a stipulated sum weekly, is insufficient to be submitted to the jury on the question of whether such person was a member of the partnership, notwithstanding further evidence that the stipulated weekly rental of the truck was in excess of its true rental value. *Ibid.*

§ 6b. Liability of Partners—Separate Firms and Firms Doing Business at Several Places.

Where there is evidence that a firm of the same name did business in two separate cities and that defendant partner appeared to be interested in the business at both places, his motion to nonsuit in an action on an account due by the firm at either place is properly denied. *Supply Co. v. Rozzell*, 631.

Where defendant partner alleges and offers evidence that there were two separate firms doing business in separate cities and that he was a partner in only one of them, it is reversible error for the court to charge that he admitted partnership in the firm and that the same concern was doing business in both cities. *Ibid.*

§ 6d. Liability of Partners for Torts.

Partners are liable jointly and severally for a tort committed by one of them in the course of the partnership business. *Johnson v. Gill*, 40.

Where the evidence is insufficient to be submitted to the jury on the question of whether defendant appellee was a member of the partnership, his motion to nonsuit in an action seeking to hold him liable for a tort committed by one of the partners is properly entered. *Ibid.*

PLEADINGS.

§ 2. Joinder of Causes.

Plaintiff may unite in a single action several causes of action if they all arise out of the same transaction or transactions connected with the same subject matter, and tell a connected story forming a general scheme tending to a single end. *Roberson v. Swain*, 50.

§ 3a. Statement of Causes in General.

Where cause for false imprisonment is stated, and allegations of malicious prosecution are not stated as separate cause of action, the complaint states by a single cause. *Cain v. Corbett*, 33.

§ 10. Counterclaims.

A defendant cannot be compelled to file a counterclaim in plaintiff's suit, but may in his election reserve such matter for a future independent action unless the claim is essentially a part of the original action and will necessarily be adjudicated in it. *Cameron v. Cameron*, 82.

It is not required that a counterclaim be based on matters existing at the time of the commencement of the action except when arising out of contract. G.S. 1-137. *Ibid.*

In plaintiff's action in tort for conversion of funds by defendant agent, defendant may not set up a counterclaim in contract which neither is connected with plaintiff's subject of action nor arises out of transactions set forth in the complaint. *Finance Co. v. Holder*, 96.

In plaintiff's action in tort for conversion of funds by defendant agent, defendant may not set up a counterclaim for the penalty for usury. *Ibid.*

PLEADINGS—*Continued.*

In plaintiff's action in tort for conversion of funds by defendant agent, defendant may not set up a counterclaim upon contract to recover the reasonable value of services rendered by defendant to plaintiff. *Ibid.*

Where a counterclaim is not served on the party sought to be charged its allegations are deemed to be denied, and this rule applies to a cross action against a codefendant as well as one against plaintiff. *Boone v. Sparrow*, 396.

§ 14. Reply.

A complaint and reply are inconsistent within the meaning of G.S. 1-141 when they are contrary so that one is necessarily false if the other is true, and the rule against inconsistency does not preclude plaintiff from replying to a defense by alleging new matter involving a new position which is not necessarily inconsistent with that taken in the complaint, since plaintiff should not anticipate a defense in his complaint. *Scott v. Jordan*, 244.

Plaintiff sought to recover the land in question as the sole heir at law of his ancestor. Defendant set up in his answer an executory contract to sell executed by the ancestor. Plaintiff's reply setting up abandonment and cancellation of the contract by mutual agreement of plaintiff and defendant. *Held:* The reply is not inconsistent with the complaint and states a defense to the new matter set up in the answer, and motion to strike the reply was properly denied. *Ibid.*

§ 15. Office and Effect of Demurrer.

A demurrer admits the truth of the well-pleaded factual allegations in the pleading of the adverse party solely for the purpose of testing the sufficiency of such allegations to state a cause of action or a defense, and therefore such admission forthwith ends if the demurrer is overruled. *Erickson v. Starling*, 643.

While plaintiff may demur to any one or more of several defenses set up in the answer, he may not divide a single affirmative defense into its several constituent paragraphs or sentences, and demur separately to such several paragraphs or sentences segregated from their respective contexts. *Ibid.*

§ 19b. Demurrer for Misjoinder of Parties and Causes.

In this action for false imprisonment, demurrer on the ground of misjoinder of parties and causes of action should have been overruled, it appearing that all parties defendant were proper or necessary parties and that the complaint stated but one cause of action. *Cain v. Corbett*, 33.

Where there is no misjoinder of causes of action, the fact that one defendant may not be a proper or necessary party is not ground for demurrer, but may be regarded as surplusage. *Roberson v. Swain*, 50.

§ 19c. Demurrer for Failure of Pleading to State Cause of Action.

Upon demurrer, a pleading will be liberally construed, giving the pleader the benefit of every reasonable inference and intendment deducible from the facts alleged as well as all relevant inferences of fact, and the demurrer cannot be sustained if upon the entire pleading any part presents facts or reasonable inferences of fact sufficient to constitute a cause of action. *Roberson v. Swain*, 50.

The rule that a pleading will be liberally construed upon demurrer does not permit the court to construe into the pleading that which it does not contain. *Dillingham v. Kligerman*, 298.

Answer to the merits cures a defective statement of a good cause of action, and a demurrer thereafter filed on this ground is properly overruled. *Shuford v. Phillips*, 387.

Answer alleging an essential element of plaintiff's cause of action is available to plaintiff under the doctrine of aider upon a subsequent demurrer by defendant. *Ibid.*

§ 22b. Amendment by Permission of Trial Court.

In wife's action for divorce from bed and board, husband will be allowed to amend so as to set up cross action for divorce on ground of separation, in order that parties may end controversy in one and the same litigation. *Cameron v. Cameron*, 82.

Where it appears on the face of the complaint that the court has no jurisdiction of the subject matter of the action, the trial court may not allow an amendment, since such defect cannot be cured by waiver, consent, amendment, or otherwise. *Anderson v. Atkinson*, 300.

The trial court may not allow an amendment which sets up a wholly different cause of action or changes substantially the form of the action originally alleged. *Ibid.*

§ 23. Amendment After Decision on Appeal.

Where the trial court erroneously refuses defendant's motion for judgment on the pleadings, the cause will be remanded, and in the subsequent proceedings defendant may renew his motion, and plaintiff, if so advised, may move to amend, in which event defendant may withdraw his motion for judgment on the pleadings and prosecute his counterclaim. *Credit Corp. v. Saunders*, 369.

§ 24c. Proof Without Allegation.

Proof without allegation is as ineffective as allegation without proof, and evidence which is not predicated upon allegation is irrelevant. *Wilson v. Chandler*, 373.

§ 25. Questions and Issues Raised by Pleadings.

Ordinarily a party is bound by an allegation of fact contained in his own pleading, unless withdrawn, amended, or otherwise altered, and when not denied by the adverse party, such matter is not in issue. *Credit Corp. v. Saunders*, 369.

The issues arise upon the pleadings, and if a material fact alleged in the complaint is not denied by the answer, such allegation, for the purpose of the action, is taken as true and no issue arises therefrom. *Wilson v. Chandler*, 373.

The admission in the answer of the allegation in the complaint that at the time in question the truck of defendant was being driven by a named person as agent and employee of defendant *is held* sufficient to establish that the agent at the time was driving in the scope of his employment, relieving plaintiff of the necessity of introducing evidence on the issue of *respondeat superior*. *Hodges v. Malone & Co.*, 512.

§ 28. Motion for Judgment on the Pleadings.

Where the mortgagee in claim and delivery alleges in his complaint and also in his reply, filed some four months after he had obtained possession of the property, that the value of the property was in a certain sum and the debt in a less amount, defendant mortgagor is entitled to recover on the pleadings the difference between the alleged debt and the alleged value of the property, but

PLEADINGS—*Continued.*

the mortgagor's motion for judgment on the pleadings is based upon plaintiff's allegations as to the value of the property and the amount of the debt, and precludes him from asserting on his counterclaim that the value of the property was in excess of that alleged in the complaint, or that the debt should be reduced by the amount of alleged usury, G.S. 1-510. *Credit Corp. v. Saunders*, 369.

A court of record has inherent power to render judgment on the pleadings where the facts shown and admitted on the pleadings entitle a party to such judgment. *Erickson v. Starling*, 643.

A motion for judgment on the pleadings admits solely for its purposes the truth of all well-pleaded facts in the adversary's pleading together with all fair inferences to be drawn therefrom, and also the untruth of movant's allegations in so far as they are controverted by the adversary's pleading, and therefore if the motion is denied, movant is not precluded from having the action regularly tried upon all issues raised by the pleadings. *Ibid.*

A motion for judgment on the pleadings is allowable only where the pleading of the opposite party is so fatally deficient in substance as to present no material issue of fact. *Ibid.*

Upon motion for judgment on the pleadings the court is confined to determining whether any material issue of fact has been joined between the parties, and he may not hear extrinsic evidence or make findings of fact. *Ibid.*

If the pleadings raise an issue of fact on any single material proposition, motion for judgment on the pleadings must be denied, and the court may not enter a partial judgment on the pleadings for a part of a litigant's claim, but must submit the issues of fact for the determination of the jury so that a single judgment which will completely and finally determine all the rights of the parties may be entered. *Ibid.*

§ 31. Motions to Strike.

Motion to strike particular allegations of the complaint which are clearly impertinent and irrelevant should be allowed, and the refusal of the motion will be reversed when the matter is sufficiently prejudicial. *Lambert v. Schell*, 21.

Refusal to strike evidential allegations which are germane to the inquiry is not, ordinarily, prejudicial. *Woody v. Barnett*, 73.

Motion to strike matter barred by agreement of compromise should have been allowed. *Snyder v. Oil Co.*, 119.

Supreme Court will not chart course of trial on appeal from order on motion to strike. *Neal v. Greyhound Corp.*, 225.

Plea that deceased was covered by Compensation Act, in addition to plea of contributory negligence of deceased *held* surplusage in action by deceased's administration for wrongful death. *Poindexter v. Motor Lines*, 286.

A motion to strike a further defense, cross action and counterclaim, should not be allowed if the facts pleaded therein may be proven by competent evidence, and if so proven, would constitute a defense in whole or in part to the affirmative relief sought in the complaint. *Weant v. McCanless*, 384.

A motion to strike defendant's counterclaim on the ground that the contract therein alleged as the basis of the counterclaim is unenforceable under the statute of frauds, is properly denied, since the contract is enforceable unless the statute of frauds is properly pleaded. *Ibid.*

PLEADINGS—*Continued.*

In bus passenger's action against bus company and truck driver to recover for injuries resulting from collision between the vehicles, consent judgment was entered against both defendants. *Held:* In subsequent action by bus company against truck driver to recover for damages to bus, defendant was entitled to plead prior judgment, and motion to strike was properly denied. *Coach Co. v. Stone*, 519.

PRINCIPAL AND AGENT.

§ 7a. Actual Authority of Agent.

A manufacturer's agent whose duties relate solely to promotion of the principal's products among prospective customers of the dealer, has no actual authority to modify the contractual relations between the principal and the dealer. *Commercial Solvents v. Johnson*, 237.

§ 7b. Apparent Authority of Agent.

The doctrine of apparent authority has no application when the person dealing with the agent has actual or constructive knowledge of the nature and extent of the agency. *Commercial Solvents v. Johnson*, 237.

§ 13c. Relevancy and Competency of Evidence of Agency.

Allegations in defendant's answer that the driver of the car was under contract with defendant to sell defendant's merchandise on a commission basis does not tend to show the existence of the relationship of principal and agent between defendant and the driver, and is properly excluded from evidence on the ground of irrelevancy. *Lindsey v. Leonard*, 100.

Admission in answer of alleged agent that he was representative of codefendant *held* incompetent as against codefendant. *Ibid.*

Evidence that shortly after the accident, merchandise of defendant was found in the car of the alleged agent who stated that he was selling the articles for defendant, *held* properly excluded. *Ibid.*

Extrajudicial declarations of an alleged agent are not competent to prove the fact of agency or its extent. *Commercial Solvents v. Johnson*, 237.

Even when the fact of agency is proven by evidence *aliunde*, extrajudicial declarations of the agent are not competent against the principal unless it also is made to appear by evidence *aliunde* that the declarations were within the actual or apparent scope of the agent's authority. *Ibid.*

PRINCIPAL AND SURETY.

§ 5c. Actions on Bonds of Public Officers.

Plaintiff may sue sheriff and his deputy as well as the sureties on their bonds in one action for false arrest committed by deputy under color of his office. *Cain v. Corbett*, 33.

§ 5d. Bonds of Public Officers—Settlement and Discharge of Surety.

Where surety on clerk's bond pays into court total liability of clerk as shown by clerk's records, court has jurisdiction to provide that unclaimed funds be returned to surety. *Hanson v. Yandle*, 532.

PROCESS.

§ 1. Form and Requisites.

The summons must be signed by the clerk. *Boone v. Sparrow*, 396.

PROCESS—*Continued.*

§ 8. Amendment of Process.

The failure of the clerk to sign summons may be cured by amendment provided the summons bears internal evidence that it was issued from the clerk's office for the purpose of bringing the defendant into court to answer a complaint, G.S. 1-163, but such failure cannot be cured by amendment when there is nothing on the face of the paper to give assurance that it received the sanction of the clerk before it was delivered to the sheriff to be served, since in such event it is not a defective summons but no summons at all. *Boone v. Sparrow*, 396.

§ 8c. Service on Agent of Foreign Corporation Doing Business in This State.

In order to acquire jurisdiction of a foreign corporation by service of process under G.S. 1-97, the corporation must be doing business in this State and it must be present in this State in the person of an authorized officer or agent. *Lambert v. Schell*, 21.

A foreign corporation is present and doing business in this State through an authorized officer or agent within the purview of G.S. 1-97 when it has an officer or agent here who exercises some control over and discretionary power in respect to some function for which the corporation was created and not merely one incidental thereto. *Ibid.*

Foreign railroad company having no property in this State *held* not doing business here in maintaining agent to promote good will to have shippers request that goods be routed so as to use it as connecting carrier. *Ibid.*

PUBLIC OFFICERS.

§ 4b. Prohibition Against Holding Two Public Offices Simultaneously.

Postmaster's appointment as member of board of education is ineffective; member of board of education vacates this office *eo instanti* he accepts office of mayor. *Edwards v. Board of Education*, 345.

§ 5a. De Facto Officers.

Mayor and commissioners of town appointed by Governor in accordance with election in which nonresident freeholders were allowed to vote *held de facto* officers of *de jure* offices. *Wrenn v. Kure Beach*, 292.

Postmaster appointed member of board of education and member of board of education accepting office of mayor *held* neither *de jure* nor *de facto* members of board of education. *Edwards v. Board of Education*, 345.

§ 7. Functions, Powers and Duties.

Where statute confers joint authority on members of a board, surviving members, acting as a board, may exercise the authority. *Ballard v. Charlotte*, 484.

§ 8. Civil Liabilities of Officials to Individuals.

In the performance of governmental duties involving the exercise of judgment and discretion, a public official is clothed with immunity for mere negligence, and may be held liable only if his act or failure to act is corrupt or malicious or if he acts beyond the scope of his duties. *Smith v. Hefner*, 1.

While an employee, as distinguished from a public official, may be held liable individually for negligence in the performance of his duties, such negligence may not be imputed to the employer on the principle of *respondeat superior* when the employer is clothed with governmental immunity. *Ibid.*

PUBLIC OFFICERS—*Continued.*

School trustees and park commissioners *held* not liable for negligent injury to patron at commercial baseball game played on school diamond rented to league club. *Ibid.*

§ 9. Attack of Validity of Official Acts.

The official acts of *de facto* officers cannot be collaterally attacked. *Wrenn v. Kure Beach*, 291.

Where the county commissioners of a county are without authority to establish a general county court, the person named in their resolution to be judge of such court is without any actual or apparent authority to so act, and therefore a person sentenced by him may attack the validity of his imprisonment at any time in any proceeding. *In re Hickerson*, 716.

RAILROADS.

§ 4. Accidents at Grade Crossings.

Evidence tending to show that plaintiff's intestate could have seen one-fourth of a mile in the direction from whence defendant's train was approaching, without evidence that the condition of the crossing caused his vehicle to stall or prevented him from looking before entering upon the crossing, *held* to disclose contributory negligence barring recovery as a matter of law. *Cockrell v. R. R.*, 303.

In car passenger's action for negligent injury in crossing accident, driver *held* guilty of insulating negligence. *Jones v. R. R.*, 640.

§ 7. Fires.

Evidence tending to show that defendant railroad company allowed its right of way to become foul with weeds, broomstraw, etc., that immediately after the passage of defendant's coal-burning engine a fire started in the inflammable material on the right of way and spread to plaintiff's house and destroyed it, with further evidence that cinders and hot ashes were found on the right of way at the point where defendant's engine had stopped, *is held* sufficient to be submitted to the jury on the issue of defendant's negligence in permitting its right of way to become and remain in such dangerous condition, and it is immaterial whether such negligence caused the injury through sparks from the smokestack or live coals or clinkers from the engine. *Gainey v. R. R.*, 114.

RAPE.

§ 11. Carnal Knowledge of Female Under Twelve—Sufficiency of Evidence.

Evidence of defendant's identity as the person who had carnal knowledge of an eight-year-old girl, together with evidence of penetration, *held* sufficient to be submitted to the jury in a prosecution for rape. G.S. 14-21, G.S. 14-23. *S. v. Reeves*, 427.

§ 14. Carnal Knowledge of Female Under Twelve—Verdict, Judgment and Sentence.

The recommendation of the jury for life imprisonment upon conviction of defendant of the crime of rape affords no ground of complaint on the part of the defendant. *S. v. Reeves*, 427.

REFERENCE.

§ 3. Compulsory Reference.

The Superior Court is without authority to order a compulsory reference in an action seeking to recover a specified amount alleged to be due plaintiff from defendant under the terms of a conditional sales contract, no equitable relief being sought. *Acceptance Corp. v. Pillman*, 295.

§ 4. Pleas in Bar.

Where defendants object to a compulsory reference ordered without first determining their plea in bar of title by adverse possession, but do not at once appeal therefrom, they may not, after reference, maintain that the plea in bar first should have been determined. *Gaither v. Hospital*, 431.

§ 9. Exceptions and Preservation of Grounds of Review.

The remedy for failure of the referee to find a material fact is by motion to recommit and not by exception to his failure to find the fact. *Murphy v. Smith*, 455.

§ 12. Remand for Additional Findings.

Where the referee fails to find a material fact, the remedy is by motion to recommit and not by exception to the failure of the referee to find the fact. *Murphy v. Smith*, 455.

§ 14a. Procedure to Preserve Right to Jury Trial in Compulsory Reference.

In order for a party to a compulsory reference to preserve his right to trial by jury he must (1) object to the order of compulsory reference at the time it is made; (2) file specific exceptions to particular findings of fact within thirty days after the referee's report is delivered to the clerk, G.S. 1-195; (3) formulate appropriate issues of fact raised by the pleadings and based on the facts pointed out in his exceptions, and tender such issues with his exceptions; (4) set forth in his exceptions to the referee's report a definite demand for jury trial on each issue so tendered; and failure to comply with any one of these requirements waives his right to jury trial. *Bartlett v. Hopkins*, 165.

Where defendants in a compulsory reference offer no evidence in support of their plea of title by adverse possession and tender no issue thereon with demand for jury trial, they waive the right to have the plea in bar tried by a jury. *Gaither v. Hospital*, 431.

A party to a compulsory reference waives his right to trial by jury, notwithstanding his objection to the order of reference and exception to the referee's finding of fact, when the issues tendered by him relate only to evidentiary matters and not to those issues arising upon the pleadings. *Murphy v. Smith*, 455.

REMOVAL OF CAUSES.

§ 7. Effect of Petition for Removal.

Petition for removal cannot deprive State court of jurisdiction to continue with proceedings for contempt in willful violation of restraining order. *Erwin Mills v. Textile Workers Union*, 107.

ROBBERY.

§ 3. Verdict and Punishment.

Where, on a charge of robbery with firearms, the jury returns a verdict of "guilty of robbery" sentence of not less than ten nor more than fifteen years is in excess of that permitted by law. *In re Ferguson*, 121.

SCHOOLS.

§ 3a. Consolidation of School Districts.

A county board of education has the discretionary power, with the approval of the State Board of Education, to close a high school in a union school and transfer the high school pupils to other high schools in adjoining districts provided there is a consolidation of the districts involved and a finding as to the adequacy of the school facilities in the consolidated district or districts. G.S. 115-99. *Keeger v. Drummond,* 8.

The courts will not interfere with the action of the school authorities in creating or consolidating school districts unless the authorities act contrary to law or there is a manifest abuse of discretion on their part. *Ibid.*

A county board of education has discretionary power to close a high school in a union school and thus change the district from a union or high school district to an elementary school district. *Ibid.*

The power of the State Board of Education to transfer students from one district to another, G.S. 115-352, contemplates a transfer of students for a single year, or from year to year, and the statute has no application to a permanent transfer of high school students from a union school to high schools in adjoining districts, which may be done by the county board of education with the approval of the State Board of Education by a consolidation of high school districts. The State Board of Education is not a necessary party in an action to determine the power of a county board to order such consolidation. *Ibid.*

The county board of education has the power, with the approval of the State Board of Education, to consolidate for administrative or attendance purposes a special tax district having no supplemental levy with a non-special tax district without the approval of the voters of the non-special tax district, G.S. 115-99. Such consolidation does not involve a tax, since the boundaries of the special tax district remain. *School District v. Board of Education,* 212.

Where a district having a supplemental tax to provide a higher standard of schools than provided by State support is consolidated with a non-special tax district, the supplemental levy may not be collected unless approved by a majority of the qualified voters of the non-special tax district. *Ibid.*

Since a supplemental tax to provide a higher standard of schools than provided by State support may be levied only in districts having a school population of five hundred or more, G.S. 115-361, the question of a supplemental levy does not arise upon the consolidation of a special tax district having no supplemental levy with a non-special tax district when the consolidated district has a school population of less than five hundred pupils, the consolidation being made under the general law, G.S. 115-99, and not under G.S. 115-192 or G.S. 115-361. *Ibid.*

A county board of education may not be restrained from exercising its power to consolidate the existing high schools into one county-wide high school with the approval of the State Board of Education, G.S. 115-99, or its power to contract for the erection of the consolidated high school building out of funds available to it for this purpose, G.S. 115-84, and where such funds have been made available by allocation of State funds with the approval of the State Board of Education, the fact that the board of county commissioners had refused to allocate funds for this purpose is immaterial. *Edwards v. Board of Education,* 345.

§ 4b. County Boards of Education.

A county board of education is a corporate body which has legal existence separate and apart from its members even though it may not act except at a

meeting attended by a quorum of its *de jure* or *de facto* members and therefore may not act when vacancies reduce its membership below the number required to constitute a quorum. *Edwards v. Board of Education*, 345.

In the absence of statutory provision to the contrary, the common law rule applies that the quorum of a municipal board is a majority of its whole membership. *Ibid; Board of Education v. Dickson*, 359.

Vacancies upon the board of education of a county may be filled by county executive committees of political parties or the State Board of Education. G.S. 115-42. *Edwards v. Board of Education*, 345.

A member of a county board of education vacates this office *eo instanti* he accepts the office of mayor of a municipality, since both are public offices under the State within the purview of Art. XIV, sec. 7, of the Constitution of North Carolina, and thereafter he is neither a *de jure* nor a *de facto* member of the board of education. *Ibid.*

A postmaster holds office under the United States and therefore his election or appointment as a member of a county board of education is ineffective, Art. XIV, sec. 7, of the Constitution of North Carolina, and he is neither a *de jure* nor a *de facto* member of the county board of education. *Ibid.*

A county board of education can exercise its powers only in a regular or special meeting attended by a quorum of its members, and cannot perform its functions through its members acting individually, informally, and separately. *Board of Education v. Dickson*, 359.

§ 4d. Actions.

A county board of education, sued in its corporate capacity with the sole joinder of the county superintendent of public schools as clerk to the board may not be restrained from doing a lawful act on the ground that two of its members were mere usurpers and that therefore it was totally incapacitated to perform any official act, the remedy being by suit against the usurpers to restrain them from doing an unlawful act, or by direct proceedings in the nature of *quo warranto* to oust the usurpers, G.S. 1-515 to G.S. 1-530. *Edwards v. Board of Education*, 345.

Trustees of a school administrative unit may not be sued in tort, there being no statutory authority therefor, G.S. 115-8, G.S. 115-56. *Semble:* An administrative school unit may not be held liable for torts committed by its employees or trustees. *Smith v. Hefner*, 1.

§ 5f. Athletics and Physical Education.

Park commissioners and school trustees of a city administrative unit act within their authority in providing an athletic field for games and exhibitions, with grandstand and other seating facilities, since an athletic field is an essential part of the physical plant of a well integrated school unit, and they may also rent such field for the benefit of the unit when the primary use of the field is reserved for school purposes. *Smith v. Hefner*, 1.

Park commissioners and school trustees of a city administrative unit may not be held individually liable for negligent injury to a patron at a baseball game occurring while the school athletic field was rented to a league baseball club, there being no allegations that their conduct was either corrupt or malicious, and it appearing that they were acting in the scope of their duties and were therefore clothed with governmental immunity. *Ibid.*

SCHOOLS—*Continued.*

§ 7f. Contracts for Construction of Schools.

Injunction will not lie to restrain a board of education from letting a contract for the construction of a school on the ground that the board had failed to make plans for water and sewer service for the school, G.S. 115-96, since it will be presumed that the defendants in proper time will comply with the law. *Lamb v. Board of Education*, 377.

Nor will local act limiting amount that can be spent on water and sewer system for any one project without a vote affect the question, since such local act is unconstitutional. *Ibid.*

Nor will injunction lie on ground that board did not intend to allocate funds for different items of building project in exact amounts specified in plan. *Ibid.*

§ 8a. Employment, Election, Re-election and Discharge of Teachers and Principals.

The re-election of a teacher or principal must be performed in the same manner in which he was originally elected and therefore re-election by the school committee of a district is not effective until approved by the county superintendent of schools and the county board of education. *Board of Education v. Dickson*, 359.

Dismissal of a teacher or principal by a county administrative unit is not effective until approved by the county board of education and the principal or teacher notified by registered mail of his dismissal or rejection, thus approved, prior to the close of the current school term, it being required that all acts essential to the validity of the dismissal or rejection be fully performed prior to the end of the school year. *Ibid.*

A letter written by the county superintendent of schools "after consultation with the chairman of the county board of education" advising a principal of the termination of his employment is not approval of the dismissal by the county board of education, since the board may act only in a duly constituted meeting. Resolution of the board passed after the end of the school year, "supporting" any action of the local unit in regard to electing a principal for the particular school, is not retroactive approval of the attempted dismissal by the local unit and in no event could be effective since not passed prior to the close of the school term. *Ibid.*

The administrative unit undertook to re-elect a principal for the ensuing year and later undertook to dismiss or reject him. Neither action was approved by the county board of education prior to the end of the school term. *Held:* Neither the attempted re-election nor the attempted dismissal is effective, and therefore the principal's original contract automatically continued in force for the ensuing school year. *Ibid.*

§ 10h. Allocation and Expenditure of Funds.

Where the board of county commissioners allots to the county board of education a designated sum for the construction of a school building and another sum for garage and equipment thereat, whether the sum set aside for the garage and equipment should be used for that purpose or some other purpose in connection with the general purpose for which the money was set aside, rests in the sound discretion of the boards, and certainly injunction will not lie to restrain the board of education from letting a contract for the building upon allegation that the sum set aside for the garage and equipment might be applied to some other purpose in connection with the school. *Lamb v. Board of Education*, 377.

SEARCHES AND SEIZURES.

§ 1. Necessity for Warrant.

When officer sees intoxicating liquor in car it is his duty to act, either with or without search warrant. *S. v. Harper*, 67.

§ 2. Requisites and Validity of Warrant.

A warrant reciting that an officer of the law had sworn under oath that named persons illegally possessed intoxicating liquor at a specified locality, and commanding a search of the premises without affidavit, *is held* governed by G.S. 18-13 and not G.S. 15-27, and the warrant is a sufficient compliance with the apposite statute to render competent evidence discovered by an officer at the premises designated. *S. v. McLamb*, 251.

SHERIFFS.

§ 6b. Liability of Sheriff for Acts of Deputies.

A sheriff is liable for the wrongful acts or omissions of his deputy to the same extent as he is for his own. *Cain v. Corbett*, 33.

A sheriff and his deputy, as well as the surety on their bonds, may be held liable for false arrest made by the deputy under color of his office. *Ibid.*

Where the complaint alleges false arrest by a deputy sheriff while acting in the scope of his employment by individuals and also under color of his office, the joinder of the deputy, the sheriff, the surety on their bonds, and the alleged employers is not a misjoinder. Whether the deputy was acting in his capacity as employee or public officer is a question of fact for the jury under the pleading. *Ibid.*

STATE.

§ 3. Claims and Actions Against the State.

Neither the State nor its political subdivisions which exercise statutory governmental functions may be sued unless authorized by statute. *Smith v. Hefner*, 1.

State Highway Commission may not be restrained or sued in tort for trespass. *Moore v. Clark*, 364.

STATUTES.

§ 2. Constitutional Inhibition Against Certain Special or Local Acts.

A statute applicable to the board of education of a single county, prohibiting the board from expending money in excess of a designated amount on any one project for the construction of a water and sewer system for a school without approval of the voters, *is held* unconstitutional as a local or special act relating to health and sanitation. *Lamb v. Board of Education*, 377.

§ 5a. General Rules of Construction.

Where a statute contains no technical language it must be interpreted in accordance with the ordinary and common understanding of the words used. *Mills Co. v. Shaw*, 14.

Whether a particular provision in a statute is mandatory or directory must be determined in accordance with the legislative intent as ascertained not only from the phraseology of the statute but also from the nature and purpose of the act and the consequences which would follow its construction one way or the other. *Art Society v. Bridges*, 125.

STATUTES—*Continued.*

When literal compliance with a nonessential provision of a statute has become impossible, a substantial compliance suffices. *Ibid.*

A statute is to be construed to effect its intent. *Midkiff v. Granite Corp.*, 149; *Watson Industries v. Shaw*, 203; *Puckett v. Sellars*, 264.

Ordinary words of a statute must be given their natural, approved, and recognized meaning. *Watson Industries v. Shaw*, 203.

A word or phrase of a statute may not be interpreted out of context so as to render it inharmonious to the intent and tenor of the act, but must be construed as a part of the composite whole and accorded only that meaning which other modifying provisions and the clear intent and purpose of the act will permit. *Ibid.*

The word "may" will be construed "must" when necessary to effectuate the intent of a statute designed for the protection of public and private interests. *Puckett v. Sellars*, 264.

The courts will not adopt a construction that results in palpable injustice when the language of the statute is susceptible to another reasonable construction which is just and is consonant with the purpose and intent of the act. *Ibid.*

Matters necessarily implied by the language of a statute must be given effect to the same extent as matters specifically expressed. *Board of Education v. Dickson*, 359.

A statute will be construed to effectuate the intent of the Legislature as therein expressed, and the courts will adopt a construction which will not defeat or impair its objective if possible by any reasonable construction of the language used. *Ballard v. Charlotte*, 484.

All parts of the same statute dealing with the same subject are to be construed together as a whole, and every part thereof must be given effect if this can be done by any fair and reasonable intendment. *In re Hickerson*, 716.

Where a literal interpretation of a statute will lead to absurd results or contravene the manifest purpose of the Legislature, the reason and purpose of the law shall control and the strict letter thereof shall be disregarded. *Ibid.*

If the meaning of a statute be in doubt, reference may be had to its title and context as legislative interpretations of the purpose of the act. *Ibid.*

§ 5b. Administrative Interpretation.

Administrative interpretation of a statute can be considered in its construction only when ambiguity exists, and never can be considered when in direct conflict with the clear intent and purpose of the act. *Watson Industries v. Shaw*, 203.

§ 5d. Construction of Statutes in Pari Materia.

Statutes *in pari materia* are to be construed together. *Midkiff v. Granite Corp.*, 149.

§ 5e. Statutes Delegating Authority to Public Officers.

Where a statute confers certain powers on persons as members of a board, the statute grants a joint authority requiring them to act after consultation together in a meeting, but such board may nevertheless act through a majority of its members, G.S. 12-3 (2), and its authority is not terminated by the death of any of its members so long as a majority of them survive and act as a board. *Ballard v. Charlotte*, 484.

STATUTES—*Continued.*

§ 8. Construction of Remedial Statutes.

A remedial statute must be construed as a whole in the light of the evils sought to be eliminated, the remedies intended to be applied, and the objective to be attained. *Puckett v. Sellars*, 264.

§ 11. Construction of Criminal Statutes.

A statute creating an offense unknown to the common law must be construed as written. *S. v. Cuthrell*, 183.

§ 13. Repeal by Implication and Construction.

An action captioned a public-local or private act does not repeal a public law unless it makes specific reference to such public law, nor will it be held to repeal such public law in its entirety even though the public law be specifically referred to therein when the public-local or private act expressly limits its purpose of repeal to a single county. *In re Hickerson*, 716.

TAXATION.

§ 4. Bond Elections.

Bond election *held* effective notwithstanding void charter provision allowing nonresidents to vote, it appearing that in fact only qualified electors actually voted. *Wrenn v. Kure Beach*, 292.

§ 20. Exemptions From Taxation—Property of Religious or Charitable Institutions.

Exemption of property of nonprofit cemetery association from taxation does not extend to exempt such property from assessments for street improvements. *Cemetery Asso. v. Raleigh*, 509.

§ 23½. Construction of Taxing Statutes in General.

Administrative interpretation can be considered only when ambiguity exists, and cannot be given effect when in direct conflict with clear intent of act. *Watson Industries v. Shaw*, 203.

Tax statutes are to be strictly construed against the State and in favor of the taxpayer. *Ibid.*

§ 29. Income Taxes.

Lump sum payment to municipality to have it extend water and sewer lines to taxpayer's mill property cannot be deducted as current operating expense. *Mills Co. v. Shaw, Comr. of Revenue*, 14. Property donated for educational purpose may be deducted at value at time of donation, and deduction is not limited to value at time of acquisition. *Ibid.*

§ 30. Levy and Assessment of Sales, License and Excise Taxes.

Fabricated parts manufactured for, and used by the purchaser in the erection or construction of radio towers in this State are building materials subject to the excise tax of 3%, and taxpayer's contention that each radio tower was but a single purchase upon which the tax was limited to fifteen dollars is untenable, G.S. 105-187. "Building" and "structure" are synonymous, and a radio tower is a structure within the meaning of the statute. *Watson Industries v. Shaw*, 203.

That parts for a structure are practically worthless singly or in combinations less than required for the unit is immaterial in the levy of sales tax, the purchase price being the yardstick by which the tax is to be measured. *Ibid.*

A use tax is a tax on the enjoyment of that which has been purchased. *Ibid.*

An excise tax is a tax levied upon the sale or consumption of personal property. *Ibid.*

No tax is imposed under G.S. 105-220 unless there has been (1) a purchase of tangible personal property, (2) from a retailer (3) for storage, use or consumption within this State; and (4) title to or possession of such property passes from the retailer to the purchaser. *Ibid.*

The rental price of transcriptions used by a radio station for rebroadcasting recorded programs, which transcriptions are then returned to the lessor, is not subject to the tax under G.S. 105-220, since such recordings are not in the "possession" of the radio station within the meaning of the law. "Custody" and "possession" are not synonymous, but possession implies custody with the added present right to control and dispose of the property at the possessor's pleasure to the exclusion of others. *Ibid.*

The words "loan, lease, rental, or license" as used in G.S. 105-219 (c) must be read in context in conformity with the intent of the statute to impose upon the storage, use, or consumption within this State of tangible personal property which has been purchased by a local resident, a use tax corresponding to and equalizing the sales tax imposed by G.S. 105, Art. V, and the words cannot be enlarged to embrace a transaction under which a resident merely leases property for nondestructive or unconsuming use and then returns the goods to lessor, so that he has "custody" without "possession" within the legal significance of that term. *Ibid.*

§ 32c. Liability for Taxes as Between Grantor and Grantee.

"Assessed" as used in G.S. 105-408 is synonymous with "levied," and therefore taxes levied at the time of a judicial sale should be paid out of the proseeds of sale. *Holt v. May*, 46.

§ 35. Payment and Discharge.

Payment of an amount less than the penalty due the Federal Government because of error made by an agent of the Government in figuring the penalty, does not discharge the debt to the Government. *Puckett v. Sellars*, 264.

§ 38a. Recovery of Illegal Expenditures.

Evidence *held* to support finding that chamber of commerce did not expend tax moneys as agency of municipality for purposes specified in G.S. 158-1. *Horner v. Chamber of Commerce*, 77.

Good faith in expenditure of tax money does not affect question of whether such expenditure is authorized. *Ibid.*

§ 40b. Foreclosure of Certificates.

A tax sale certificate may be foreclosed by either of two methods: (1) the purchaser may institute an action for this purpose, G.S. 105-391, in which action any other taxing unit having tax or assessment liens must be made a party defendant unless it joins as a party plaintiff, and may prosecute the action to final judgment even though the claim of the plaintiff be satisfied while the action is pending; (2) or the taxing unit may file the certificate in the office of the clerk of the Superior Court, who must docket it upon the judgment docket, in which event it has the force and effect of a judgment, and execution may issue thereon against the property of the tax debtor, G.S. 105-392. *Boone v. Sparrow*, 396.

TAXATION—*Continued.*

§ 40c. Foreclosure of Tax Liens.

A taxing unit may foreclose its tax lien, irrespective of any tax sale certificate, by action under G.S. 105-414 in the nature of an action to foreclose a mortgage, subject to the provisions of G.S. 105-391 (f) to (v), and in such action the judgment shall provide for the payment out of the proceeds of sale of all taxes then assessed upon the property and remaining unpaid and for the payment of such sums as may be required to redeem the property, G.S. 105-408. *Boone v. Sparrow*, 396.

Where, in an action by a county to foreclose a tax lien under G.S. 105-414, a municipality made a defendant elects to file a cross action against the tax debtor for taxes due it, G.S. 105-391 (j), its answer must be served on the tax debtor, since otherwise the tax debtor would have no legal notice thereof requiring him to defend. *Ibid.*

§ 40g. Validity and Attack of Tax Foreclosure.

It is the duty of the purchaser of a tax title to investigate or cause to be investigated all sources of title, and where the judgment roll in a tax foreclosure by a county discloses that the municipality from which tax title was derived failed to serve its counterclaim for taxes upon defendant tax debtor, the purchaser is charged with notice of this fatal defect of jurisdiction in the rendition of a default judgment for the municipal taxes. *Boone v. Sparrow*, 396.

§ 45. Expenditure of Tax Moneys—Statutory Directions.

The intent of Chap. 1097, Session Laws 1947, and Chap. 1168, Session Laws 1951, is that works of art selected by the State Art Commission be appraised by a competent and qualified art critic before payment should be made, which provision is mandatory, but the provision naming the person to make the appraisals is directory, and it appearing that the person named could not serve, appraisal by an equally qualified and competent art critic chosen by the State Art Commission and the Directors of the State Art Society is a substantial compliance with the statute, and judgment upon appropriate findings is sufficient to authorize and empower the State Auditor to issue warrants for such paintings. *Art Society v. Bridges*, 125.

TORTS.

§ 6. Joinder of Joint Tort-Feasors for Contribution.

In an automobile guest's action against the driver and owner of the truck involved in a collision with the car, defendants had the driver of the car joined for the purpose of enforcing contribution, G.S. 1-240. *Held:* The driver of the car is entitled to set up a previous settlement of her claim against the truck owner and driver as a bar, but is not entitled to set up settlement of the claims of her children, also passengers in the car, arising out of the collision, and motion to strike should be ruled upon accordingly. *Snyder v. Oil Co.*, 119.

TRESPASS.

§ 1a. Acts Constituting Trespass in General.

Every unauthorized entry on land in the peaceable possession of another constitutes a trespass, without regard to the degree of force used, and entitles the person in actual or constructive possession to nominal damages, at least. *Matthews v. Forrest*, 281.

TRESPASS—*Continued.*

A person is in the actual possession of land when he exercises dominion over it by using it for the purposes for which it is ordinarily adaptable and by taking the profits of which it is susceptible, and he is in constructive possession if the land is not in the actual possession of anyone and he has title giving him the right to assume its immediate actual possession. *Ibid.*

§ 1c. Trespass Where Original Entry Was Lawful.

Father going upon mother-in-law's premises to get custody of child in accord with divorce decree, may by language and acts become trespasser. *S. v. Goodson*, 177.

§ 2. Pleadings.

Plaintiff need not allege damages in order to be entitled to recover for a trespass, since a technical trespass alone entitles him to nominal damages, but he must plead actual damages in order to be entitled thereto, and that the trespass was malicious or wanton in order to be entitled to punitive damages. *Matthews v. Forrest*, 281.

Allegations to the effect that defendant went to plaintiff's cemetery lot while no one was there is sufficient to support the inference that the lot was in plaintiff's constructive possession; and allegations to the effect that plaintiff maintained the lot for the burial of his dead pursuant to permission given him by the owner of the fee, is sufficient to allege that the lot was in plaintiff's actual possession. *Ibid.*

Allegations to the effect that defendant went to plaintiff's cemetery lot without authority from plaintiff and wrongfully and unlawfully carried away floral designs from the grave of plaintiff's wife are sufficient to allege an unauthorized and wrongful entry on plaintiff's grave lot. *Ibid.*

§ 6. Damages.

Compensatory damages may be awarded to plaintiff for mental suffering endured by him as the natural and probable consequences of a trespass to his burial lot. *Matthews v. Forrest*, 281.

TRESPASS TO TRY TITLE.

§ 3. Trial.

Where defendant, in an action for trespass, pleads adverse possession of a tract of land, but the allegations of the boundaries of such tract do not cover the land in dispute, defendant is not entitled to introduce evidence of adverse possession of the land in dispute, since such evidence is not predicated upon allegation. *Wilson v. Chandler*, 373.

Evidence offered by plaintiff and so much of defendant's evidence as is favorable to plaintiff or tends to explain or make clear plaintiff's evidence, considered in the light most favorable to plaintiff, *is held* sufficient to be submitted to the jury on the issue of plaintiff's acquisition of title by adverse possession through the possession by one of the tenants in common under a parol partition for more than twenty years, either by the tenant in common or his lessees. *Williams v. Robertson*, 478.

In an action in trespass to try title plaintiff has the burden of proving both title good in himself and trespass by defendant. *Ibid.*

In action involving title to real property, title is conclusively presumed to be out of the State unless it be a party to the action. *Ibid.*

TRIAL.

§ 4. Time of Trial and Continuance.

A motion for continuance is addressed to the direction of the trial judge, and, in the absence of manifest abuse, his ruling thereon is not reviewable. *Todd v. Smathers*, 123.

§ 5. Course and Conduct of Trial in General.

A trial is the examination before a competent tribunal, according to the law of the land, of the issues between the parties in a cause, whether they be issues of law or of fact, for the purpose of determining such issues. *Erickson v. Starling*, 643.

§ 6. Expression of Opinion by Court on Evidence in Progress of Trial.

The trial judge is forbidden to convey to the petit jury in any manner at any stage of the trial his opinion on the facts in evidence. *In re Will of Bartlett*, 489.

Propounders sought to prove the genuineness of the handwriting of the script by testimony of a witness who had received Christmas cards each year from deceased but who had never seen deceased write. *Held:* Interrogation of the witness by the judge which amounted to an expression of opinion by the court to the effect that the testimony of the witness proved the cards to be in the handwriting of decedent is error and was prejudicial under the facts of this case. *Ibid.*

While the trial court has the power to interrogate a witness for the purpose of clarifying matters material to the issues, he must exercise such power with caution so as not to reveal to the jury his opinion on the facts in evidence. *Ibid.*

§ 19. Province of Court and Jury in Regard to Evidence.

The general rule is that it is the province of the judge to determine preliminary questions of fact upon which the admissibility of evidence depends. *Sanderson v. Paul*, 56; *S. v. Harper*, 62; *S. v. Harper*, 67.

The weight of the evidence and the credibility of the witnesses are exclusively within the province of the jury, and on motion to nonsuit the sole duty of the court is to determine whether there is any evidence upon which the jury can properly base a verdict. *Gainey v. R. R.*, 114.

It is the duty of the court alone to decide legal questions presented at the trial and to instruct the jury as to the law arising on the evidence in the case; and it is the function of the jury alone to determine the facts of the case from the evidence, it being prohibited that the court should give an opinion in any manner as to whether a fact is fully or sufficiently proven. *In re Will of Bartlett*, 489.

Upon motion to nonsuit, the trial court is limited to ascertaining whether there is any evidence of probative value sufficient to take the issue to the jury. *Adcox v. Austin*, 591.

§ 20. Questions of Law and of Fact.

Even though the question of whether a housing authority acted arbitrarily or capriciously in the selection of a site may be a question of fact reviewable by the judge on appeal from the clerk, nevertheless the judge has the discretionary power to submit the question to a jury. *In re Housing Authority*, 463.

Issues of law must be tried by the judge; issues of fact, even though they involve matters in equity, must be tried by a jury unless trial by jury is waived. *Erickson v. Starling*, 643.

TRIAL—*Continued.*

§ 21½. Necessity for Motion to Nonsuit and Renewal.

Where motion to nonsuit is not renewed after defendant introduces evidence, the question of the sufficiency of the evidence is not presented for review. *Sprinkle v. Reidsville*, 140.

§ 22a. Consideration of Evidence on Motion to Nonsuit.

On motion to nonsuit, every reasonable inference and intendment arising from the evidence must be resolved in favor of plaintiff. *Gainey v. R. R.*, 114.

The evidence must be considered in the light most favorable to plaintiff on motion to nonsuit. *McDonald v. McCrummen*, 550.

On motion to nonsuit, plaintiff's evidence and so much of defendant's evidence as is favorable to plaintiff or tends to explain and make clear plaintiff's evidence, will be considered in the light most favorable to plaintiff. *Rice v. Lumberton*, 227.

§ 22b. Consideration of Defendant's Evidence on Motion to Nonsuit.

On motion to nonsuit, defendant's evidence is not to be considered except when not in conflict with plaintiff's evidence, in which event it may be considered to explain or make clear that which has been offered by plaintiff. *Rice v. Lumberton*, 227.

Upon motion to nonsuit, defendant's evidence which is favorable to plaintiff or which tends to explain or make clear that which has been offered by plaintiff, is properly considered. *Williams v. Robertson*, 478.

§ 23b. Sufficiency of Evidence to Overrule Nonsuit—Prima Facie Case.

A *prima facie* case takes the issue to the jury notwithstanding an affirmative defense set up by defendant. *Royster v. Hancock*, 110.

§ 29. Directed Verdict.

A verdict may not be directed in favor of the party upon whom rests the burden of proof. *McCracken v. Clark*, 186.

An instruction that if the jury believe all the evidence in the case it should answer the issue as directed is not a directed verdict, since under the instruction it is left to the jury to determine whether it believes the evidence. *Commercial Solvents v. Johnson*, 237.

While a verdict may not be directed in favor of the party upon whom rests the burden of proof, when all the evidence in the case points one way as the sole inference, the court may instruct the jury that if it believes all the evidence so to answer the issue. *Ibid.*

§ 31a. Form and Requisites of Charge in General.

An instruction to the effect that it was the province, privilege, and prerogative of the jury to answer the issues in a certain manner must be held for reversible error, since the jury does not have arbitrary power to answer the issues irrespective of the evidence but must declare the truth as to the issues of fact submitted to them. *Bartlett v. Hopkins*, 165.

§ 31b. Statement of Evidence and Application of Law Thereto.

It is prejudicial error for the trial court to fail to charge the law on substantive features of the case arising on the evidence, even in the absence of a request for instructions, G.S. 1-180, and the requirements of the statute are not met by a mere statement of the contentions of the parties. *Howard v. Carman*, 289.

TRIAL—*Continued.*

It is error for the court to charge the jury in regard to abstract propositions of law which are not pertinent to the facts in evidence. *Childress v. Motor Lines*, 522.

§ 32. Requests for Instructions.

A party desiring more specific instructions on any subordinate phase of the evidence must aptly tender request therefor. *Battle v. Battle*, 499.

§ 36. Form and Sufficiency of Issues.

Where the issue submitted adequately presents the issuable question raised by the pleadings, an exception to the issue is without merit. *In re Housing Authority*, 463.

§ 42. Acceptance or Rejection of Verdict by Court.

While the trial court may refuse to accept an indefinite or inconsistent verdict, a party litigant has a substantial right in a consistent verdict in his favor on issues determinative of the rights of the parties, and where the trial court deprives him of this right by refusing to accept a consistent verdict, such error vitiates all subsequent proceedings and entitles appellant to a remand so that he may move for judgment on the verdict. *Edwards v. Motor Co.*, 269.

§ 47. Motions for New Trial for Newly Discovered Evidence.

A new trial for newly discovered evidence cannot be allowed for evidence which relates solely to an issue answered in appellant's favor. *Lamm v. Lorbacher*, 728.

§ 48½. Motions to Set Aside Verdict in Discretion.

Where error of the trial court in refusing as a matter of law to accept a consistent verdict precluded consideration of motion by appellee to set aside the verdict as a matter of discretion, upon remand so that appellant might move for judgment on the verdict, appellee is entitled to move to set aside the verdict as a matter of discretion, notwithstanding that such motion ordinarily must be considered at trial term. *Edwards v. Motor Co.*, 269.

A motion to set aside the verdict for inadequate award is addressed to the sound discretion of the trial court, and its refusal of the motion will not be reviewed on appeal except upon a showing of manifest abuse. *Lamm v. Lorbacher*, 728.

TROVER AND CONVERSION.

§ 1. Nature and Essentials of Cause of Action.

Allegation that defendant salesman sold merchandise for plaintiff and failed to account for the proceeds sets up a cause of action in tort for conversion of funds. *Finance Co. v. Holder*, 96.

TRUSTS.

§ 24. Actions Against Trustees for Maladministration.

In this action for the removal of trustees and to recover against them for maladministration of the trust, the answers denying certain material allegations of the complaint and also drawing opposing inferences from admitted matters, as well as pleading new matter constituting extenuating circumstances in the nature of a single affirmative defense against the cause for the removal of the trustees, *is held* to require the overruling of plaintiffs' demurrers to the

TRUSTS—*Continued.*

answers and the denial of plaintiffs' motions for judgment on the pleadings, and judgment of the lower court adjudicating the rights of the parties without a determination of the issues of fact by a jury is error. *Erickson v. Starling*, 643.

UTILITIES COMMISSION.

§ 2. Jurisdiction and Powers.

The Utilities Commission has authority to compel common carriers to maintain all such public service facilities and conveniences as may be reasonable and just. *Utilities Com. v. R. R.*, 273.

§ 3. Hearings.

G.S. 62-121.52 (5) relates to an amendment by a petitioning carrier which would enlarge or in any manner extend the scope of its operations, and has no application to an amendment which merely clarifies a carrier's petition under the grandfather clause to continue the same business operations the carrier had been engaged in prior to the passage of the Bus Act of 1949. *Utilities Com. v. Fleming*, 660.

Where a carrier files an application under the grandfather clause of the Bus Act of 1949 for "Contract Carrier Permit" and it is clearly understood by the Commission and all the parties that the application was for the purpose of obtaining permits for the carrier to continue all business operations he was then and had been engaged in, which included both contract and charter bus operations, the admission by the Commission of evidence of previous charter operations will not be held for error notwithstanding that the Commission had denied the carrier's motion to amend. *Ibid.*

§ 5. Appeal and Review of Orders.

An order of the Utilities Commission is *prima facie* just and reasonable, and an appeal therefrom is limited to review, without a jury, of the record as certified by the Commission, and its order, supported by findings, may be reversed or modified only if substantial rights have been prejudiced because of findings and conclusions not supported by competent, material and substantive evidence. *Utilities Com. v. R. R.*, 273.

VENDOR AND PURCHASER.

§ 11. Abandonment and Rescission of Contract to Convey.

A mutual oral agreement to abandon or cancel an executory contract to convey realty is a defense to any rights asserted by the other party under the contract, since the statute of frauds, while applying to the contract, does not apply to its abandonment or cancellation. G.S. 22-2. *Scott v. Jordan*, 244.

§ 23. Actions for Specific Performance.

In an action for specific performance of a contract of sale of real estate or for damages in lieu thereof, demurrer of those defendants other than vendors is properly sustained in the absence of allegation that they have or claim any interest in the land or that they were in anywise obligated to plaintiff, certainly where it appears of record that the contract of the *feme* vendor, who owned the land, had not been acknowledged. *Dillingham v. Kligerman*, 298.

VENUE.

§ 3. Objections to Venue and Waiver of Right to Object.

Venue is not jurisdictional and may be waived by either party, and therefore when a plaintiff brings a suit in an improper county he waives his right to have the action removed to the county of his residence. *Teer Co. v. Hitchcock Corp.*, 741.

§ 4a. Change of Venue as Matter of Right.

Where an action on contract between two domestic corporations is instituted in a county in which neither maintains its principal place of business, motion of defendant for change of venue to the county of its residence, when the motion is made in apt time and without waiver by defendant of its rights, is properly allowed as a matter of right, and plaintiff's subsequent motion to remove to the county of its residence is properly disregarded. *Teer Co. v. Hitchcock Corp.*, 741.

§ 4b. Motions for Change of Venue for Convenience.

The fact that an action is removed to the county of defendant's residence as a matter of right upon its motion, does not preclude plaintiff from thereafter moving in the county to which the cause is removed for change of venue for convenience of witnesses, but such motion would be addressed to the discretion of the court. *Teer Co. v. Hitchcock Corp.*, 741.

WAIVER.

§ 2. Acts Constituting Waiver.

Waiver is an intentional relinquishment of a known right. *Holt v. May*, 46.

WATERS AND WATERCOURSES.

§ 11. Determination of Whether Waters Are Navigable.

Under the common law rule, the ebb and flow of the tide is the test of navigable waters. *Development Co. v. Parmele*, 689.

Under the decisions of this State, waters which are actually navigable by sea vessels are navigable waters. *Ibid.*

Chap. 42, sec. 1, of the revised statutes of 1836 did not have the effect of abrogating or repealing the common law rule defining navigable waters. *Ibid.*

§ 12. Rights of Public and Riparian Owners Along Navigable Water.

Where the owner of lands sells same by lots with reference to a plat showing streets and roads, each grantee of a lot acquires an easement to use all of the streets and roads so shown, and this rule extends to the dedication of riparian rights along a navigable stream shown on the plat. *Gaither v. Hospital*, 431.

Navigable waters constitute a public highway which the public is entitled to use for travel either for business or pleasure, subject to the riparian owners' right of access and the right of private property in the banks of the stream. *Ibid.*

The owner of lands along a navigable stream sold same with reference to a plat showing a street along the river with a strip of land never wider than six feet lying between the river and the street. *Held:* The purchasers of lots acquire the right to access to navigable water in front of the narrow strip of land, and are entitled to restrain another grantee from filling in the shallow water in front of his property so as to interfere with such right of access. *Ibid.*

WATERS AND WATERCOURSES—*Continued.*

The filling in of land under shallow water along a navigable river in such a manner as to constitute a material obstruction to convenient, secure and expeditious navigation constitutes a nuisance notwithstanding that the obstruction may be a source of public benefit, and the creation of such nuisance may be restrained. *Ibid.*

§ 13. Title to, and Conveyance of Land Under Navigable Waters.

State grant issued in 1841 for land under navigable waters as defined by common law could not transfer title thereto. *Parker v. White*, 689.

Where it is agreed or found as a fact that all of the *locus in quo* is covered by water at high tide and that adjacent waters are navigable by ocean-going vessels with channels or sloughs running through the land navigable by small motor launches, etc. *Held:* The North Carolina Board of Education is not vested with authority to convey such land and no title can be acquired by such conveyance, the land not being swamp land within the meaning of G.S. 146-4. *Ibid.*

WILLS.

§ 8. Holographic Wills—Handwriting and Signature.

While it is not required that a holographic will be dated or the place of its execution be stated therein, it is necessary that the testator's name be inserted in his own handwriting in some part of the instrument. G.S. 31-3, G.S. 31-18 (2). *Pounds v. Litaker*, 746.

Every word of a holographic will must be in the handwriting of testator, and while words printed on the paper will not invalidate the instrument but will be treated as surplusage if such printed words are not essential to the written words, printed words or letters may not be used to supply any essential part of the instrument. *Ibid.*

Where depositive words appear in the handwriting of deceased but her name is not written in any part of the instrument, her engraved monogram on the paper may not be used to supply the requisite signature, and the paper writing is ineffectual as a holographic will. *Ibid.*

§ 16. Nature and Effect of Probate.

The probate of a will in common form is *ex parte*, and while conclusive until set aside in a proper proceeding, it is subject to caveat at the time of probate or at any time within seven years thereafter by any person entitled under the will or interested in the estate, G.S. 31-32, or the will may be probated *per testes* without probate in common form. *In re Will of Ellis*, 27.

§ 17. Nature and Effect of Caveat.

The clerk may probate a will in solemn form without a verdict of the jury where all interested parties are cited to appear or they come in voluntarily, provided such parties raise no issue of fact; but where issues of law and of fact, or issues of fact are raised by any party denying the validity of the will, the issue of *devisavit vel non* is raised and must be tried by a jury, and in such instance trial by jury may not be waived by any of the parties nor may nonsuit or a directed verdict be entered. *In re Will of Ellis*, 27.

The clerk refused to probate the paper writing in question in common form because of the testimony of one of the subscribing witnesses that he did not sign same in the presence of testator. No appeal was taken by propounder. Thereafter the widow filed a petition for probate in solemn form, and citation

to interested parties was duly issued and served. Upon like testimony the clerk refused to admit the paper writing to probate in solemn form. *Held:* The parties are not bound by the findings of the clerk, since an issue of fact was raised by the parties which must be determined by the jury upon the issue of *devisavit vel non*. *Ibid.*

The Declaratory Judgment Act cannot be used for the purpose of having a part of a probated writing declared void under the guise of construction, and judgment avoiding a part of the instrument on the ground that it was a codicil not executed as required by law, must be set aside. *Farthing v. Farthing*, 634.

§ 23b. Caveat—Evidence on Issue of Mental Capacity.

Where a will is attacked solely on the ground that the signature thereto was not the genuine signature of decedent, testimony of a witness of a conversation with deceased shortly before the execution of the instrument, introduced for the purpose of showing deceased's mental capacity to make a will, is incompetent as irrelevant to the issue. *In re Will of McGowan*, 404.

§ 24. Sufficiency of Evidence, Nonsuit and Directed Verdict in Caveat Proceedings.

Where issues of fact are raised nonsuit may not be entered. *In re Will of Ellis*, 27.

Testimony of a subscribing witness that he did not sign the paper writing in the presence of testator is not conclusive, but the contrary may be shown by other testimony. *Ibid.*

Issues of fact raised by a caveat must be tried by a jury. *In re Will of Bartlett*, 489.

§ 25. Caveat—Instructions.

In an action attacking a paper writing solely on the ground that the signature thereto was not the genuine signature of deceased, it is error for the court to charge the jury as to what disposition would be made of decedent's property in the event the paper writing was not upheld, since this matter is irrelevant to the issue, but where the instruction is in response to the argument of counsel on both sides upon the matter the error is invited and will not be held prejudicial. *In re Will of McGowan*, 404.

§ 31. General Rules of Construction.

The intent of testator as ascertained from the language of the instrument must be given effect unless contrary to some rule of law or at variance with public policy. *Mangum v. Wilson*, 353; *Trust Co. v. Schneider*, 446.

Where there is apparent repugnancy in the intent of the testator as expressed in one part of the will and as gathered from the entire instrument, the meaning of the language used is subject to judicial construction. *Trust Co. v. Schneider*, 446.

Where a will is ambiguous, the courts must construe it to discover and effectuate testatrix' intention as gathered from the language of the instrument. *Bank v. Phillips*, 494.

In ascertaining the intent of a will, all its provisions must be examined in the light of the circumstances surrounding testator, including the state of testator's family at the time the will was made. *Trust Co. v. Schneider*, 446.

WILLS—*Continued.*

It is not required that the intent of testator be declared in express terms, and in fact the intent as inferred from the language of the entire instrument is more to be regarded than the use of any particular words. *Ibid.*

The words of a will are to be interpreted according to their ordinary meaning, unless it clearly appears that they were used in some other sense. *Bank v. Phillips*, 494.

§ 31½. Construction of Codicils.

Ordinarily, a will and codicil thereto are to be treated as a single and entire instrument, taking effect at the time of testator's death. *Armstrong v. Armstrong*, 733.

A codicil imports some addition, explanation, or alteration of the prior will and, the codicil being the latest expression of testator's intent, its provisions are to be given precedence, and when plainly repugnant or inconsistent with provisions of the will revokes the will to the extent of the repugnancy or inconsistency, even in the absence of any express words of revocation, but in order to do so the inconsistency or repugnancy must be such as to exclude any legitimate inference other than that of a change in testator's intention. *Ibid*

The will in suit devised to testator's son the remaining 33½ acres of a certain tract. The codicil devised the son 10 acres of the same tract. *Held:* The provisions of the will and codicil are inconsistent and repugnant, and the codicil revokes by implication the cognate provision of the will, even though it results in testator dying intestate as to the remaining 23½ acres. *Ibid.*

§ 32. Presumption Against Partial Intestacy.

The presumption against partial intestacy is only an aid in construction and may not be invoked to alter the will when its language is plain and unambiguous, or to include in the will property not embraced by its terms. *Armstrong v. Armstrong*, 733.

§ 32½. Transmittible Estate.

A vested estate is transmittible, a contingent estate is not. *Trust Co. v. Schneider*, 446.

§ 33a. Estates and Interests Created in General.

A devise of the use, income, rents and profits from property indefinitely will be held a devise in fee simple unless it appears in plain and express words of the instrument that testator intended to convey an estate of less dignity. *Mangum v. Wilson*, 353.

A devise to testator's wife for life ". . . remainder to stand as it is all together, and the clear rents to be equally divided among all my five children . . . If my children marry and die leaving children their part shall go to their children. If any of my children die without heirs their part shall return to" testator's bodily heirs, *is held* a devise of the remainder in fee to the children of testator as tenants in common. *Ibid.*

Where a bequest and devise of the income of an estate to the beneficiaries is limited to a specified period, with provision for the vesting of the *corpus* at the end of the period upon contingent limitations, so that the beneficiaries of the *corpus* need not be the same as the beneficiaries of the income, the beneficiaries of the income do not take the fee, since the will manifests an intent to pass an estate of less dignity. *Trust Co. v. Schneider*, 446.

WILLS—*Continued.*

§ 33c. Vested and Contingent Interests and Defeasible Fees.

An estate is vested when there is either an immediate right of present enjoyment or a present fixed right of future enjoyment. *Trust Co. v. Schneider*, 446.

Where there is uncertainty as to the person or persons who are to take, and the uncertainty is to be resolved in a particular way or according to conditions at a particular time in the future, the estate is contingent. *Ibid.*

Beneficiary of income of trust *held* not entitled to *corpus* unless he lived until expiration of period set up by the will for distribution of the *corpus*, and therefore he took no vested interest in the *corpus* and his heirs could not take through him. *Ibid.*

§ 33i. Restraint on Alienation.

Where testator's children take the fee in remainder as tenants in common, a provision of the devise that ". . . remainder to stand as it is all together, . . . except they all should agree to sell some part of it," *is held* merely a recognition that it might not be practical or desirable to keep the entire estate intact, but if it be construed as a restraint on alienation it is void, and testator's children can convey the fee simple. *Mangum v. Wilson*, 353.

§ 34b. Designation of Beneficiaries.

A residuary devise to testatrix' "first cousins" includes only those who are testatrix' first cousins in the common sense, and excludes first cousins once removed, even though they be children of deceased first cousins. *Bank v. Phillips*, 494.

§ 34c. Gifts to a Class.

When a gift is to a class, but the time of vesting is postponed beyond the date of the termination of the preceding life estate, members of the class *in esse* at the time of the termination of the life estate are possessed of the contingent right to take, subject to be opened up to admit members of the class thereafter born and to be closed so as to exclude members who die prior to the date set for the vesting of the estate. *Trust Co. v. Schneider*, 446.

§ 34e. Designation of Amount or Share.

A residuary devise "Then Edna Taylor is to come in for her equal part of my estate. The rest going to my first cousins . . ." *is held* to bequeath one-half the residuary estate to the beneficiary named and the other one-half of the residuary estate to be equally divided among testatrix' first cousins. *Bank v. Phillips*, 494.

A devise of 10 acres to be cut off of a designated tract on the side adjoining the lands of specified persons is sufficiently definite to be valid. *Armstrong v. Armstrong*, 733.

§ 38. Residuary Clauses.

A clause disposing of the remainder of the estate after debts are paid and specified legacies satisfied is the residuary clause, notwithstanding that it is not at the end of the other dispositive clauses. *Bank v. Phillips*, 494.

§ 39. Actions to Construe Wills.

Courts do not enter anticipatory judgments, and therefore in an action to construe a will, an adjudication directing the distribution of the *corpus* of the estate in the event of the death of the contingent beneficiary prior to the time

fixed in the will for the distribution of the *corpus*, will be vacated. *Trust Co. v. Schneider*, 446.

Fees of attorneys for parties who are *sui juris* and elect to employ counsel and assert their claim to a part of the estate cannot be allowed as a part of the costs in an action to construe the will, even though it was necessary for plaintiff to make them parties to the action. *Ibid.*

Where, in an action to construe a will, the codicil, which was attacked on the ground of invalidity, is ambiguous, the court should construe such codicil notwithstanding its want of jurisdiction to declare it void. *Farthing v. Farthing*, 634.

§ 43. Forfeiture Clauses.

Where caveator acts in good faith and with probable cause in caveating the will, he is entitled to take a legacy bequeathed him in the instrument notwithstanding a provision therein that any beneficiary taking any action in caveating the will should forfeit any interest thereunder. The forfeiture provision will not be given effect to oust the supervisory power of the courts to determine the issue of *devisavit vel non*. *Ryan v. Trust Co.*, 585.

§ 46. Nature of Titles of Devisees, Right to Convey and Estoppel.

Deed executed by testator's only surviving child and all of testator's grandchildren, all being *sui juris* and under no disability, and there being no great-grandchildren not represented by a living parent, conveys the fee simple in lands devised to testator's children or their heirs regardless of whether testator's child held a life estate or a defeasible fee, since any heir not a party to the deed would be estopped from claiming any interest in the land by the warranty deed of his ancestor. *Mangum v. Wilson*, 353.

GENERAL STATUTES CONSTRUED.

G.S.

1-36. Title conclusively presumed out of State when it is not party. *Williams v. Robertson*, 478.

1-38. Statute does not begin to run against remaindermen until death of life tenant. *Sprinkle v. Reidsville*, 140. Commissioner's deed at foreclosure is color of title notwithstanding that trustee was not a party. *Trust Co. v. Parker*, 326. Party must introduce in evidence asserted color of title. *Chambers v. Chambers*, 749.

1-40. Evidence of adverse possession of son against father *held* sufficient. *Chambers v. Chambers*, 749.

1-69. Plaintiff may join two or more defendants to determine which is liable. *Cain v. Corbett*, 33.

1-73. Statute does not authorize court to bring in party not liable either to plaintiff or defendant upon theory stated in complaint. *Moore v. Clark*, 364.

1-83. Where action between domestic corporation is instituted in county in which neither maintains principal place of business, defendant's motion to remove must be allowed, but plaintiff may thereafter move for change of venue for convenience of witnesses. *Teer Co. v. Hitchcock Corp.*, 741.

1-89. Summons must be signed by clerk; want of signature may be cured by amendment only if paper bears internal evidence that it was issued from clerk's office. *Boone v. Sparrow*, 396.

1-97. Agent of foreign corporation upon whom process may be served must be in this State and have some control over and discretionary power in respect to some function for which corporation was created; railroad company agent whose duties are limited to promoting good will and to inducing shippers to request that his company be used as connecting carrier is not process agent. *Lambert v. Schell*, 21.

1-111; 1-294. Appeal from order refusing motion to strike does not preclude another Superior Court judge from ordering increase of defense bond. *Scott v. Jordan*, 244.

1-116. Complaint *held* to disclose election to affirm sale of realty and sue for fraud, and *lis pendens* was not authorized. *Parker v. White*, 680.

1-123. Complaint *held* to allege single cause for false imprisonment, and allegations of malicious prosecution did not state separate cause. *Cain v. Corbett*, 33.

1-130. Decision upon demurrer is appealable; demurrer is improper when issues of fact constituting cause are raised. *Erickson v. Starling*, 643.

1-134. Where complaint fails to state cause of action, court may not allow amendment. *Anderson v. Atkinson*, 300.

1-135; 1-159. No issue arises where material fact alleged in complaint is not denied. *Wilson v. Chandler*, 373.

1-137; 50-7 (1). In wife's action for divorce from bed and board, husband may set up cross-action for divorce on ground of separation, but he may not maintain independent action therefor. *Cameron v. Cameron*, 82.

1-137 (1); 24-2. In plaintiff's action against agent for conversion, agent may not set up counterclaim for usury or counterclaim in contract not connected with subject of action. *Finance Co. v. Holder*, 96.

GENERAL STATUTES—*Continued.*

G.S.

1-140. Where counterclaim is not served on party to be charged, its allegations are deemed denied, and this rule applies to cross-action by one defendant against another. *Boone v. Sparrow*, 396.

1-141. Party may not demur to separate paragraphs or sentences segregated from contexts. *Erickson v. Starling*, 643. Complaint and reply are inconsistent within meaning of statute only if they are so contrary that if one is true the other is necessarily false. *Scott v. Jordan*, 244.

1-151. Court may not construe into pleading that which it does not contain. *Dillingham v. Kligerman*, 298.

1-163. Making of additional party plaintiff is ordinarily within trial court's discretion. *Shelby v. Lackey*, 343. Court may not allow amendment substantially changing form of action. *Anderson v. Atkinson*, 300.

1-170; 1-172. Issues of law must be tried by judge; issues of fact by jury. *Erickson v. Starling*, 643.

1-180. Court is required to charge law arising on evidence, and mere statement of contentions of parties is insufficient. *Howard v. Carman*, 289. It is error for court to charge law not pertinent to facts in evidence. *Childress v. Motor Lines*, 522. Evidence *held* to require submission of right of self-defense. *S. v. Goodson*, 177. Charge may not assume as true the existence or nonexistence of any material fact in issue. *S. v. Cuthrell*, 173. Interrogation of witnesses by court *held* to amount to expression of opinion on evidence. *In re Will of Bartlett*, 489. Charge *held* not subject to criticism that it gave State's evidence in too great detail. *S. v. Roman*, 627. In prosecution for murder, court is not required to define rape, even though evidence showed rape. *S. v. Roman*, 627. Exception must point out particular in which instructions were deficient. *Hodges v. Malone & Co.*, 512. Charge not in record presumed correct. *S. v. Sears*, 623.

1-183. Where motion to nonsuit is not renewed, question of sufficiency of evidence is not presented for review. *Sprinkle v. Reidsville*, 140; *Jones v. Jones*, 390.

1-189. Court may not order compulsory reference in action for specified amount due under conditional sales contract, no equitable relief being demanded. *Acceptance Corp. v. Pillman*, 295.

1-195. Procedure to preserve right to jury trial in compulsory reference. *Bartlett v. Hopkins*, 165.

1-208. If pleading raise issue of fact on any single material proposition, judgment on pleadings is improper. *Erickson v. Starling*, 643.

1-209; 1-174; 1-273; 1-171. Clerk may not enter default judgment if issues are raised by pleadings either by express denial of material fact or by denial by implication of law arising upon failure to serve cross-action. *Boone v. Sparrow*, 396.

1-240. Defendant joined under the statute may plead prior settlement in another action arising out of same collision as a bar. *Snyder v. Oil Co.*, 119.

1-277. Appeal does not lie from interlocutory order unless order deprives appellant of substantial right he would lose if order is not reviewed before final judgment. *Shelby v. Lackey*, 343.

1-283. Trial court has no power to settle case on appeal when oral evidence has been offered unless there is disagreement of counsel. *Hall v. Hall*, 711.

GENERAL STATUTES—*Continued.*

G.S.

1-341. In offsetting rental value against betterments, rental value should be ascertained without taking the improvements into consideration. *Edwards v. Edwards*, 93.

1-399. Plea of sole seizin converts partition proceeding into action in ejectment. *Murphy v. Smith*, 455.

1-475. Mortgagee must account for value of property as of date of seizure. *Credit Corp. v. Saunders*, 369.

1-510. Defendant is bound by allegations of complaint for purpose of his motion for judgment on pleadings. *Credit Corp. v. Saunders*, 369.

1-515; 1-530. Procedure to attack validity of appointment to board of education is by suit to enjoin usurpers or *quo warranto* to oust them, and not action to enjoin board. *Edwards v. Board of Education*, 345.

4-1. Child may not maintain action for negligent injury against parents. *Redding v. Redding*, 638. Obligation of father to support minor child cannot be made basis of claim against father's estate when father has disposed of his property without making provision for the child. *Elliott v. Elliott*, 153. Ch. 42, sec. 1, revised statutes of 1841 did not have effect of repealing common law definition of navigable water. *Development Co. v. Parmele*, 689.

6-21. Except as provided by statute, attorneys' fees not part of costs. *Trust Co. v. Schneider*, 448.

7-285. Repealed only in regard to Surry County by Ch. 896, Session Laws of 1949. *In re Hickerson*, 716.

8-40. Does not alter rule that expert may give opinion of handwriting from papers identified by witnesses as genuine without offering such papers in evidence. *In re Will of McGowan*, 404.

8-51. Party asserting witness is disqualified under the statute has burden of showing disqualification. *Sanderson v. Paul*, 56. That witness would get property of greater value under will *held* not proven, and therefore it was error to exclude testimony. *Ibid.*

8-54. Argument that defendant was "hiding behind wife's coattail" *held* tantamount to comment on defendant's failure to testify. *S. v. McLamb*, 251.

12-1. Local act does not repeal general statute. *In re Hickerson*, 716.

12-3 (2). Board must act at meeting, but majority of members can act. *Ballard v. Charlotte*, 484.

14-21; 14-23. Evidence of guilt of carnal knowledge of 8-year-old girl *held* sufficient; jury's recommendation of life imprisonment affords no ground for complaint by defendant. *S. v. Reeves*, 427.

14-32. Evidence of guilt *held* sufficient for jury. *S. v. Birchfield*, 410.

14-62. Definition of "building" within meaning of statute. *S. v. Cuthrell*, 173.

14-133. Filling in land under shallow water along navigable stream held nuisance. *Gaither v. Hospital*, 431.

14-223. Charge that defendant "did resist arrest" *held* insufficient. *S. v. Raynor*, 184.

14-335. Charge that defendant "unlawfully and willfully did appear drunk on public highway" *held* sufficient. *S. v. Raynor*, 184.

15-173. Defendant's evidence favorable to State or which explains State's evidence is properly considered. *S. v. Bryant*, 420. Circumstantial evi-

GENERAL STATUTES—*Continued.*

G.S.

dence of guilt of arson and murder *held* insufficient. *S. v. Needham*, 555. Defendant's evidence of alibi cannot justify nonsuit. *S. v. Sears*, 623.

15-200.1. Defendant may now appeal from order executing suspended sentence. *S. v. Simmington*, 612.

15-Art. 20. Provisions are cumulative and concurrent to court's inherent power to suspend judgment or execution. *S. v. Simmington*, 612.

16-3. Burden of proving defense that consideration was illegal gambling debt is on maker. *Royster v. Hancock*, 110.

18-4. Warrant charging illegal possession of property for purpose of manufacturing liquor instead of "designed" for that purpose, *held* sufficient. *S. v. McLamb*, 251.

18-6. Warrant not necessary when officer sees whiskey in car. *S. v. Harper*, 67.

18-13; 15-27. Warrant for illegal liquor is governed by G.S. 18-13, and affidavit is not required. *S. v. McLamb*, 251.

19-2. Action to abate nuisance cannot be maintained by the county. *Dare County v. Mater*, 179.

20-129 (a) (c) (d). Evidence *held* not to show proximate cause between violation of statute and accident, even if negative evidence was sufficient to show that lights were not burning. *Morris v. Transport Co.*, 568.

20-141. In addition to limits, driver must not exceed speed which is reasonable and prudent under conditions. *Sowers v. Marley*, 607. Evidence *held* to show contributory negligence as matter of law on part of plaintiff in outrunning range of lights. *Morris v. Transport Co.*, 568.

20-158. It is not sufficient for motorist to stop before entering upon intersection with dominant highway, he must use due care to see that movement can be made in safety. *Morrisette v. Boone Co.*, 162.

20-161 (a). Where evidence shows collision after truck had stopped, but before driver could dismount from cab, it fails to show "parking." *Morris v. Transport Co.*, 568.

20-166. Warrant failing to allege damage to property or injury of or death to person does not state offense under this statute. *S. v. Morris*, 393.

22-2. Parol partition comes within statute of frauds. *Williams v. Robertson*, 478. Statute does not apply to abandonment of contract to convey. *Scott v. Jordan*, 244.

25-9. Promise to pay "per our agreement" does not validate note. *Royster v. Hancock*, 110.

28-98. Heir claiming land is necessary party to action by purchaser against vendor's administrator. *Scott v. Phelps*, 244.

28-170. In absence of testamentary provision, right of personal representative to commissions is controlled by statute; he is not entitled to commissions on credits offset against claim. *In re Ledbetter*, 642.

28-173; 28-174. Value of services as housewife cannot be recovered in action for wrongful death. *Lamm v. Lorbacher*, 728.

31. Caveat may be filed by any person entitled under the will or interested in the estate. *In re Will of Ellis*, 27.

31-3; 31-18 (2). Monogramed initials may not supply signature to holographic will. *Pounds v. Litaker*, 746.

GENERAL STATUTES—*Continued.*

G.S.

31-33. Issues of fact raised by caveat must be tried by jury. *In re Will of Bartlett*, 489.

33-1. Clerk of Superior Court in county in which infant resides has jurisdiction to appoint guardian. *In re Hall*, 697.

33-6. There may be separate appointments of guardian for person and of estate of orphan. *In re Hall*, 697.

42-28. Where record on appeal in summary ejectment fails to contain affidavit, appeal will be dismissed. *Allen v. Allen*, 554.

46-1; 46-3. Tenancy in common is basis for partition, and relief properly denied when evidence fails to show such title. *Murphy v. Smith*, 455.

46-17. Failure to file report within sixty days of notification does not vitiate it. *Thompson v. Thompson*, 416.

47-18. Person making improvement under parol contract to convey may not claim betterments against vendor's grantee under registered deed. *Haas v. Smith*, 341.

50-11. Consent judgment for alimony cannot be enforced by contempt proceedings after decree of absolute divorce. *Livingston v. Livingston*, 515.

50-16. Upon hearing of motion for alimony *pendente lite*, court may refuse motion upon finding that defendant had theretofore obtained valid absolute divorce against plaintiff in another state, but should not dismiss the action. *Bond v. Bond*, 754.

59-36 (1); 59-37 (3) (4) (a) (b) (e); 42-1. Division of profits alone insufficient to establish partnership. *Johnson v. Gill*, 40.

59-39; 59-43. Partners are jointly and severally liable for tort committed by one of them in course of partnership business. *Johnson v. Gill*, 40.

62-26.10. Evidence *held* to support Commission's finding that public convenience required continuance of station agency, and finding is conclusive. *Utilities Com. v. R. R.*, 273.

62-39. Commission has authority to compel carrier to maintain such facilities as may be reasonable and just. *Utilities Com. v. R. R.*, 273.

62-121.52 (9); 62-121.50; 62-121.46. Permit for both charter and contract carrier business should be issued upon proper showing under grandfather clause. *Utilities Com. v. Fleming*, 660.

62-121.66; 62-121.65. Rates filed and published by contract carrier are "tariffs." *Utilities Com. v. Fleming*, 660.

96-4 (m). Findings of fact of Employment Security Commission are conclusive when supported by any competent evidence. *Employment Security Com. v. Smith*, 104.

97-2 (e). Commission properly took into consideration employee's wages during entire fifty-two weeks in determining compensation. *Honeycutt v. Asbestos Co.*, 471.

97-10. Defendant setting up contributory negligence of plaintiff's intestate is not entitled to also plead that contributory negligence was also bar to recovery which would inure to benefit of employer. *Poindexter v. Motor Lines*, 286.

97-54; 97-2. Evidence *held* sufficient to sustain finding that claimant was disabled from silicosis within two years from last exposure. *Singleton v. Mica Co.*, 316.

GENERAL STATUTES—*Continued.*

G.S.

97-54; 97-55; 97-2 (i); 97-61. Employee who becomes disabled by reason of asbestosis from performing normal labor in his occupation is disabled notwithstanding he may later earn more money in another occupation. *Honeycutt v. Asbestos Co.*, 471.

97-61; 97-63. Employee who has not been subjected to silica dust for as much as two years in this State within ten years prior to last exposure is not entitled to compensation. *Midkiff v. Granite Corp.*, 149.

97-84; 97-86. Cause remanded to Industrial Commission for specific findings of determinative facts. *Thomason v. Cab Co.*, 602.

105-147.1. Expenditure by corporation to have municipality extend water and sewer systems to its plant is capital expenditure, and not deductible as current expense. *Mills Co. v. Shaw*, 14. Nor may it be deducted as "rentals and other payments under G.S. 105-147.2. Nor as a contribution to municipality when payment was made prior to enactment of G.S. 105-147¾. *Ibid.*

105-147.9. Donation to charitable or educational institution may be valued as of time of gift and not time of acquisition of property by donor. *Mills Co. v. Shaw*, 14.

105-187. Fabricated parts of radio tower are subject to sales tax. *Watson Industries v. Shaw*, 203.

105-220. Rental price of recordings used in rebroadcast not subject to tax. *Watson Industries v. Shaw*, 204.

105-296 (2); 160-85 (4). Property *held* by institution is subject to assessments for public improvements. *Cemetery Asso. v. Raleigh*, 509.

105-393; 105-394; 105-395; 105-391; 105-392; 105-408. Methods and procedure to foreclose tax liens and certificates. *Boone v. Sparrow*, 396.

105-408. Taxes assessed at time of judicial sale should be paid from proceeds, and "assessed" is synonymous with "levied." *Holt v. May*, 46.

105-414; 105-391 (j). Where city files cross-action against tax debtor in county's action, its answer must be served on tax debtor. *Boone v. Sparrow*, 396.

106-465. Statute prescribes no standards for determination of number of sales, and therefore board of trade may not require purchasers to participate in prescribed number of sales. *Board of Trade v. Tobacco Co.*, 737.

115-8; 115-56. Trustees of school administrative unit may not be sued in tort. *Smith v. Hefner*, 1.

115-37. Majority of members of board may act. *Board of Education v. Dickson*, 359.

115-42. Vacancies on county board of education may be filled by county executive committee or state board. *Edwards v. Board of Education*, 345.

115-96. Injunction will not lie to restrain board of education from letting contract for construction of school on ground that it had failed to make plans for water and sewer service. *Lamb v. Board of Education*, 377.

115-99. County board may close high school in union school and transfer high school pupils to adjoining districts provided there is consolidation of districts. *Kreeger v. Drummond*, 8.

115-99; 115-84. County board may not be restrained from proper exercise of its power to consolidate high school districts or its power to contract for erection of consolidated high school. *Edwards v. Board of Education*, 345.

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G.S.

115-99; 115-361. Special tax district having no supplemental levy may be consolidated with non-special tax district without vote. *School District v. Board of Education*, 212.

115-112; 115-354. Re-election of teacher or principal must be performed in same manner as original election. *Board of Education v. Dickson*, 359.

115-179; 115-183. Where surety pays into court total liability as shown by clerk's records, court has jurisdiction to provide that unclaimed funds be returned to surety rather than escheat. *Hanson v. Yandle*, 532.

115-352. State Board of Education has power to transfer pupils from one district to another only for single year or from year to year. *Kreeger v. Drummond*, 8.

115-359. Dismissal of teacher or principal is not effective until approved by county board, and all acts essential to dismissal must be fully performed prior to end of school year. *Board of Education v. Dickson*, 359.

129-1. Father and son successively held land. If title ripened in father, the son acquired title by descent; but if full period did not transpire before father's death, son became new propositus. *Brite v. Lynch*, 182.

136-1; 136-18; 136-51; 136-19. Landowner injured by construction of highway may not sue contractor except for negligence in performance of contract of construction; may institute proceedings for compensation against Highway Commission if construction according to plan results in injury. *Moore v. Clark*, 364.

136-20. City may contribute to elimination of grade crossings. *Austin v. Shaw*, 722.

136-67. Each section of abandoned State highway which is necessary for ingress and egress becomes neighborhood public road, and proceeding to have it so declared is properly instituted before clerk. *Woody v. Barnett*, 74.

146-1; 146-4. Land covered by water at high tide not subject to grant. *Development Co. v. Parmele*, 689.

157-11; 157-50; 40-37. Power of eminent domain has been delegated to housing authorities, but proceedings may be restrained upon showing of arbitrariness in selecting site. *In re Housing Authority*, 463.

158-1. Evidence *held* to support finding that chamber of commerce did not expend tax money as agency of municipality for purposes specified in the statute. *Horner v. Chamber of Commerce*, 77.

160-204; 160-205; 40-10. City may take dwelling property for water storage tank. *Raleigh v. Edwards*, 671.

160-205; 40-10. City may condemn dwelling for street purposes. *Mount Olive v. Cowan*, 259.

162-8; 109-34. Sheriff and his deputy, as well as sureties on their bonds, may be held liable for false arrest by deputy under color of his office. *Cain v. Corbett*, 33.

CONSTITUTION OF NORTH CAROLINA, SECTIONS OF, CONSTRUED.

ART.

I, Sec. 17. To make statute retroactive so as to deprive person of pre-existing rights would be unconstitutional. *Utilities Com. v. Fleming*, 660. Erecting water storage tank in subdivision subject to restrictive covenant constitutes a "taking." *Raleigh v. Edwards*, 671. Judgment cannot bind person not a party. *Scott v. Jordan*, 244.

IV. Provision of municipal charter that nonresident freeholders might vote is void, but does not invalidate election participated in by qualified voters only. *Wrenn v. Kure Beach*, 292.

XIV, Sec. 7. Member of county board of education vacates this office by accepting office of mayor; appointment of postmaster to board is ineffective. *Edwards v. Board of Education*, 345.

IV, Sec. 8. Supreme Court may exercise supervisory power even though appellant is not party aggrieved. *Ange v. Ange*, 506.

IV, Sec. 13. Defendant in compulsory reference may lose right to jury trial by failing to follow procedural requirements to preserve it. *Bartlett v. Hopkins*, 165.

IV, Sec. 3. Constitution does not require maintenance of high school. *Kreeger v. Drummond*, 8.

IX, Sec. 5. Where surety on clerk's bond pays into court total liability as shown by clerk's records, court has jurisdiction to provide that unclaimed funds be returned to surety rather than escheat. *Hanson v. Yandle*, 532.

CONSTITUTION OF THE UNITED STATES, SECTIONS OF, CONSTRUED.

ART.

IV, Sec. 1. Constitution of U. S. Divorce decree of another state is binding, but its decree awarding custody of child of marriage domiciled here is not binding. *Gafford v. Phelps*, 218.

Fifth Amendment. Erecting water storage tank in subdivision subject to restrictive covenants constitutes a "taking." *Raleigh v. Edwards*, 671.

Fifth and Fourteenth Amendments. To make statute retroactive so as to deprive person of pre-existing rights would be unconstitutional. *Utilities Com. v. Fleming*, 660.