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VOLUME 210

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NORTH CAROLINA REPORTS
VOL. 210

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

SPRING TERM, 1936
FALL TERM, 1936

REPORTED BY
ROBERT C. STRONG

RALEIGH
BYNUM PRINTING COMPANY
PRINTERS TO THE SUPREME COURT
1937

CITATION OF REPORTS

Rule 46 of the Supreme Court is as follows:

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

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1 Murphey	"	5 "
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2 " "	"	17 "
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1 Dev. & Bat. Eq.	"	21 "
2 " "	"	22 "
1 Iredell Law	"	23 "
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8 " "	"	30 "
9 Iredell Law	as	31 N. C.
10 " "	"	32 "
11 " "	"	33 "
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13 " "	"	35 "
1 " Eq.	"	36 "
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7 " "	"	42 "
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Busbee Law	"	44 "
" Eq.	"	45 "
1 Jones Law	"	46 "
2 " "	"	47 "
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7 " "	"	52 "
8 " "	"	53 "
1 " Eq.	"	54 "
2 " "	"	55 "
3 " "	"	56 "
4 " "	"	57 "
5 " "	"	58 "
6 " "	"	59 "
1 and 2 Winston	"	60 "
Phillips Law	"	61 "
" Eq.	"	62 "

☞ In quoting from the *reprinted* Reports, counsel will cite always the marginal (*i. e.*, the original) paging, except 1 N. C. and 20 N. C., which have been repaged throughout without marginal paging.

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

From the 7th to the 62d volumes, both inclusive, will be found the opinions of the Supreme Court, consisting of three members, for the first fifty years of its existence, or from 1818 to 1868. The opinions of the Court, consisting of five members, immediately following the Civil War, are published in the volumes from the 63d to the 79th, both inclusive. From the 80th to the 101st volumes, both inclusive, will be found the opinions of the Court, consisting of three members, from 1879 to 1889. The remaining volumes contain the opinions of the Court, consisting of five members, since that time or since 1889.

JUSTICES

OF THE

SUPREME COURT OF NORTH CAROLINA

FALL TERM, 1936.

CHIEF JUSTICE:

W. P. STACY.

ASSOCIATE JUSTICES:

HERIOT CLARKSON, MICHAEL SCHENCK,
GEORGE W. CONNOR, WILLIAM A. DEVIN.

ATTORNEY-GENERAL:

A. A. F. SEAWELL.

ASSISTANT ATTORNEYS-GENERAL:

T. W. BRUTON.
HARRY McMULLAN.

SUPREME COURT REPORTER:

ROBERT C. STRONG.

CLERK OF THE SUPREME COURT:

EDWARD MURRAY.

LIBRARIAN:

JOHN A. LIVINGSTONE.

JUDGES

OF THE

SUPERIOR COURTS OF NORTH CAROLINA

EASTERN DIVISION

Name	*District*	*Address*
WALTER L. SMALL	First	Elizabeth City.
M. V. BARNHILL	Second	Rocky Mount.
R. HUNT PARKER	Third	Roanoke Rapids.
CLAWSON L. WILLIAMS	Fourth	Sanford.
J. PAUL FRIZZELLE	Fifth	Snow Hill.
HENRY A. GRADY	Sixth	Clinton.
W. C. HARRIS	Seventh	Raleigh.
E. H. CRANMER	Eighth	Southport.
N. A. SINCLAIR	Ninth	Fayetteville.
MARSHALL T. SPEARS	Tenth	Durham.

SPECIAL JUDGES

G. V. COWPER .... Kinston.

WESTERN DIVISION

Name	District	Address
JOHN H. CLEMENT	Eleventh	Winston-Salem.
H. HOYLE SINK	Twelfth	Lexington.
F. DONALD PHILLIPS	Thirteenth	Rockingham.
W. F. HARDING	Fourteenth	Charlotte.
FRANK M. ARMSTRONG*	Fifteenth	Troy.
WILSON WARLICK	Sixteenth	Newton.
J. A. ROUSSEAU	Seventeenth	Wilkesboro.
J. WILL PLESS, JR.	Eighteenth	Marion.
P. A. MCELROY	Nineteenth	Marshall.
FELIX E. ALLEY, SR.	Twentieth	Waynesville.

SPECIAL JUDGE

FRANK S. HILL .... Murphy.
SAM J. ERVIN, JR. .... Morganton.

EMERGENCY JUDGES

THOS. J. SHAW .... Greensboro.
F. A. DANIELS .... Goldsboro.
T. B. FINLEY .... North Wilkesboro.

*Succeeded John M. Oglesby, deceased, 21 July, 1936.

SOLICITORS

EASTERN DIVISION

Name	*District*	*Address*
HERBERT R. LEARY	First	Edenton.
DONNELL GILLIAM	Second	Tarboro.
W. H. S. BURGWIN	Third	Woodland.
CLAUDE C. CANADAY	Fourth	Benson.
D. M. CLARK	Fifth	Greenville.
JAMES A. POWERS	Sixth	Kinston.
WILLIAM Y. BICKETT	Seventh	Raleigh.
JOHN J. BURNEY	Eighth	Wilmington.
T. A. MCNEILL	Ninth	Lumberton.
LEO CARR	Tenth	Burlington.

WESTERN DIVISION

ALLEN H. GWYN	Eleventh	Reidsville.
H. L. KOONTZ	Twelfth	Greensboro.
ROWLAND S. PRUETTE	Thirteenth	Wadesboro.
JOHN G. CARPENTER	Fourteenth	Gastonia.
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L. SPURGEON SPURLING	Sixteenth	Lenoir.
JNO. R. JONES	Seventeenth	N. Wilkesboro.
C. O. RIDINGS	Eighteenth	Forest City.
Z. V. NETTLES	Nineteenth	Asheville.
JOHN M. QUEEN	Twentieth	Waynesville.

LICENSED ATTORNEYS

FALL TERM, 1936.

List of applicants granted law license by the North Carolina Board of Law Examiners at Raleigh, North Carolina, 7 August, 1936:

ALLISON, JUNIUS LANDRUM....Swannanoa.
ANDREWS, ALEXANDER BOYD, III....Raleigh.
BARNHILL, MAURICE VICTOR, JR....Rocky Mount.
BARNES, BENNETT HARPER....Lillington.
BENNETT, CLIFTON CLEMENT....Wadesboro.
BENNETT, HAROLD KIMSEY....Asheville.
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BROWN, EUGENE WILSON....Rich Square.
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CHEEK, WALDO CLAYTON....Asheboro.
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Stern, Sidney Joseph, Jr........Greensboro.
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Taylor, Borden Elliott........Wilmington.
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Thomas, James Hiner........Forest City.
Tucker, Irvin Burchard, Jr........Whiteville.
Walker, Francis Edgar........Durham.
Weeks, Orin Haywood........Swansboro.
Williams, Croxton........Greensboro.
Williams, John Hugh........Concord.
Williams, Staton Pender........Robersonville.
Wilson, Carl Charles........Linwood.
Young, Kenneth Wharton........Durham.
Zeigler, Earle Neville........Wilmington.

COMITY LICENSEES.

Mitchell, James L........Ahoskie from Virginia.
Sullivan, Frank J........Raleigh from South Carolina.
Martin, Carroll B........Raleigh from Iowa.

I, H. M. London, Secretary of the North Carolina Board of Law Examiners, do hereby certify that the foregoing is a true and correct copy of the list of attorneys granted license by the said Board, August 7, 1936.

Witness my hand and official seal, this 21st day of August, 1936.

(Seal) H. M. London,
Secretary.

SUPERIOR COURTS, FALL TERM, 1936

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

THIS CALENDAR IS UNOFFICIAL

EASTERN DIVISION

FIRST JUDICIAL DISTRICT

Fall Term, 1936—Judge Frizzelle.

Beaufort—Sept. 21* (A); Oct. 5† (2); Nov. 9* (A); Dec. 2†.
Camden—Sept. 28.
Chowan—Sept. 14; Dec. 21.
Currituck—Sept. 7.
Dare—Oct. 26.
Gates—Nov. 23.
Hyde—Aug. 17† (2); Oct. 19.
Pasquotank—Sept. 21†; Oct. 12† (A) (2); Nov. 9†; Nov. 16*.
Perquimans—Nov. 2.
Tyrrell—Oct. 5 (A).

SECOND JUDICIAL DISTRICT

Fall Term, 1936—Judge Grady.

Edgecombe—Sept. 14; Oct. 19†; Nov. 16† (2).
Martin—Sept. 21 (2); Nov. 23† (A) (2); Dec. 14.
Nash—Aug. 31; Sept. 21† (A) (2); Oct. 12†; Nov. 30*; Dec. 7†.
Washington—July 13; Oct. 26†.
Wilson—Sept. 7; Oct. 5†; Nov. 2† (2); Dec. 21.

THIRD JUDICIAL DISTRICT

Fall Term, 1936—Judge Harris.

Bertie—Aug. 31; Nov. 16 (2).
Halifax—Aug. 17 (2); Oct. 5† (A) (2); Oct. 26* (A); Nov. 30 (2).
Hertford—July 27; Oct. 19*; Oct. 26†.
Northampton—Aug. 10; Nov. 2 (2).
Vance—Oct. 5*; Oct. 12†.
Warren—Sept. 21 (2).

FOURTH JUDICIAL DISTRICT

Fall Term, 1936—Judge Cranmer.

Chatham—Aug. 3† (2); Oct. 26.
Harnett—Sept. 7*; Sept. 21†; Oct. 5† (A) (2); Nov. 16* (2).
Johnston—Aug. 17*; Sept. 28† (2); Oct. 19 (A); Nov. 9† (A) (2); Dec. 14 (2).
Lee—July 20 (2); Nov. 2† (2).
Wayne—Aug. 24; Aug. 31†; Oct. 12† (2); Nov. 30 (2).

FIFTH JUDICIAL DISTRICT

Fall Term, 1936—Judge Sinclair.

Carteret—Oct. 19; Dec. 7†.
Craven—Sept. 7*; Oct. 5† (2); Nov. 23† (2).
Greene—Dec. 7 (A); Dec. 14 (2).
Jones—Sept. 21.
Pamlico—Nov. 9 (2).
Pitt—Aug. 24†; Aug. 31; Sept. 14†; Sept. 28†; Oct. 26†; Nov. 2; Nov. 23† (A).

SIXTH JUDICIAL DISTRICT

Fall Term, 1936—Judge Spears.

Duplin—July 27*; Aug. 31† (2); Oct. 5*; Dec. 7† (2).
Lenoir—Aug. 24; Sept. 28†; Oct. 19; Nov. 9† (2); Dec. 14 (A).
Onslow—July 20‡; Oct. 12; Nov. 23† (2).
Sampson—Aug. 10 (2); Sept. 14† (2); Oct. 26† (2).

SEVENTH JUDICIAL DISTRICT

Fall Term, 1936—Judge Small.

Franklin—Aug. 31† (2); Oct. 19*; Nov. 16† (2).
Wake—July 13*; Sept. 14*; Sept. 21 (2); Oct. 5†; Oct. 12*; Oct. 26† (2); Nov. 9*; Nov. 30† (2); Dec. 14* (2).

EIGHTH JUDICIAL DISTRICT

Fall Term, 1936—Judge Barnhill.

Brunswick—Sept. 7†; Oct. 5.
Columbus—Aug. 24 (2); Nov. 23† (2).
New Hanover—July 27*; Sept. 14*; Sept. 21†; Oct. 19† (2); Nov. 16*; Dec. 7† (2).
Pender—July 20; Nov. 2 (2).

NINTH JUDICIAL DISTRICT

Fall Term, 1936—Judge Parker.

Bladen—Aug. 10; Sept. 21.
Cumberland—Aug. 31*; Sept. 28† (2); Oct. 26† (2); Nov. 23*.
Hoke—Aug. 24; Nov. 16.
Robeson—July 13†; Aug. 17*; Sept. 7†; Sept. 14*; Oct. 12*; Oct. 19†; Nov. 9*; Dec. 7† (2); Dec. 21*.

TENTH JUDICIAL DISTRICT

Fall Term, 1936—Judge Williams.

Alamance—Aug. 3†; Aug. 17*; Sept. 2†; Sept. 9*; Nov. 16† (A) (2); Nov. 30*.
Durham—July 20*; Sept. 7* (A); Sept. 14† (A); Sept. 21† (2); Oct. 12*; Oct. 26† (A); Nov. 2† (2); Dec. 7*.
Granville—July 27; Oct. 26†; Nov. 16 (2).
Orange—Aug. 24; Aug. 31†; Oct. 5†; Dec. 14.
Person—Aug. 10; Oct. 19.

WESTERN DIVISION

ELEVENTH JUDICIAL DISTRICT

Fall Term, 1936—Judge Oglesby.

Ashe—July 27† (2); Oct. 26*.
Alleghany—Sept 28.
Caswell—July 6; Nov. 23.
Forsyth—July 13 (2); Sept. 7 (2); Sept. 21; Sept. 28† (A); Oct. 12 (2); Oct. 26† (A) (2); Nov. 9 (2); Nov. 23† (A) (2); Dec. 7 (A); Dec. 14.
Rockingham—Aug. 10* (2); Sept. 7† (A) (2); Nov. 2*; Nov. 30† (2).
Surry—July 13† (A) (2); Oct. 5*; Oct. 12† (A).

TWELFTH JUDICIAL DISTRICT

Fall Term, 1936—Judge Warlick.

Davidson—Aug. 24*; Sept. 14†; Sept. 21† (A); Oct. 5† (A) (2); Nov. 23 (2).
Guilford—July 13* (A); Aug. 3*; Aug. 10† (2); Aug. 31† (2); Sept. 21* (2); Sept. 21† (A) (2); Oct. 5† (2); Oct. 26* (A); Nov. 2† (2); Nov. 16*; Nov. 23† (A) (2); Dec. 21*.
Stokes—July 6*; July 13†; Oct. 19*; Oct. 26†.

THIRTEENTH JUDICIAL DISTRICT

Fall Term, 1936—Judge Rousseau.

Anson—Sept. 14†; Sept. 28*; Nov. 16†.
Moore—Aug. 17; Sept. 21†; Sept. 28† (A); Dec. 14†.
Richmond—July 20†; July 27*; Sept. 7†; Oct. 5*; Nov. 9†.
Scotland—Nov. 2†; Nov. 30 (2).
Stanly—July 13; Sept. 7† (A) (2); Oct. 12†; Nov. 23.
Union—Aug. 3*; Aug. 24† (2); Oct. 19; Oct. 26†.

FOURTEENTH JUDICIAL DISTRICT

Fall Term, 1936—Judge Pless.

Gaston—July 27*; Aug. 3† (2); Sept. 14* (A); Sept. 21† (2); Oct. 26* (A); Nov. 30* (A); Dec. 7† (2).
Mecklenburg—July 13* (2); Aug. 31*; Aug. 31† (A) (2); Sept. 7† (2); Sept. 14† (A) (2); Sept. 28† (A) (2); Oct. 5*; Oct. 12† (A) (2); Oct. 12† (2); Oct. 26† (2); Nov. 2† (A) (2); Nov. 2† (2); Nov. 9† (A) (2); Nov. 16*; Nov. 23† (2); Nov. 23† (A) (2); Dec. 7† (A) (2).

FIFTEENTH JUDICIAL DISTRICT

Fall Term, 1936—Judge McElroy.

Cabarrus—Aug. 24*; Aug. 31†; Oct. 19 (2).
Iredell—Aug. 3 (2); Nov. 9 (2).
Montgomery—July 13; Sept. 28†; Oct. 5; Nov. 2†.
Randolph—July 20† (2); Sept. 7*; Dec. 7 (2).
Rowan—Sept. 9 (2); Oct. 12†; Oct. 19† (A); Nov. 23 (2).

SIXTEENTH JUDICIAL DISTRICT

Fall Term, 1936—Judge Alley.

Burke—Aug. 10 (2); Sept. 28† (3); Dec. 14 (2).
Caldwell—Aug. 24 (2); Nov. 30 (2).
Catawba—July 6 (2); Sept. 7† (2); Nov. 16*; Nov. 23†; Dec. 7† (A).
Cleveland—July 27 (2); Sept. 14† (A) (2); Nov. 2 (2).
Lincoln—July 20; Oct. 19; Oct. 26†.
Watauga—Sept. 21.

SEVENTEENTH JUDICIAL DISTRICT

Fall Term, 1936—Judge Clement.

Alexander—Dec. 21.
Avery—July 6*; July 13† (2); Oct. 19*; Oct. 26†.
Davie—Aug. 31; Dec. 7†.
Mitchell—July 27† (2); Sept. 21 (2).
Wilkes—Aug. 10 (2); Oct. 5 (2); Nov. 16 (2); Nov. 30†.
Yadkin—Aug. 24*; Dec. 14† (2).

EIGHTEENTH JUDICIAL DISTRICT

Fall Term, 1936—Judge Sink.

Henderson—Oct. 12 (2); Nov. 23† (2).
McDowell—July 13† (2); Sept. 7 (2).
Polk—Aug. 24 (2).
Rutherford—Sept. 28† (2); Nov. 9 (2).
Transylvania—July 27 (2); Dec. 7 (2).
Yancey—Aug. 10 (2); Oct. 26† (2).

NINETEENTH JUDICIAL DISTRICT

Fall Term, 1936—Judge Phillips.

Buncombe—July 13† (2); July 27; Aug. 3† (2); Aug. 17; Aug. 31; Sept. 7† (2); Sept. 21; Oct. 5; Oct. 12†; Oct. 19; Nov. 2† (2); Nov. 16; Nov. 30; Dec. 7† (2); Dec. 21.
Madison—Aug. 24; Sept. 28; Oct. 26; Nov. 23.

TWENTIETH JUDICIAL DISTRICT

Fall Term, 1936—Judge Harding.

Cherokee—Aug. 10 (2); Nov. 9 (2).
Clay—Sept. 28 (A); Oct. 5.
Graham—Sept. 7 (2).
Haywood—July 13 (2); Sept. 21† (2); Nov. 30 (2).
Jackson—Oct. 12 (2).
Macon—Aug. 24 (2); Nov. 23; Nov. 30 (A).
Swain—July 27 (2); Oct. 26 (2).

*For criminal cases only.
†For civil cases only.
‡For jail and civil cases.
Unmarked for mixed terms.
(A) Special Judge to be assigned.

UNITED STATES COURTS FOR NORTH CAROLINA

DISTRICT COURTS

Eastern District—ISAAC M. MEEKINS, *Judge*, Elizabeth City.
Middle District—JOHNSON J. HAYES, *Judge*, Greensboro.
Western District—EDWIN YATES WEBB, *Judge*, Shelby; JAMES E. BOYD, *Judge*, Greensboro.

EASTERN DISTRICT

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

Raleigh, criminal term, second Monday after the fourth Monday in April and October; civil term, second Monday in March and September. S. A. ASHE, Clerk.

Fayetteville, third Monday in March and September. S. H. BUCK, Deputy Clerk.

Elizabeth City, fourth Monday in March and first Monday in October. J. A. HOOPER, Deputy Clerk, Elizabeth City.

Washington, first Monday in April and fourth Monday in September. J. B. RESPESS, Deputy Clerk, Washington.

New Bern, second Monday in April and October. GEORGE GREEN, Deputy Clerk, New Bern.

Wilson, third Monday in April and October. G. L. PARKER, Deputy Clerk.

Wilmington, fourth Monday in April and October. PORTER HUFHAM, Deputy Clerk, Wilmington.

OFFICERS

J. O. CARR, United States District Attorney, Wilmington.
JAMES H. MANNING, Assistant United States District Attorney, Raleigh.
CHAS. F. ROUSE, Assistant United States District Attorney, Kinston.
F. S. WORTHY, United States Marshal, Raleigh.
S. A. ASHE, Clerk United States District Court, Raleigh.

MIDDLE DISTRICT

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

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

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

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

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

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

Wilkesboro, third Monday in May and November. HENRY REYNOLDS, Clerk, Greensboro; LINVILLE BUMGARNER, Deputy Clerk.

OFFICERS

CARLISLE HIGGINS, United States District Attorney, Greensboro.
ROBT. S. MCNEILL, Assistant United States Attorney, Greensboro.
MISS EDITH HAWORTH, Assistant United States Attorney, Greensboro.
BRYCE R. HOLT, Assistant United States Attorney, Greensboro.
WM. T. DOWD, United States Marshal, Greensboro.
HENRY REYNOLDS, Clerk United States District Court, Greensboro.

WESTERN DISTRICT

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

Asheville, second Monday in May and November. J. Y. JORDAN, Clerk; OSCAR L. MCLURD, Chief Deputy Clerk; WILLIAM A. LYTLE, Deputy Clerk.

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

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

Shelby, fourth Monday in September and third Monday in March. FAN BARNETT, Deputy Clerk, Charlotte.

Bryson City, fourth Monday in May and November. J. Y. JORDAN, Clerk.

OFFICERS

MARCUS ERWIN, United States Attorney, Asheville.
W. R. FRANCIS, Assistant United States Attorney, Asheville.
W. M. NICHOLSON, Assistant United States Attorney, Charlotte.
CHARLES R. PRICE, United States Marshal, Asheville.
J. Y. JORDAN, Clerk United States District Court, Asheville.

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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1936

RALPH B. WAGNER AND EDNA E. WAGNER v. CONSOLIDATED REALTY CORPORATION, ASHEVILLE SAFE DEPOSIT COMPANY, TRUSTEE, AND REAL ESTATE TRUST COMPANY OF BALTIMORE, MARYLAND.

(Filed 29 April, 1936.)

1. Evidence E b—Admissions in principal's letters to agent, disclosed to third party to principal's knowledge, held competent.

In this action by purchasers to enforce specific performance of a contract to convey, certain letters written by the vendor to its exclusive selling agents were offered in evidence. It appeared that the contents of the letters were disclosed to the purchasers with the knowledge and consent of the seller, that the purchasers and officers of the seller acted thereon, and as a result thereof met to execute the contract of sale, that the letters were written by officers of the seller having full authority to enter the contract of sale, and that the letters contained an admission by the seller of its willingness to complete the contract of sale although the purchasers had theretofore forfeited their rights under the contract by refusing to accept deed to the property during the time stipulated in the original contract for the transfer of the title. *Held:* The letters were competent and material, and were properly admitted in evidence against the seller to show a waiver by it of its right to disregard the contract for failure of the purchasers to accept deed within the time stipulated in the original contract.

2. Appeal and Error J c—

Where no evidence is set forth in the record, it will be presumed on appeal that the court's finding of fact was supported by sufficient evidence.

3. **Vendor and Purchaser B a—Where vendor signifies its willingness to convey after expiration of time stipulated in the contract, purchaser has reasonable time thereafter to enforce agreement.**

Where a contract to convey stipulates that time is of the essence, and the purchasers refuse to accept deed tendered within the time stipulated, the purchasers, ordinarily, may not thereafter enforce the contract against the vendor, but where the vendor, after expiration of the stipulated time, advises its selling agents that it is ready and willing to transfer title, which information is communicated to the purchasers with the knowledge and consent of the vendor, and acted upon by the parties by meeting to execute the contract, the vendor waives its right to disregard the contract for failure of the purchasers to accept deed within the time stipulated, and the purchasers are entitled to consummate the purchase within a reasonable time thereafter.

4. **Vendor and Purchaser F a—Purchaser held not entitled to specific performance as against trustee in deed of trust executed by vendor.**

The vendor in a contract of sale acquired title at foreclosure sale of the property, and upon failure of the vendor to pay the price bid, the *cestui que trust* agreed to accept the amount agreed to be paid by the purchasers in the contract of sale. Thereafter, upon refusal of the purchasers to accept deed and pay the price agreed, the vendor executed a note secured by deed of trust to the *cestui que trust* to take up its bid at the foreclosure sale. The vendor instituted action against the purchasers to enforce specific performance, but the action was not indexed as *lis pendens*, and the vendor later abandoned its appeal from an adverse judgment upon the purchasers' agreement to accept deed, and the vendor waived the purchasers' previous breach of the contract. The vendor refused to transfer title in accordance with the supplemental agreement, and the purchasers instituted this action against the vendor and the trustee and *cestui que trust* to enforce specific performance. *Held:* The trustee and *cestui que trust* were not parties to the contract to convey and had no knowledge, actual or constructive, at the time of the execution of the deed of trust, of the supplemental agreement for the sale of the property, the vendor's action not being notice because not listed as *lis pendens* and because the purchasers did not claim any rights in the land in that action, and the purchasers are not entitled to specific performance as against the trustee and *cestui que trust* upon the supplemental contract to convey.

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

APPEAL from *Warlick, J.*, at June Term, 1935, of BUNCOMBE. Affirmed.

This is a civil action for specific performance of a contract of purchase and sale of real property, instituted by the plaintiffs Ralph B. Wagner and Edna E. Wagner against the Consolidated Realty Corporation (hereinafter called the Consolidated), the Asheville Safe Deposit Company (hereinafter called the Deposit Company), trustee, and the Real Estate Trust Company of Baltimore, Maryland (hereinafter called the Trust Company).

The findings of fact disclose the following:

The Trust Company held notes secured by a first lien deed of trust on the property involved and, at its request, the property was foreclosed and a trustee's deed, dated 30 April, 1933, was delivered to the purchaser, the Consolidated, and subsequently recorded 29 September, 1933.

The Consolidated, as owner, through its exclusive real estate sales agent, Carlberg & Cook, Inc., offered the property to plaintiffs for $25,000, which offer plaintiffs accepted and paid $500.00 down and entered into a written contract of sale and purchase with the Consolidated on 5 August, 1933, wherein it was agreed that payment of the balance of $24,500 should be made and deed delivered on or before 5 October, 1933, and that time was of the essence of the contract.

On 5 October, 1933, the Consolidated tendered the plaintiffs a deed and demanded payment of the balance due. The plaintiffs refused to accept the deed and to make the payment. Whereupon Consolidated, on the same day, 5 October, 1933, instituted action against the plaintiffs in the Superior Court of Buncombe County demanding specific performance. The plaintiffs herein, Wagner and wife, the defendants in said action, filed answer 2 December, 1933, and set up as a defense certain alleged misrepresentations in connection with the procurement of the contract of purchase and sale. The Consolidated demurred to the answer, and, upon demurrer being overruled, gave notice of appeal, and had case on appeal settled 6 March, 1934, but never further perfected the appeal.

When the Consolidated purchased at the foreclosure sale in April, 1933, it did not pay its bid, and later the Trust Company agreed to accept the $25,000 contracted to be paid by Wagner and wife and retire the purchase price bid at the aforesaid foreclosure sale. After Wagner had failed to pay and the Consolidated had sued for specific performance, the Consolidated executed a new note for $57,000 in lieu of said $25,000, which new note, secured by deed of trust on the property involved to the Deposit Company, trustee, was accepted by the Trust Company in payment of the notes it formerly held.

On or about 27 March, 1934, while the action instituted by the Consolidated against Wagner and his wife (the present plaintiffs) for specific performance was at issue and the Consolidated's appeal on demurrer was pending, Wagner notified the president of Carlberg & Cook, Inc., that he would comply with the contract of purchase, and Carlberg & Cook immediately notified the Consolidated, and the Consolidated, through its vice-president, Francis J. Heazel, under date of 3 April, 1936, wrote: "I am pleased to note that Mr. Wagner is now ready to complete his purchase of the Campbell property (the property involved). We are also ready to complete this transaction and to deliver to Mr.

Wagner deed to the property upon payment of the $25,000, plus interest on this amount from the date when the purchase was to be completed. I think, however, that this transaction should be completed here in Asheville. It will be necessary for us to pay some taxes that are a lien against the property, and also to cancel the existing mortgage on the property. We intend to pay the taxes and cancel the mortgage at the time of the delivery of the deed and the payment of the purchase price. No doubt, Mr. Wagner's attorneys will also desire to close the transaction here, as they can be satisfied as to the title at the time of the delivery of the deed and be in a position to record the deed so as to vest record title in Mr. Wagner immediately upon completion of the transaction. We have in our possession the papers in connection with the existing mortgage on the property and are, therefore, ready to complete this transaction at any time. If Mr. Wagner cannot find it convenient to come to Asheville to complete the transaction, I am sure that the matter can be handled for him by his attorneys here. The attorneys should be able to complete the examination of the title in a few days, and I hope, therefore, that this matter may be closed during the week." On 11 April, 1934, Mr. Heazel, in reply to letter of Mr. Carlberg, dated 6 April, wherein Carlberg stated that he had furnished Mr. Wagner a copy of Heazel's letter of 3 April, wrote: "I note that Mr. Wagner expects to be ready to close the purchase of the Campbell property on 22 April. If he finds that it will not be convenient for him to be here on the 22d, it will be entirely satisfactory for him to postpone the closing of this matter until later on in the month or the early part of May. I may not be here on the 22d, but Larry will undoubtedly be here, and the matter can be handled whenever Mr. Wagner arrives in Asheville."

The information contained in these letters was conveyed to Wagner, with the knowledge of the Consolidated, by Carlberg & Cook, the sales agents, who negotiated the sale of the property and with whom Wagner had all his dealing leading up to the signing of the contract of purchase and sale.

The plaintiffs, with the knowledge of the Consolidated, had their attorney examine the title to said property, and this attorney reported certain minor defects in the title to the Consolidated, and, on 21 April, 1934, Mr. D. H. Perry, secretary of the Consolidated, wrote Mr. Carlberg: "We wish to advise that the matter (slight discrepancies in the title to the property involved) has been discussed with Mr. DuBose in person and we feel that upon Mr. Wagner's arrival in the city Monday, 23 April, that there will be no delay in bringing the sale of the property to a conclusion." This information was communicated by Carlberg to Wagner, who thereupon came from Florida to Asheville on Sunday,

22 April, 1934, prepared to pay the balance of the purchase price with interest and take title to the property.

On 23 April, 1934, there was some controversy between counsel for the parties as to the meaning of the reference to the payment of taxes in the letter from Mr. Heazel, and during this controversy counsel for the Consolidated stated to counsel for plaintiffs, in effect, that negotiations were at an end, to which counsel for plaintiffs replied that the plaintiffs would waive the question and pay the full amount for the property and assume the payment of the taxes. On 24 April, 1934, the Consolidated, the plaintiff in the case of "Consolidated Realty Corporation *v.* Wagner and Wife," took a voluntary nonsuit in that case and paid into court the $500.00 down payment theretofore made by Wagner. Also, on 24 April, 1934, Wagner, on behalf of himself and wife, tendered the Consolidated $25,320.74 in cash, being the full amount with interest, and agreed to accept a deed for the property, subject to taxes. This tender was refused by the Consolidated, and the plaintiffs instituted this action on 26 April, 1934.

Trial by jury was waived and the court found the facts and decreed that the plaintiffs were entitled to specific performance against the Consolidated, but not against the Deposit Company, trustee, and the Trust Company. The Consolidated Realty Corporation appealed from so much of the decree as awarded the plaintiffs the right of specific performance against it, and the plaintiffs appealed from so much of said decree as denied them the relief prayed for against the Deposit Company, trustee, and the Trust Company.

Parker, Bernard & DuBose for the plaintiffs.
Heazel, Shuford & Hartshorn for the defendants.

SCHENCK, J., after stating the case: Had there been no further transactions between the plaintiffs and the appellant, the Consolidated, after the refusal of the plaintiffs to accept deed tendered by it to them, or after the plaintiffs had filed answer in the action instituted by the Consolidated against them for specific performance, the plaintiffs could not now maintain this action for specific performance. However, the plaintiffs offered in evidence certain letters tending to establish subsequent transactions between the plaintiffs and the Consolidated, these letters being from and to Francis J. Heazel and D. H. Perry, vice-president and secretary, respectively, of the Consolidated. The letters to said Heazel and Perry were from Carlberg & Cook, Inc., who, as sales agents of the Consolidated, had conducted the negotiations for the sale to the plaintiffs of the property involved.

To the introduction in evidence and consideration of these letters by the court, the Consolidated excepted. The Consolidated further excepted

to the findings of fact based upon said letters (Findings of Fact Nos. 15, 20, and 23), and to the conclusion of law based upon such findings. (Conclusion No. 1.)

The findings of fact based thereupon are supported by the letters, and the conclusions of law based thereupon are supported by the findings of fact. Therefore, the Consolidated's appeal presents the question: Were the letters competent evidence? We hold that the question should be answered in the affirmative.

All of the evidence tends to show that Francis J. Heazel was the vice-president of the Consolidated, with full authority to act for his corporation in entering into the contract of purchase and sale of the property involved, and that the same was true of D. H. Perry, secretary of the Consolidated, and the court finds, without objection, that their authority is not questioned. (Findings of Fact Nos. 17 and 18.)

These letters, together with the findings of fact to which no exceptions are taken, disclose that Carlberg & Cook, Inc., were the exclusive real property sales agents of the Consolidated, and that they communicated the contents of their correspondence with the officers of the Consolidated to the plaintiffs, with the knowledge and consent of the Consolidated, and that the plaintiffs and the officers of the Consolidated acted thereupon, and as a result thereof met in Asheville on Monday, 23 April, 1934.

These letters and the findings of fact further tend to show that after the plaintiffs had declined to accept the deed tendered to them by the Consolidated on 5 October, 1933, and had refused to comply with the original contract of purchase and sale, and had filed answer in the action by the Consolidated against them for specific performance, and while said action was pending, they, the plaintiffs, informed Carlberg & Cook that they would carry out the original contract, and that Carlberg & Cook, under date of 27 March, 1934, communicated this information to the Consolidated, and that it, through its officers (vice-president and secretary), replied that it was ready, willing, and able to carry out the contract at such time as the plaintiffs desired, and suggested that all concerned meet in Asheville on 22 April, 1934, to close the transaction; and that as a result of these letters the plaintiffs came to Asheville on Sunday, 22 April, 1934, prepared and willing to consummate the purchase of the property involved, and that, after certain negotiations on Monday, 23 April, made proper legal tender of the purchase price of $25,000.00, with interest, on 24 April, which was declined by the Consolidated. Under this factual situation the competency of the letters as evidence is manifest.

The Consolidated also assigns as error the finding of the court to the effect that Mr. Lawrence Quigley, president of the Consolidated, gave to

Mr. Bror Carlberg, president of Carlberg & Cook, Inc., on 23 April, 1934, in Asheville, a memorandum indicating the exact amount ($23,-441.66) necessary to complete the transaction, and suggested a further conference the following day, and that Carlberg communicated this information to the plaintiffs. (Finding of Fact No. 24.) This assignment states that the court erred in making this finding "for that the same was predicated upon incompetent evidence." No evidence is set forth in the record, except the memorandum itself. Therefore, it must be presumed that there was sufficient evidence to support the findings, and, under the facts found, the memorandum itself is clearly competent.

The exception of the Consolidated to the first conclusion of law "because said conclusion of law was based upon incompetent evidence, in that said conclusion of law was predicated upon Findings of Fact Nos. 15, 20, 23, and 24, and the letters therein set forth," cannot be sustained, for the reason that the exceptions to said findings of fact upon which said conclusion of law is based, as well as to the competency of the letters as hereinbefore stated, cannot be sustained.

While the original contract made time of its essence, and provided that the transaction should be consummated by 5 October, 1933, and the failure and refusal of the plaintiffs to comply therewith on or before that date, gave to the Consolidated, nothing else appearing, the right from then on to disregard the contract, still when the Consolidated, through its duly authorized officers and agents, wrote letters accepting the offer of the plaintiffs to close the sale in April, 1934, and made engagements to meet in Asheville at that time and for that purpose, it waived its right to disregard the contract on account of the former failure and refusal of the plaintiffs to close within the time named, and restored in the plaintiffs the right within a reasonable time to consummate the purchase. The findings of fact are to the effect that plaintiffs made full and proper tender at the time and place (24 April, 1934, in Asheville) fixed by the parties for the consummation of the contract.

Upon the appeal of the defendant Consolidated Realty Corporation, the judgment of the Superior Court is affirmed.

The plaintiffs appeal from so much of the decree as denies them the right to maintain an action for specific performance against the Asheville Deposit Company, trustee, and the Real Estate Trust Company of Baltimore, Maryland. They filed but one exception, and that is to the second conclusion of law, which is to the effect that the plaintiffs are not entitled to relief sought against the Deposit Company, trustee, and the Trust Company.

The findings of fact, germane to the plaintiffs' appeal, are that the Consolidated purchased the land involved at a foreclosure sale on 30 April, 1933, and registered the deed to it from the trustee on 29 September,

1933, and that this deed conveyed a valid title to the Consolidated (Finding of Fact No. 10); that on 5 October, 1933, tender of a valid deed for the property was made by the Consolidated to the plaintiffs, in accord with contract of purchase and sale entered into on 5 August, 1933, which deed was refused and contract breached by the plaintiffs, and, on the same day, suit for specific performance was instituted by the Consolidated against the plaintiffs; that on 20 October, 1933, the Consolidated executed and delivered to the Deposit Company, as trustee, a deed of trust on the property involved to secure a note held by the trust company for $57,000; and that on 26 April, 1934, this action for specific performance was instituted by the plaintiffs against the three defendants, the Consolidated, the Deposit Company, trustee, and the Trust Company.

There is no finding that either the Deposit Company, trustee, or the Trust Company, on 20 October, 1933, the date they received the deed of trust from the Consolidated, had any knowledge of the contract between the plaintiffs and the Consolidated for the purchase and sale of the property involved. There is an affirmative finding that the Trust Company is an independent corporation with "no underlying connection in any particular with either of its codefendants" (Finding of Fact No. 22), and it appears, from the facts found, that the Deposit Company, trustee, was simply a stakeholder.

There is no finding of fact to the effect that the action for specific performance instituted by the Consolidated against the present plaintiffs on 5 October, 1933, was docketed and indexed as *lis pendens.* However, if it be conceded that the Deposit Company, trustee, and the Trust Company had knowledge of the pendency of that action, such knowledge would not be notice of any claim by the plaintiffs, since they, as defendants in that action, were alleging and contending that the contract then in suit was obtained by misrepresentation, and was therefore void, and that no valid claim could arise therefrom.

Neither the Deposit Company, trustee, nor the Trust Company was a party to the contract sued upon in this action, and neither is fixed with any knowledge, actual or constructive, of said contract at the time the deed of trust under which they claim became effective.

Upon the facts found, to which no objections were lodged, we concur in his Honor's holding (Conclusion of Law No. 2) that the plaintiffs are not entitled to a decree of specific performance against the Deposit Company, trustee, and the Trust Company.

Upon the appeal of the plaintiffs the judgment of the Superior Court is affirmed.

Affirmed on both appeals.

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

ARMOUR FERTILIZER WORKS v. H. D. NEWBERN, DEFENDANT, AND S. C. NEWBERN AND P. W. McMULLAN, INTERVENERS.

(Filed 29 April, 1936.)

1. **Parties A a—Where plaintiff assigns any recovery he may have, assignees are proper but not necessary parties to the action.**

Where a plaintiff assigns any recovery he may obtain against defendant to third persons, such third persons, upon becoming assignees, are proper but not necessary parties to the action, and plaintiff may prosecute same after the assignment in behalf of his assignees in the absence of objection by the defendant.

2. **Execution J b—Judgment debtor held to have assigned rights before institution of supplemental proceedings, and judgment creditor was not entitled to attach same as against assignee.**

After return of execution against defendant unsatisfied, plaintiff instituted supplemental proceedings against defendant and obtained an order that defendant and his debtor, against whom defendant had instituted suit, appear before the clerk, and that defendant be enjoined from transferring or assigning the debt. Upon the hearing of the supplemental proceedings it appeared that prior to the institution of the proceedings, defendant had verbally agreed to assign part of the recovery for money borrowed, and that while the action was pending defendant had executed a written assignment in conformity to the verbal agreement, and that upon defendant's recovery of judgment against his debtor after the institution of the supplemental proceedings, the judgment was assigned on the judgment docket in accordance with defendant's agreements with his assignee. *Held:* At the time of the rendition of the judgment the assignee was the equitable owner of the stipulated part thereof, and defendant had no legal or equitable interest in such part, and plaintiff is not entitled to attach such part in the supplemental proceedings instituted by it against defendant. C. S., 711, *et seq.* The balance of the judgment had been paid to another to whom defendant had executed a like assignment prior to the institution of the supplemental proceedings and such payment had been credited on the judgment docket.

3. **Judgments P a—Assignees of plaintiff are entitled to assignment of judgment upon its rendition.**

Where plaintiff, while the action is pending, assigns any recovery he may obtain against defendant to third persons for a valuable consideration, such third persons at the time of the rendition of the judgment are the equitable owners thereof and entitled to the assignment of the judgment upon the judgment docket, plaintiff having no legal or equitable interest therein.

DEVIN, J., dissents.

APPEAL by plaintiff from *Cranmer, J.*, at April-May Term, 1935, of CURRITUCK. Affirmed.

This action was begun in the Superior Court of Pasquotank County, by summons dated 28 September, 1928.

On 17 May, 1929, judgment was rendered in the action that plaintiff recover of the defendant H. D. Newbern the sum of $12,867.09, with interest and costs. This judgment was duly docketed in the office of the clerk of the Superior Court of Pasquotank. Thereafter, to wit: On 25 May, 1929, a transcript of said judgment was duly docketed in the office of the clerk of the Superior Court of Currituck County. The defendant H. D. Newbern was then and is now a resident of Currituck County.

On 2 July, 1931, an execution was issued on said judgment by the clerk of the Superior Court of Pasquotank County directed to the sheriff of Currituck County. This execution was thereafter duly returned, with endorsement as follows: "Issued July 2, 1931. Received July 8, 1931. Served on the 13th day of July, 1931, by reading to defendant H. D. Newbern. Said execution is returned to the court unsatisfied. No property of the defendant to be found in my county. H. F. Forbes, Sheriff Currituck County."

Thereafter, on 6 January, 1932, supplemental proceedings in execution were instituted by an affidavit filed in the action on behalf of the plaintiff. It appeared from said affidavit that W. A. Brock, a resident of Pasquotank County, was then indebted to the defendant H. D. Newbern in a sum in excess of $10.00, and that the amount of said indebtedness should be applied as a payment on the judgment in this action in favor of the plaintiff and against the defendant H. D. Newbern. On the facts alleged in said affidavit, it was ordered by the clerk of the Superior Court of Pasquotank County (1) that the defendant H. D. Newbern be and appear before the clerk of the Superior Court of Currituck County, at his office in the courthouse in said county, on 20 January, 1932, then and there to be examined by the plaintiff with respect to the indebtedness of W. A. Brock to him; (2) that the said W. A. Brock be and appear before the clerk of the Superior Court of Pasquotank County, at his office in the courthouse in said county, on 21 January, 1932, then and there to be examined by the plaintiff with respect to his indebtedness to the defendant H. D. Newbern; and (3) that, until the further orders of the court, the said H. D. Newbern be enjoined from transferring or assigning any indebtedness of W. A. Brock to him, and that the said W. A. Brock be enjoined from paying any amount due by him to the defendant H. D. Newbern to the said defendant, or to anyone for him. The affidavit and order of the clerk of the Superior Court of Pasquotank County were duly served on both the defendant H. D. Newbern and the said W. A. Brock, on 8 January, 1932.

At a hearing of the said supplementary proceedings in execution, by the clerk of the Superior Court of Pasquotank County, on 22 June, 1932, on the facts disclosed by the examination of the defendant H. D. Newbern, and by the examination of the said W. A. Brock, the plaintiff moved that a certain judgment in favor of the said H. D. Newbern and against the said W. A. Brock for the sum of $3,795.24, with interest and costs, docketed in the office of the clerk of the Superior Court of Currituck County, on 21 May, 1932, be condemned as a payment on the judgment in this action in favor of the plaintiff and against the defendant H. D. Newbern for the sum of $12,867.09, with interest and costs, and that the said W. A. Brock be ordered and directed by the court to pay the amount due on said judgment to the plaintiff in partial satisfaction of the judgment in this action. This motion was denied by the clerk, and the plaintiff appealed to the judge of the Superior Court of Pasquotank County.

On 20 March, 1933, pursuant to an order made in said supplemental proceedings in execution by the judge of the Superior Court of Pasquotank County, S. C. Newbern and P. W. McMullan intervened in said proceedings and filed their complaint, in which they alleged that by virtue of certain assignments made to them by H. D. Newbern they are the owners of the judgment docketed in the office of the clerk of the Superior Court of Currituck County, in favor of the said H. D. Newbern and against the said W. A. Brock, for the sum of $3,795.24, with interest and costs, and prayed the court to so adjudge. The plaintiff filed an answer to said complaint, in which it denied that the interveners are the owners of said judgment as alleged in their complaint.

Thereafter, by consent of the parties, the said supplemental proceedings in execution were heard at April-May Term, 1935, of the Superior Court of Currituck County, on an agreed statement of facts. These facts are as follows:

1. On 21 September, 1921, H. D. Newbern instituted an action in the Superior Court of Currituck County against W. A. Brock, to recover certain sums of money which he alleged in his complaint were due him by the said W. A. Brock by reason of certain contracts alleged in his complaint. In his answer, the said W. A. Brock denied the allegations of the complaint, and set up a counterclaim. The action was referred by consent to a referee for trial. On ...... December, 1931, the referee filed his report. On the facts found by him, the referee concluded that the plaintiff in said action, H. D. Newbern, was entitled to recover of the defendant W. A. Brock on the causes of action alleged in the complaint the sum of approximately $5,500, and that the defendant in said action, W. A. Brock, was entitled to recover of the plaintiff H. D. Newbern on his counterclaim the sum of approximately $1,700. The referee

recommended that judgment be rendered by the court that the plaintiff H. D. Newbern recover of the defendant W. A. Brock the sum of $3,795.24, with interest from 23 October, 1919, and the costs of the action.

After the report of the referee was filed, to wit: On 16 April, 1932, the plaintiff H. D. Newbern filed exceptions to said report, and agreed that the defendant W. A. Brock might have further time within which to file his exceptions. On 12 May, 1932, by agreement between the parties, the plaintiff withdrew his exceptions to the report of the referee, and the defendant abandoned his right to file exceptions. Thereupon, by consent, judgment was rendered in said action by the Superior Court of Currituck County in accordance with the recommendation of the referee. This judgment was docketed in the office of the clerk of the Superior Court of Currituck County on 21 May, 1932.

2. While the action entitled "H. D. Newbern *v.* W. A. Brock" was pending before the referee for trial, to wit: On 25 May, 1931, H. D. Newbern, the plaintiff in said action, executed a paper writing which is in words and figures as follows:

"NORTH CAROLINA—CURRITUCK COUNTY.
IN THE SUPERIOR COURT.

"H. D. Newbern *v.* W. A. Brock.

"For value received, I hereby transfer, assign and set over to P. W. McMullan one-fourth (25%) of all recoveries made and had in the above case.

"For value received, I further transfer, assign and set over to said P. W. McMullan the sum of three hundred dollars ($300.00) from and out of the remaining three-fourths (75%) of the recoveries made and had in the above action.

"And I hereby expressly authorize the said P. W. McMullan to retain from and out of any recoveries of collections made or had as the result of final judgment or settlement of the above action, the amounts and sums hereinbefore so assigned to him.

"Subject to the foregoing assignment to the said P. W. McMullan, after the percentage and the amount heretofore assigned to him have been deducted, for value received, I further transfer, assign and set over to S. C. Newbern the rest and residue of all sums recovered in the foregoing action—being the balance of said recovery after the percentage and amount assigned to said McMullan have been paid in full.

"Witness my hand and seal, this 25th day of May, 1931.

H. D. NEWBERN. (Seal.)"

The said paper writing was on the day of its execution delivered to P. W. McMullan, one of the assignees named therein, who at the time received and agreed to hold the same, for the benefit of himself and S. C. Newbern, as therein set out. The paper writing was recorded in Currituck County on 5 November, 1934.

3. On 20 June, 1932, H. D. Newbern executed a paper writing which is in words and figures as follows:

"ASSIGNMENT OF JUDGMENT.

"NORTH CAROLINA—CURRITUCK COUNTY.
IN THE SUPERIOR COURT.

"H. D. Newbern *v.* W. A. Brock.

"Pursuant to a written agreement made on 25 May, 1931, and to an oral agreement to the same effect entered into theretofore, and for value received, I have this day transferred, assigned and set over the principal and interest of the judgment in the above entitled case, rendered by the Hon. G. V. Cowper, judge presiding, on 12 May, 1932, as follows:

"One-fourth (25%) thereof to P. W. McMullan; $300.00 of the remaining three-fourths (75%) thereof to P. W. McMullan; and the residue, after the percentage and amount heretofore assigned to the said P. W. McMullan have been deducted, to S. C. Newbern.

"Witness my hand and seal, this 20th day of June, 1932.

H. D. NEWBERN. (Seal.)"

"Attest: W. D. Cox."

The said paper writing was, on the day of its execution, attached to the page in the judgment docket in Currituck County, opposite the page whereon the judgment in the case of "H. D. Newbern *v.* W. A. Brock" is docketed, same being the page upon which an assignment of said judgment was and is required to be recorded or docketed, if required to be recorded or docketed at all.

4. The paper writings set out in paragraphs 2 and 3, *supra,* were executed pursuant to certain oral agreements between H. D. Newbern of the one part and P. W. McMullan and S. C. Newbern of the other part, under the terms of which, at the time of the institution of the action of "H. D. Newbern *v.* W. A. Brock," the said H. D. Newbern agreed to assign and pay over to the said P. W. McMullan, as compensation for legal services to be rendered by the latter in said action, 25% of all sums recovered, and further agreed to pay the said P. W. McMullan an additional sum of $300.00 in settlement of amounts due for legal services theretofore performed in other matters; and under the terms of

which said agreements, further, the said H. D. Newbern, on .... December, 1927, in consideration of money loaned and for the purpose of obtaining and securing said loan or loans, agreed to assign and pay over to S. C. Newbern all amounts recovered in said action, after the percentage and other amounts to be paid to the said P. W. McMullan had been deducted, and further agreed, subject to the same deduction, to assign to the said S. C. Newbern the judgment recovered by him in the said action of "H. D. Newbern *v.* W. A. Brock," if and when such judgment should be recovered; and that at the time of the execution of said two paper writings, and each of them, and at all times subsequent to the said oral agreement between the said H. D. Newbern and S. C. Newbern there was due from the former to the latter, by reason and virtue of the loan or loans aforesaid, a sum in excess of the amount of the judgment obtained by the plaintiff in the said suit of "Newbern *v.* Brock," after deducting the amount assigned to the said P. W. McMullan, which has been paid in full.

On the foregoing facts, it was considered, ordered, and adjudged by the court that, subject to the sums paid thereon to P. W. McMullan and duly credited on said judgment, the intervener, S. C. Newbern, is the owner of the judgment for $3,795.24, with interest and costs, rendered in the action entitled "H. D. Newbern *v.* W. A. Brock," and duly docketed in the office of the clerk of the Superior Court of Currituck County, on 21 May, 1932. It is further ordered that the intervener, S. C. Newbern, recover of the plaintiff his costs in this proceeding.

The plaintiff excepted to the judgment and appealed to the Supreme Court, assigning error in the judgment.

John H. Hall for plaintiff.
McMullan & McMullan for intervener.

CONNOR, J. On 6 January, 1932, supplemental proceedings in execution, as authorized by statute, C. S., 711, *et seq.*, were instituted by the plaintiff in this action for the purpose of procuring an order of the court that the indebtedness of W. A. Brock to the defendant H. D. Newbern, then existing, if any, be applied as a payment on the judgment which the plaintiff had theretofore recovered against the defendant, and which had not been paid or satisfied. At that date an action which had been instituted in the Superior Court of Currituck County by the defendant H. D. Newbern against W. A. Brock was pending in said court on the report of a referee to whom the action had been referred by consent for trial. On the facts found by him and set out in his report, the referee recommended that judgment be rendered by the court that H. D. Newbern, the plaintiff therein, recover of the defendant W. A. Brock the sum of

$3,795.24, with interest and costs. On 12 May, 1932, by consent of the parties to said action, exceptions theretofore filed by the plaintiff therein to the referee's report were withdrawn, and judgment was rendered in said action in accordance with the report of the referee. This judgment was docketed in the office of the clerk of the Superior Court of Currituck County on 21 May, 1932.

At the date of the institution of the action entitled "H. D. Newbern *v.* W. A. Brock" in the Superior Court of Currituck County, the plaintiff therein agreed to assign to P. W. McMullan, his counsel in said action, as compensation for his professional services, one-fourth (25%) of the recovery in said action, and the further sum of three hundred dollars ($300.00), to be deducted from the remaining three-fourths (75%) of the recovery, in payment of professional services theretofore rendered to him by the said P. W. McMullan in other matters. Thereafter, while the action was pending for trial before the referee, the plaintiff executed and delivered to the said P. W. McMullan the paper writing dated 25 May, 1931, and subsequently, after judgment had been rendered in the action on the report of the referee, executed and delivered to the said P. W. McMullan the paper writing dated 20 June, 1932. Since the institution of the supplemental proceedings in execution in this action, the sums due to P. W. McMullan under the agreements, both oral and written, have been paid to him and have been duly credited as payments on the judgment in favor of H. D. Newbern and against W. A. Brock. For that reason, the intervener, P. W. McMullan, has no interest in the matters involved in this appeal.

Some time during the month of December, 1927, prior to the commencement of this action, while the action instituted by him in the Superior Court of Currituck County against W. A. Brock was pending before the referee for trial, H. D. Newbern, the plaintiff therein, in consideration of a loan or of loans of money made to him by S. C. Newbern, and as security for the payment of said money, agreed to assign to the said S. C. Newbern all sums recovered by him in said action, after the payment to P. W. McMullan of the amounts due him out of said sums by virtue of the agreement theretofore entered into by and between the plaintiff and the said P. W. McMullan. Thereafter, the said H. D. Newbern executed and delivered to P. W. McMullan the paper writings dated 25 May, 1931, and 20 June, 1932. Both said paper writings were delivered to and received by the said P. W. McMullan for the benefit of himself and of the said S. C. Newbern.

Conceding that the paper writing dated 20 June, 1932, having been executed and delivered subsequent to the institution of the supplementary proceedings in execution in this action, is not sufficient alone to sustain the contention of the intervener, S. C. Newbern, that he is the owner,

as assignee, of the judgment docketed in the office of the clerk of the Superior Court of Currituck County on 21 May, 1932, as against the plaintiff in this action, the question of law presented by this appeal is whether the oral agreement entered into by and between H. D. Newbern and S. C. Newbern in December, 1927, and the paper writing executed by the said H. D. Newbern and delivered by him to P. W. McMullan for the benefit of the said S. C. Newbern, on 25 May, 1931, were sufficient for that purpose.

The validity of the judgment rendered by the Superior Court of Currituck County in the action entitled "H. D. Newbern *v.* W. A. Brock" cannot be challenged by the plaintiff in this action on the ground that if the interveners in this action, P. W. McMullan and S. C. Newbern, became the assignees of the causes of action on which the judgment was rendered, by virtue of the agreements, both oral and written, as found by the court, they were necessary parties to the action, after they became such assignees. As assignees of the causes of action alleged in the complaint, they were proper but not necessary parties to the action. The right of H. D. Newbern, who had instituted the action in his own behalf, to prosecute the same, after the assignment, in behalf of his assignees, in the absence of objection by the defendant in the action, was not affected by the assignment. See *Chatham v. Realty Co.,* 180 N. C., 500, 105 S. E., 329, and *Valentine v. Holloman,* 63 N. C., 476.

In the instant case, by virtue of the oral agreement entered into by and between the defendant H. D. Newbern and the intervener S. C. Newbern, during the month of December, 1927, and of the paper writing executed by the defendant H. D. Newbern on 25 May, 1931, the intervener S. C. Newbern became the equitable owner at least of all sums which the said H. D. Newbern should thereafter recover of W. A. Brock in the action then pending in the Superior Court of Currituck, subject to the rights of P. W. McMullan under his agreement with the defendant H. D. Newbern and under the paper writing dated 25 May, 1931. When the judgment was recovered in said action on 12 May, 1932, the said S. C. Newbern became the owner of said judgment, subject to the rights of P. W. McMullan, and was entitled to a legal assignment of the same. In recognition of this right, the defendant H. D. Newbern, who then had no interest, legal or equitable, in said judgment, executed the paper writing dated 20 June, 1932.

In *Godwin v. Bank,* 145 N. C., 320, 59 S. E., 154, the following statement of the principle applicable to the facts in this case is quoted with approval from the opinion of *Story, J.,* in *Mitchell v. Winslow,* 2 Story, 630: "It seems to me a clear result of all the authorities that wherever the parties, by their contract, intend to create a positive lien or charge, either upon real or personal property, whether then owned by the

assignor or contractor or not, or if personal property, whether it is *in esse* or not, it attaches in equity as a lien or charge upon the particular property as soon as the assignor or contractor acquires a title thereto against the latter, and all persons asserting a claim thereto under him, either voluntary or with notice or in bankruptcy."

The judgment in this action is supported by this principle, and is, accordingly,

Affirmed.

DEVIN, J., dissents.

VERA SPARROW ROBERTS, ADMINISTRATRIX OF D. I. ROBERTS, DECEASED, ET AL., v. CITY ICE AND COAL COMPANY, EMPLOYER; NORTHWESTERN CASUALTY AND SURETY COMPANY, AND UNION INDEMNITY COMPANY, CARRIERS.

(Filed 29 April, 1936.)

1. Master and Servant F a—Employer is liable for award upon default of insurance carrier because of insolvency.

An award was entered in favor of the dependents of a deceased employee for payment of compensation in weekly installments for the death of the employee. After the insurance carrier had paid several installments, it defaulted in the payment of the balance of the installments because of insolvency. *Held:* Under the provisions of the Compensation Act the employer is primarily liable to the employee, which obligation is unimpaired by its contract with an insurer for insurance protection, or by the insurer's subrogation to the rights of the employer upon paying or assuming the payment of an award, and the employer is not relieved of its liability to the dependents of the deceased employee for the balance of the weekly payments because of the insolvency of the insurer.

2. Same—

The Workmen's Compensation Act must be construed with reference to its primary purpose to provide compensation for injured employees and dependents of deceased employees.

3. Same—Where insurer recovers from third person and then defaults in paying award, employer is liable for balance of award.

The dependents of a deceased employee elected to pursue their remedy under the Compensation Act, and recovered compensation payable in weekly installments. Thereafter, the insurer, upon assuming liability under the award, instituted suit in the name of the administratrix of the deceased employee against the third person tort-feasor and recovered judgment. Insurer retained an amount sufficient to compensate it for the award and paid the excess to the employee's widow under order of the Industrial Commission. Thereafter, the insurer became insolvent and for that reason was unable to pay the balance of the award. *Held:* The administratrix was only a nominal party to the suit against the third person tort-

feasor and had no control over the recovery and could not safeguard it for the purpose of paying the award, and the employer, who selected the insurance carrier for his own protection, is not relieved of his primary obligation to the dependents of the employee by reason of the insurer's recovery from the third person and default in payment because of insolvency, nor does the fact that the employer had no notice of the suit by the insurer against the third person alter this result, the insurer and the employer having a community of interest, and the failure of the insurer to notify the employer not being chargeable to the dependents of the deceased employee.

4. **Master and Servant F h—Award may not be reduced, but may be enlarged by subsequent suit by employer or insurer against tort-feasor.**

After assuming liability for an award to the dependents of a deceased employee, the insurer brought suit against the third person tort-feasor and recovered judgment in excess of the amount necessary to compensate it for the award, which excess was paid to the dependents of the employee under orders of the Industrial Commission. Thereafter the insurer became insolvent and defaulted in payment of the balance of the award. *Held:* The employer, held liable for the balance of the award, is not entitled to a credit for the amount paid the dependents out of the judgment against the third person tort-feasor or for the amount paid plaintiff's attorneys in that action, the amount paid the dependents out of the judgment being an amount in addition to the award, and the award not being subject to reduction by such amount.

STACY, C. J., dissents.

APPEAL by defendant Ice and Coal Company from *Barnhill, J.,* at January Term, 1936, of WAKE. Affirmed.

This case arose under the act known as the North Carolina Workmen's Compensation Act. The facts as they appear from the findings and opinion of the North Carolina Industrial Commission are substantially these:

D. I. Roberts, an employee of defendant Ice Company, was accidentally killed while in the service of the Ice Company, as result of coming in contact with live tension wires of the Carolina Power and Light Company. Defendant Ice Company was insured against liability by the Northwestern Casualty and Surety Company, whose business was afterwards taken over by the New York Indemnity Company, and the liability of the latter was afterwards assumed by Union Indemnity Company. The New York Indemnity Company was represented by Thomas Creekmore, attorney of Raleigh. On 29 May, 1930, an award was made by the North Carolina Industrial Commission against the Ice Company and its insurance carrier for the payment of compensation to the plaintiff widow and four infant children at the rate of $15.72 per week for 350 weeks, plus $200.00 burial expenses. On 22 November, 1930, the New York Indemnity Company, through its attorneys,

Thomas Creekmore and Murray Allen, gave notice to the Carolina Power and Light Company that the award had been made, and that under the subrogation provision of the Workmen's Compensation Act it had elected to institute suit in the name of the plaintiff Vera Sparrow Roberts, administratrix of D. I. Roberts, against Carolina Power and Light Company for the purpose of recovering damages for the death of D. I. Roberts. Suit in the name of plaintiff administratrix against Carolina Power and Light Company was accordingly instituted, and resulted in a consent judgment and recovery of $7,250. Judgment was consented to by plaintiff's attorney, J. C. Ray, and by Messrs. Creekmore and Allen, attorneys for New York Indemnity Company, and was approved by the North Carolina Industrial Commission. The Carolina Power and Light Company paid the judgment by check payable to the clerk of the Superior Court of Wake County, and the check was endorsed by the clerk to the order of Thos. Creekmore, appearing as counsel for plaintiff in that suit. The New York Indemnity Company, or its successor, Union Indemnity Company, under the order of the Industrial Commission, paid to the plaintiff $866.74, the excess over the amount due under the award, and paid $250.00 to her attorney, and retained the remainder for the reimbursement of itself for amounts paid and to be paid under the award.

The New York Indemnity Company or Union Indemnity Company (which had assumed the liability of the former) continued to make payments to plaintiff on behalf of herself and her infant children in accordance with the award until December, 1932, at which time the Union Indemnity Company went into receivership. At that time there was a balance due under the award of $3,348.36, or payments for 203 weeks. No additional payments have since been made. No notice of the suit nor of the settlement with the Carolina Power and Light Company was given the Ice Company.

After the discontinuance of payments the plaintiff, on behalf of herself and children, brought the matter to the attention of the Industrial Commission, and an order was made by the Commission holding that the defendant Ice Company, the employer, was liable under the original award, and that it was entitled to credit thereon only for compensation which had been actually paid and for funeral expenses paid.

In the findings and opinion of the North Carolina Industrial Commission the following portions of the Workmen's Compensation Act are quoted:

"Any amount collected by the employer under the provisions of this section in excess of the amount paid by the employer, or for which he is liable, shall be held by the employer for the benefit of the injured employee or other persons entitled thereto, less such amounts as are paid

by the employer for reasonable expenses and attorneys' fee when approved by the Commission."

"When any employer is insured against liability for compensation with any insurance carrier, and such insurance carrier shall have paid any compensation for which the employer is liable, or shall have assumed the liability of the employer therefor, it shall be subrogated to all the rights and duties of the employer, and may enforce any such rights in its own name or in the name of the injured employee or his personal representatives: *Provided, however,* nothing herein shall be construed as conferring upon the insurance carriers any other or further rights than those existing in the employer at the time of the injury to his employee, anything in the policy of insurance to the contrary notwithstanding."

Section 67 reads in part: "Every employer who accepts the provisions of this act relative to the payment of compensation shall insure and keep insured his liability thereunder, or shall furnish to the Industrial Commission satisfactory proof of his financial ability to pay direct the compensation in the amount and manner and when due, as provided for in this act."

Section 68-b reads in part: "Any employer required to secure the payment of compensation under this act, who refuses or neglects to secure such compensation shall be punished by a fine of ten cents for each employee at the time of the insurance becoming due, but not less than one dollar nor more than fifty dollars for each day of such refusal or neglect, and until the same ceases; and he shall be liable during continuance of such refusal or neglect to an employee either for compensation under this act or at law in the same manner as provided in section 15."

From the order of the North Carolina Industrial Commission holding the employer liable under the original award, the defendant Ice Company appealed to the Superior Court, and from judgment of the Superior Court affirming the findings and order of the Industrial Commission, defendant appealed to this Court.

Bonner D. Sawyer for plaintiff.

J. C. Little and Morehead & Murdock for City Ice and Fuel Company, appellant.

DEVIN, J. Two questions are presented here:

(1) Was the employer, under the Workmen's Compensation Act, relieved of liability for the payment of the balance of an award for the benefit of the widow and children of the employee by reason of the insolvency of the insurance carrier?

(2) Under these circumstances, was the employer discharged of liability by reason of the fact that the insurance carrier brought suit in the name of the administratrix of the employee against a third party and recovered an amount sufficient to pay the award in full, which amount the insurance carrier received and was thereafter unable to pay by reason of insolvency?

Standing alone, the proposition that the employer under the Workmen's Compensation Act should be relieved of liability for the compensation to his injured employee by reason of the insolvency of his insurance carrier would present no serious difficulty. The liability of the employer under the award is primary. He, by contract, may secure liability insurance for his protection, but his obligation to the injured employee is unimpaired. As was said in *C. & O. R. R. v. Palmer,* 140 S. E. (Va.), 831: "Into the construction of every act must be read the purpose of the Legislature, and the underlying purpose in this instance (Workmen's Compensation Act) was to give relief to workmen. This relief in the nature of things had to be charged against the employer."

The primary consideration is compensation for injured employees. In the words of *Brogden, J.,* in *Hodges v. Mortgage Co.,* 201 N. C., 701, "The title and theory of the act import the idea of compensation for workmen and their dependents."

The statute requires the employer to insure and keep insured his liability or furnish proof of his own ability to pay the compensation. It is further provided that insolvency of the employer shall not relieve the insurer, and manifestly the insolvency of the insurer should not relieve the insured, nothing else appearing. The obligation of the insurance company is to insure the employer against liability under the act, and while the statute gives to insurer the right of subrogation, that is for the benefit of the insurer and not intended to impair the right of the injured workman to compensation from the insured employer.

But here the defendant Ice Company, the employer, contends that where the insurance carrier, after paying a part of the award, brings a suit in the name of the injured employee against a third party and recovers and receives an amount in excess of the award, and, after paying such excess to the employee, appropriates the remainder to itself to reimburse itself for payments made and to be made, and then becomes insolvent, a different question is presented. It is contended that since the plaintiff, administratrix of deceased employee, was party to the suit against the tort-feasor, the Carolina Power and Light Company, even though she was merely a nominal party, and received part of the recovery, to wit, the excess over the amount of the award, she was in position to have required that the fund be retained within the jurisdiction of the court or the Commission, and having failed to take steps to safeguard

the fund which should have been held in trust to secure the payment of the award to her, and thus prevent the resulting loss, the employer is thereby relieved and discharged of its obligation to make the payments as to which the insurance carrier is in default and cannot now respond; that, having no notice of the suit, it had no opportunity to protect itself.

The facts, however, set out in the findings and opinion of the Industrial Commission, which by agreement constitute the case before us, and the principles of law deducible therefrom, do not sustain these contentions. The plaintiff Vera Sparrow Roberts, as administratrix of her deceased husband, the employee, was only a nominal party to the suit against the Carolina Power and Light Company. She had no control over it. At the outset the law gave her the election to pursue her remedy under the act, or against the Carolina Power and Light Company. Her election of the former precluded the latter. But the statute gave the employer the right to sue in her name for reimbursement from the third party, and by subrogation the same right, no more, no less, was given to the insurance carrier when it paid the compensation or assumed liability therefor.

"For the protection of the employer and for the proper distribution of the recovery, it (the Act) provided that one action should be brought, and that by the employer. All this was for his benefit." *C. & O. R. R. v. Palmer, supra.*

In *Brown v. R. R.*, 202 N. C., 256, opinion by *Connor, J.*, we find this language: "The action is prosecuted, not in behalf of the injured employee, but in behalf, primarily, of the employer or the insurance carrier. The amount recovered is applied first to reimbursement of the employer or the insurance carrier for such sums as may have been paid by either of them to the employee. Only the excess, if any, is payable to the injured employee."

Indeed, the injured employee, to whom an award has been made, is not the real party in interest. *McCarley v. Council,* 205 N. C., 370.

In the instant case formal notice was given the Power Company that the suit against it was being prosecuted by the New York Indemnity Company, in the name of plaintiff administratrix, by its attorneys, Messrs. Creekmore and Allen. The recovery was turned over by the clerk of the Superior Court of Wake County, where the case was tried, to Mr. Creekmore, who was attorney for the Indemnity Company. The fund was disbursed by the Indemnity Company pursuant to order of the Industrial Commission by paying the plaintiff the excess of the recovery over the award, less certain expenses, and permitting the insurer to retain the remainder for the reimbursement of itself for payments made and to be made. The plaintiff had no control over the disposition of the fund. This was 9 May, 1932, and in December, 1932, the Union

Indemnity Company, which had assumed the liability of the New York Indemnity Company, went into receivership, leaving unpaid a balance due under the award to the plaintiff.

It would seem, looking back on it now, that if the fund had been secured, or retained within the jurisdiction of the court, or had the Indemnity Company been required presently to pay the entire balance of the award, this unfortunate situation would probably not have arisen. A loss has been occasioned by the insolvency of the Indemnity Company.

But to hold that the plaintiff widow and her infant children, the beneficiaries, should suffer for the failure to safeguard the fund in the hands of the insurance carrier which had been selected by the employer, and to provide against the carrier's subsequent default, would seem to require of her greater foresight and care than was exercised by the Commission and the careful attorneys appearing in the case, and would tend to defeat the primary object of the Act, to wit, to provide for the widow and children of an employee who was killed while in discharge of his duty to his employer.

Neither the employee nor this plaintiff had any voice in the selection of the insurance carrier chosen by the defendant Ice Company. The plaintiff was not in law charged with responsibility for its solvency. She had no knowledge of nor right to interfere with or question the successive changes in the identity of the defendant's insurance carriers. She had a right to rely on the employer's care for his own protection in the selection of solvent insurers.

In the matter of the original award the defense was handled by the employer's insurance carrier by its attorney, Mr. Creekmore, who also prosecuted the suit against the third party and for it received the recovery, nominally acting for the plaintiff, but in reality the attorney of the New York Indemnity Company. The employer under the law had the right at the outset to institute suit in the name of the plaintiff against the Carolina Power and Light Company if it had seen fit to do so, but was precluded from doing so after the Indemnity Company had brought the suit and occupied the Ice Company's shoes in that respect. It is found that the Ice Company had no notice of that suit. There being a community of interest between the insurer and insured, the failure of the one to inform the other of action taken with respect to a common interest should not be held to the discredit of the plaintiff, or prevent her from claiming the remainder of the award. The suit was prosecuted in the county where the employer was doing business, by its chosen insurance carrier. The plaintiff, the widow of the deceased employee, was at all times a resident of another county.

The defendant's contention that it should have credit for the "excess" received by the plaintiff cannot be sustained. There is nothing in the

statute to indicate an intent that the "excess" should go as a credit to the employer on his obligation to compensate the employee. It is an additional amount accruing for the benefit of the employee. And the same rule applies to the fee of plaintiff's attorney. The amount originally awarded may not be reduced, but may be enlarged by subsequent suit by the employer or insurance carrier against a tort-feasor. Nor is the right of the plaintiff affected by the insolvency of the insurance carrier.

The Industrial Commission carefully considered this case and reached a unanimous decision in favor of the plaintiff on the facts found. On appeal the able and careful judge of the Superior Court approved and affirmed that decision, and in this we find no error.

As the case is presented to this Court, we conclude that defendant City Ice and Coal Company is liable under the original award of the North Carolina Industrial Commission for the unpaid balance on the compensation to the plantiff Vera Sparrow Roberts, administratrix of D. I. Roberts, and her children.

Affirmed.

STACY, C. J., dissents.

O. A. EDWARDS AND C. H. HALL, ADMINISTRATORS OF JOHN R. PACE ESTATE, AND PATTIE PACE EDWARDS AND IRENE PACE HALL, v. J. B. PERRY.

(Filed 29 April, 1936.)

Trial C a—Allowing counsel to read from opinion of Supreme Court held error under the facts as tending to impeach party's own witness.

Plaintiffs introduced defendant as their own witness, and also introduced in evidence a receipt for money signed by defendant and the receipt book showing that the stub of the receipt had been torn out. Defendant as a witness did not deny that the amount had been received by him. Plaintiffs' counsel, in his argument to the jury, was allowed, over defendant's objection, to read the facts and law from an opinion of the Supreme Court to the effect that where a party failed to present evidence in his possession the law presumed that such evidence withheld was detrimental to such party, plaintiffs' counsel maintaining that the fact that the receipt stub had been torn out prior to the production of the receipt book upon plaintiffs' order for the production of records and documents, should be considered against defendant. *Held:* Under the facts and circumstances of this case allowing plaintiffs' counsel to read from the opinion of the Supreme Court tended to impeach and discredit the testimony of defendant in his testimony as plaintiffs' own witness, which constituted prejudicial and reversible error upon defendant's exception.

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

APPEAL by defendant from *Frizzelle, J.*, and a jury, at Second October Term, 1934, of WAKE. New trial.

The plaintiffs O. A. Edwards and C. H. Hall are the duly appointed and qualified administrators of the estate of John R. Pace, who died about 1 July, 1930. (Pattie Pace Edwards and Irene Pace Hall are the wives, respectively, of Edwards and Hall.) This action was brought by plaintiffs on 20 October, 1931, against the defendant for an accounting and settlement. John R. Pace was a farmer and defendant J. B. Perry a merchant, doing business at Youngsville, N. C. In plaintiffs' original complaint the gravaman was to recover $2,450.40, with interest from 27 September, 1930, on insurance collected by defendant from the Mutual Life Insurance Company of New York. The plaintiffs contended that the Mutual Life Insurance Company of New York had no right to pay this amount to defendant.

The plaintiffs' prayer is as follows: "(1) That they recover of the defendants, and each and either of them, the sum of $2,450.40, with interest from 27 September, 1930, until paid, subject to a credit for such amount, if any, as the court shall find due assignee. (2) For an accounting between plaintiffs and defendants, and a detailed statement of the account of John R. Pace claimed by defendant J. B. Perry. And for all such other and further relief as to the court may seem proper." In this action the insurance company was not made a party defendant.

In defendant's answer he admitted that he received this insurance money, but alleged that the policies were assigned to him for debts then existing and advancements to be made. That the premiums to the amount of $844.70 were paid on the policies by defendant and the sum has been properly applied on the indebtedness due by J. R. Pace to defendant.

In a further answer the defendant sets up the transaction in reference to the insurance policies and a counterclaim showing the dealings between J. R. Pace and defendant: "This defendant alleges that plaintiffs' intestate is now indebted to this defendant in the sum of $933.61, balance due on account of premiums paid $475.79, with interest on insurance policies and for goods, wares, and merchandise sold and delivered, and for $3,446.30 due on the notes secured by the deed of trust hereinbefore described. Wherefore, this defendant prays judgment: (1) For $933.61 due by account. (2) For $3,446.30 due by notes secured by deed of trust on lands in Franklin County. (3) That said sum of $3,446.30 is a lien on the land described in the deed of trust from J. R. Pace and wife to J. A. Williams, registered in the office of the register of deeds for Franklin County, in Book 193, page 241."

The plaintiffs made reply and denied that defendant paid the amount claimed on insurance premiums, or any other sum, except such sums as

were repaid to defendant by J. R. Pace. Plaintiffs denied defendant's counterclaim, and alleged that plaintiffs paid defendant all that was due him, and prays: "(1) That the defendant J. B. Perry recover nothing on his counterclaim. (2) That the defendant be required to render to plaintiffs a proper accounting for the money collected by him involved in this case. (3) That a proper accounting be had, and for judgment against the defendant J. B. Perry for such sum as the court shall find due plaintiffs by reason of overpayment on account and notes claimed by said defendant in addition to the $2,450.40 insurance money. (4) That the defendant be required to deliver up to plaintiffs all notes and mortgages held by him affecting plaintiffs' property."

Cranmer, J., on 18 April, 1933, signed a consent order referring the matter to R. N. Simms, Jr., "to take and state the account between the parties, and the said referee shall report his findings of facts and conclusions of law to the term of court beginning 22 May, 1933."

Thereafter, on 5 December, 1933, R. N. Simms, Jr., filed his report as referee. It contains 10 pages and seems to go carefully into every phase of the controversy. It gives in detail the account between J. B. Perry and J. R. Pace, and in the report is the following: "That, as is shown by the foregoing statement of the account, there is a balance in favor of the defendant Perry in the sum of $1,543.08. Upon the foregoing findings of fact and conclusions of law, the referee is of the opinion that judgment should be entered in this cause in favor of the defendant J. B. Perry and against the estate of John R. Pace for the sum of $1,543.08, with interest thereon from 20 November, 1933, until paid; and it should be provided that appropriate entries should be made upon the securities dealt with in this cause and affected by the said judgment. The referee files with the clerk of this court all the exhibits which were offered in evidence by the parties."

Both plaintiffs and defendant made certain exceptions to the referee's report. On 2 January, 1934, at the Special Term of the Superior Court of Wake County, the case came on for hearing on the exceptions. The court set forth certain issues for the jury to determine at a subsequent term. The matter was heard before Frizzelle, J., at November Term, 1934, of Wake Superior Court, and on the findings of the jury on the issues, the judgment in part is as follows: "It is, therefore, ordered, adjudged, and decreed that the plaintiffs have and recover of the defendant the sum of $5,137.02, with 6 per cent interest thereon from 30 November, 1933, until paid, together with the cost of this action; and it is further ordered that the defendant cancel the $850.00 note and the two $950.00 notes with the mortgages and deeds of trust securing the same, and deliver them to the plaintiffs, plaintiffs to pay balance due referees and stenographer under previous orders."

The plaintiffs introduced defendant as a witness, and the findings of the jury were based on defendant's testimony, books produced by him, etc. He testified to the transactions between Pace and himself during the long course of dealings. The record discloses: "The plaintiffs served notice upon the defendant to produce all day books, journals, ledgers, cash books, fertilizer books, receipt books, cotton weighers' certificates, and all other records in his possession containing accounts of J. R. Pace. . . . The defendant produced day books, journals, and ledgers containing account of J. R. Pace through July, 1924; also two receipt books and fertilizer books."

As plaintiffs' witness, the defendant, in giving in detail the various dealings over the years, testified: "This is a receipt for $400.00 that I gave J. R. Pace on 10 June, 1919. I don't know where I credited the $400.00. The duplicate receipt is not in the receipt book. I could not tell why the page was torn out. I gave Mr. Pace other receipts on that day. The $1,503.00 and the $400.00 were not given in payment of the $1,900 note. On 10 June, 1919, Mr. Pace owed me $172.54 on his merchandise account."

The defendant submitted several prayers for instruction, among them is the following: "That the plaintiffs made the defendant their witness and cannot impeach him or deny what he said. The only thing they can do is to show by other evidence that the facts were otherwise than as stated by their witness. There is no other evidence."

The record discloses: "The plaintiffs exhibited to the jury a receipt book produced by the defendant, from which the page containing the $400.00 duplicate receipt dated 10 June, 1919, had been torn out. The defendant objected on two grounds: (a) That the plaintiffs could not impeach their own witness; (b) that the plaintiffs had the original receipt and nothing the defendant could do to the stub could injure him. Objection overruled; defendant excepted and assigned error. The plaintiffs' attorney, in his argument to the jury, stated that defendant had failed to produce certain books and records for which demand had been made and read to the jury from the case of *Yarborough v. Hughes*, 139 N. C., 199, relative to the effect or failure to produce documents in one's control. Defendant objected and assigned error," and appealed to the Supreme Court.

E. D. Flowers and J. G. Mills for plaintiffs.
Gulley & Gulley for defendant.

CLARKSON, J. Prayer for instructions and exception and assignment of error were made by defendant to the fact that defendant was plaintiffs' witness, and the evidence was not sufficient to go to the jury on cer-

tain issues submitted. We will not go into this phase of the case, as the case goes back for a new trial.

Defendant excepted and assigned error as follows: "The plaintiffs' attorney, in his argument to the jury, stated that defendant had failed to produce certain books and records for which demand had been made, and read to the jury from the case of *Yarborough v. Hughes,* 139 N. C., 199, relative to the effect of failure to produce documents in one's control." We think this exception and assignment of error should be sustained.

In *Conn v. R. R.,* 201 N. C., 157 (160-1), *Brogden, J.,* says: "The third class of inhibitions denies to counsel the right to read the decisions of the Supreme Court of North Carolina where such reading would reasonably tend to prejudice either party upon the facts. *S. v. Corpening,* 157 N. C., 621; *Forbes v. Harrison,* 181 N. C., 461; *Elliott v. Power Co.,* 190 N. C., 62. Thus, in the *Corpening case, supra,* the Court said: 'As we understand the record, the counsel for the prosecution read the facts in *Malonee's case,* relied upon as supporting evidence to the prosecutrix, and over defendant's objection was allowed by the court to say in effect that a jury of Jackson County had convicted Malonee, and the supporting evidence was much stronger "than in *Malonee's case,"* etc. A new trial was awarded because the trial judge permitted such argument to be made. In the *Forbes case, supra,* counsel attempted to read a portion of the opinion in *Bell v. Harrison,* 179 N. C., 190, and upon objection by counsel for defendant the court declined to permit such reading, and this ruling was upheld. The court observed "that two cases grew out of said administration, and there was grave danger of prejudicing the defendants upon the facts as counsel was allowed to read the part of the opinion in the case proposed to be read by him." ' "

The plaintiffs cite the case of *Howard v. Telegraph Co.,* 170 N. C., 495 (497): "The court erred in refusing to permit the counsel to argue that the ruling in *Cashion v. Tel. Co.,* 123 N. C., 267, applied to this case. Revisal, 216, provides that in jury trials counsel may argue the law as well as the facts to the jury. This is entirely distinct from the instances in which the court has refused to permit counsel to read the facts in one case as evidence in another." This case is distinguishable from the *Conn case, supra,* and the present case.

The plaintiffs had the receipt for $400.00. The defendant was plaintiffs' witness and made no denial that the amount had been received by him. The reading of the facts in the *Yarborough case, supra,* and the law applicable to same, would undoubtedly prejudice the jury and throw suspicion and discredit on defendant's testimony, who was plaintiffs' own witness. For example, at pp. 208-9, the law applicable to the facts

in that case is thus stated: "It is the failure to introduce testimony, oral or written, which should be valuable to a party, that raises the inference against him that, if introduced, it would be detrimental to his case. The relevancy and weight of such a fact as evidence is established by one phase of the maxim *omnia præsumuntur contra spoliatorem,* which is said to rest upon logic, and the presumption it raises to be reinforced by our everyday experience that men do not as a rule withhold from a tribunal facts beneficial to themselves. It is therefore laid down in the books as a well settled principle that where a party fails to introduce in evidence documents that are relevant to the matter in question and within his control, and offers in lieu of their production secondary or other evidence of inferior value, there is a presumption, or at least an inference, that the evidence withheld, if forthcoming, would injure his case."

It will be seen that plaintiffs were attempting to impeach their own witness by reading the facts in the *Yarborough case, supra,* and the law applicable to the facts as above set forth, so as to cast suspicion and wrongdoing on defendant. The plaintiffs had the original receipt for the $400.00, and the fact that the stub showing this $400.00 receipt was torn out could in no wise injure plaintiffs. Reading the facts and the law in that case, under the facts and circumstances of this case, we think was prejudicial to defendant as the verdict of the jury indicated. The referee, from an elaborate finding of facts and conclusions of law, found that plaintiffs owed defendant $1,543.08. On the evidence of defendant, a witness for plaintiffs, the jury found that defendant owed plaintiffs $5,157.02. To say the least, it is an unusual verdict, and there was prejudicial error, as we have set forth.

For the reasons given, there must be a

New trial.

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

RICHMOND MORTGAGE AND LOAN CORPORATION v. WACHOVIA BANK AND TRUST COMPANY AND ALEXANDRA G. JOHNSON, EXECUTORS OF ROBERT P. JOHNSON, DECEASED.

(Filed 29 April, 1936.)

1. Mortgages H k—Where holder of notes bids in property at foreclosure under power of sale, deficiency judgment may be resisted upon showing that property was worth amount of debt at the time.

Where a mortgage or deed of trust is foreclosed under the power of sale contained in the instrument, and the holder of the notes secured thereby

bids in the property, directly or indirectly, for an amount less than the debt and sues to recover a deficiency judgment. *Held:* Under the provisions of sec. 3 of ch. 275, Public Laws of 1933, recovery is properly denied upon the finding of the jury that the property was worth the amount of the debt at the time and place of the sale. The statute applies only to foreclosures under powers of sale and not to actions to foreclose, and only to instances where the creditor bids in the property, directly or indirectly, and not to instances where the property is bid in by independent third persons.

2. **Constitutional Law E a—Statute regulating recovery of deficiency judgment held not to impair obligations of contract.**

Sec. 3 of ch. 275, Public Laws of 1933, providing that upon the purchase of the property at the foreclosure sale under the power contained in the instrument by the mortgagee, *cestui que trust*, or holder of the notes secured by the instrument, the mortgagor or trustor may resist recovery of a deficiency judgment by showing that at the time of the sale the property was worth the amount of the debt, is constitutional and valid and does not impair the obligations of contract, since the statute recognizes the obligation of the debtor to pay his debt and the right of the creditor to enforce payment by proceedings in accordance with the terms of the agreement, but provides merely for judicial supervision of sales under power to the end that the price bid at the sale shall not be conclusive as to the value of the property, and that the creditor may not recover any deficiency after applying the purchase price to the notes without first accounting for the fair value of the property in accordance with well settled principles of equity. Constitution of the United States, Art. I, sec. 10, 5th Amendment, 14th Amendment, sec. 1; Constitution of North Carolina, Art. I, secs. 7, 17, 35.

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

APPEAL by plaintiff from *Oglesby, J.*, at August Term, 1935, of BUNCOMBE. Affirmed.

This is an action to recover judgment for the amount due on certain notes which were executed by the defendants, and are now owned by the plaintiff.

The action was begun in the general county court of Buncombe County on 18 June, 1934. The facts admitted in the pleadings are as follows:

On 15 August, 1928, the defendants executed and delivered to the State-Planters Bank of Richmond, Virginia, their promissory notes aggregating in amount $8,000.00. The consideration for said notes was the sum of $8,000.00, which was loaned to the defendants by the State-Planters Bank on or about 15 August, 1928. The said notes, with interest at the rate of six per cent per annum from date, payable semi-annually, were due and payable from time to time until 15 August, 1933, when the last of said notes was due. At the date of the commencement of this action the plaintiff was the holder and owner of said notes.

Contemporaneously with the execution of said notes, and for the purpose of securing their payment, as they should severally become due, the defendants executed a deed of trust by which they conveyed to the trustees named therein a certain lot of land, together with the building located thereon, situate in the city of Asheville, Buncombe County, North Carolina. This deed of trust contained a power of sale by which, upon the default of the defendants in the payment of said notes as the same became due, and upon the request of the holder of said notes, the trustees were authorized and empowered to sell the lot of land described therein, and to apply the proceeds of the sale as a payment on said notes. The deed of trust was duly recorded in the office of the register of deeds of Buncombe County.

After they had paid the sum of $1,200.00 on the principal, and had also paid the interest which had accrued on said notes prior to 15 August, 1932, the defendants defaulted in the payment of principal and interest due at said date. Because of such default, and at the request of the plaintiff as the holder of said notes, the trustees named in the deed of trust, after fully complying with all its provisions, offered the lot of land described in the deed of trust for sale on 19 June, 1933. At said sale, the Madison Investment Company was the last and highest bidder for said lot of land in the sum of $3,000.00. This bid was not raised within ten days after the sale, and thereafter the trustees conveyed said lot of land to the Madison Investment Company, and applied the proceeds of the sale, to wit: The sum of $2,841.11, as a payment on the amount then due on said notes, to wit: The sum of $7,375.90, leaving the amount due on said notes at the date of the commencement of this action $4,534.79, with interest from 19 June, 1933.

On the facts admitted in the pleadings, the plaintiff demanded judgment that it recover of the defendants the sum of $4,534.79, with interest from 19 June, 1933, and the costs of the action.

In their answer, in defense of plaintiff's recovery in this action, the defendants alleged that as the result of the sale of the lot of land described in the deed of trust securing the payment of the notes sued on in this action, on 19 June, 1933, and of its subsequent conveyance by the trustees pursuant to said sale, the plaintiff has become the owner of said lot of land; that the amount bid for said lot of land on 19 June, 1933, to wit: The sum of $3,000.00, was not its fair value at said date; and that at said date, the said lot of land was fairly worth the amount then due to the plaintiff on said notes.

The defendants prayed judgment that the plaintiff recover nothing in this action, and that they recover of the plaintiff their costs incurred in the action.

At the trial, the plaintiff admitted that the Madison Investment Company purchased the lot or parcel of land described in the deed of trust for and on behalf of the plaintiff, and that the plaintiff was the holder and owner of the notes secured by said deed of trust at the date of the sale.

Issues submitted to the jury were answered as follows:

"1. What was the amount of the indebtedness secured by the deed of trust described in the complaint on 19 June, 1933?" Answer: "$7,375.90."

"2. Did the plaintiff, either directly or indirectly, become the purchaser of the property at the foreclosure sale?" Answer: "Yes."

"3. What was the property sold fairly worth at the time and place of the sale?" Answer: "$8,000.00."

"4. What amount was unpaid on the notes described in the complaint after all credits have been allowed immediately subsequent to the sale on 19 June, 1933?" Answer: "$4,534.79."

From judgment on the verdict that plaintiff recover nothing of the defendants, and that defendants recover of the plaintiff their costs, the plaintiff appealed to the Superior Court of Buncombe County, assigning errors in the trial and in the judgment.

At the hearing of its appeal, neither of plaintiff's assignments of error was sustained.

From judgment affirming the judgment of the general county court, the plaintiff appealed to the Supreme Court, assigning as errors the refusal of the judge of the Superior Court to sustain its assignments of error on its appeal from the judgment of the general county court.

Harkins, Van Winkle & Walton for plaintiff.
Parker, Bernard & DuBose for defendants.

CONNOR, J. Chapter 275, Public Laws of North Carolina, 1933, is entitled "An act to regulate the sale of real property upon the foreclosure of mortgages or deeds of trust." The Act was ratified on 18 April, 1933, and has been in full force and effect since said date. It applies only to a sale made by a mortgagee or trustee under a power of sale contained in a mortgage, deed of trust, or other instrument, securing the payment of money. It does not apply to a sale made under an order, judgment, or decree in an action to foreclose a mortgage or deed of trust, or similar instrument.

In sections 1 and 2 of the Act it is provided that where real property has been offered for sale by a mortgagee, or by a trustee under the power of sale contained in a mortgage or deed of trust, and the sum bid at such sale is inadequate, and for that reason the consummation of the sale

would be inequitable, because it would result in irreparable damage to the mortgagor or grantor in the deed of trust, or to any other person having a legal or equitable interest in the property, the mortgagor, or the grantor, or any other interested person, at any time before the consummation of the sale, may apply to a judge of the Superior Court for an order enjoining the consummation of the sale, and that in such case the judge of the Superior Court may enjoin the consummation of the sale, and may order a resale of the property by the mortgagee, by the trustee, or by a commissioner appointed by him for that purpose, upon such terms as he may deem just and equitable.

The validity of these sections of the statute was challenged in *Woltz v. Deposit Co.,* 206 N. C., 239, 173 S. E., 587. The challenge was not sustained. It was held by this Court that sections 1 and 2 of the statute are valid, and were applicable to the facts in that case. This decision was approved in *Hopkins v. Swain,* 206 N. C., 439, 174 S. E., 409, in *Miller v. Shore,* 206 N. C., 732, 175 S. E., 135, and in *Barringer v. Trust Co.,* 207 N. C., 505, 177 S. E., 795.

Speaking of sections 1 and 2 of the statute, it was said in *Woltz v. Deposit Co., supra:* "The statute does not violate any provision of the Constitution of the United States, or of the Constitution of the State of North Carolina, by which limitations are imposed upon the legislative power of the General Assembly of this State. It does not impair the obligation of the contract entered into by and between the parties to the mortgage or to the deed of trust; it does not deprive either party of property without due process of law; nor does it confer upon mortgagors or grantors in deeds of trust any exclusive privilege. The statute is remedial only, and is valid for the purpose. It is applicable to a sale made since its enactment, although the sale was made under a power of sale contained in a mortgage or deed of trust executed prior to its enactment."

In the instant case, the validity of section 3 of the statute is challenged by the appellant on the ground that its enactment by the General Assembly of this State was in violation of section 10 of Article I of the Constitution of the United States, of the Fifth Amendment, and of section 1 of the Fourteenth Amendment of said Constitution, and was also in violation of sections 7, 17, and 35 of Article I of the Constitution of the State of North Carolina, in that said section impairs the obligation of the contract entered into by and between the plaintiff and the defendant prior to its enactment.

Section 3 of chapter 275, Public Laws of North Carolina, 1933, is as follows: "Sec. 3. When any sale of real estate or personal property has been made by a mortgagee, trustee, or other person authorized to make the same, at which the mortgagee, payee, or other holder of the

obligation thereby secured becomes the purchaser and takes title either directly or indirectly, and thereafter such mortgagee, payee, or other holder of the secured obligation, as aforesaid, shall sue for and undertake to recover a deficiency judgment against the mortgagor, trustor, or other maker of any such obligation whose property has been so purchased, it shall be competent and lawful for the defendant against whom such deficiency judgment is sought to allege and show as a matter of defense and offset, but not by way of counterclaim, that the property sold was fairly worth the amount of the debt secured by it at the time and place of sale, or that the amount bid was substantially less than its true value, and upon such showing, to defeat or offset any deficiency judgment against him, either in whole or in part: *Provided,* this section shall not affect nor apply to the rights of other purchasers or of innocent purchasers, nor shall it be held to affect or defeat the negotiability of any note, bond, or other obligation secured by such mortgage, deed of trust, or other instrument: *Provided, further,* this section shall not apply to foreclosure sales made pursuant to an order or decree of court, nor to any judgment sought or rendered in any foreclosure suit, nor to any sale heretofore made and confirmed."

The statute recognizes the obligation of a debtor who has secured the payment of his debt by a mortgage or deed of trust to pay his debt in accordance with his contract, and does not impair such obligation. Nor does the statute hinder, delay, or defeat, in whole or in part, the right of the creditor to enforce such obligation by an action instituted by him against his debtor in a court of competent jurisdiction. There is nothing in the statute which prevents a recovery by the creditor in such action of a judgment for the amount due on the debt. The statute provides only that when the creditor has elected to become the purchaser of the property conveyed by the mortgage or deed of trust at a sale made under a power of sale contained in the mortgage or deed of trust, and thereafter, pursuant to such sale and purchase, acquires title to the property, he shall not recover judgment against his debtor for any deficiency, after the application of the amount of his bid as a payment on the debt, without first accounting to his debtor for the fair value of the property at the time and place of the sale, and that such value shall be determined by the court. In such case, the amount bid by the creditor at the sale, and applied by him as a payment on the debt, is not conclusive as to the value of the property.

We are of the opinion that the statute is valid, and so held.

The statute involved in this action is not "emergency legislation," nor is its purpose to provide a "moratorium" for debtors during a temporary period of depression. For this reason, the cases cited by appellant from other jurisdictions are not applicable in the instant case. The

statute recognizes the validity of powers of sale contained in mortgages or deeds of trust, but regulates the exercise of such powers by the application of well settled principles of equity. It does not impair the obligation of contracts, but provides for judicial supervision of sales made and conducted by creditors whose debts are secured by mortgages or deeds of trust, and thereby provides protection for debtors whose property has been sold and purchased by their creditors for a sum which was not a fair value of the property at the time of the sale. See *Better Plan Building & Loan Assn. v. Holden* (N. J.), 169 Atl., 289.

The statute is applicable in the instant case, and supports the judgment of the Superior Court. For that reason the judgment is

Affirmed.

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

TARBORO BUILDING AND LOAN ASSOCIATION v. L. F. BELL, ADMINISTRATOR C. T. A. OF W. L. BELL, DECEASED, AND OTHERS.

(Filed 29 April, 1936.)

APPEAL by plaintiff from *Moore, Special Judge,* at April Term, 1935, of EDGECOMBE. Affirmed.

This is an action to recover judgment for the amount due on a note executed by W. L. Bell, deceased, on 20 April, 1931, and payable to the plaintiff.

The note sued on was secured by a deed of trust executed by W. L. Bell, deceased. This deed of trust was foreclosed by a sale of the property described therein, under the power of sale contained in the deed of trust, on 22 June, 1933. The plaintiff was the purchaser at said sale and is now the owner of the property. The plaintiff has applied the amount of its bid at the sale as a payment on the note. The property described in the deed of trust and now owned by the plaintiff as the purchaser at the sale was fairly worth a sum in excess of the amount due on the note at the time of the sale.

From judgment that plaintiff recover nothing of the defendant, and that the defendant recover of the plaintiff his costs in the action, the plaintiff appealed to the Supreme Court, assigning error in the judgment.

H. H. Philips for plaintiff.
Gilliam & Bond for defendant.

CONNOR, J. The judgment in this action is affirmed on the authority of *Richmond Mortgage and Loan Corporation v. Wachovia Bank and Trust Co., et al., ante,* 29. In that case it was held that section 3 of chapter 275, Public Laws of North Carolina, 1933, is valid. On the facts found by the judge presiding at the trial of this action, there is no error in the judgment.

Affirmed.

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

CAROLINA MOTOR SERVICE, INC., AND THE JOHN P. NUTT CORPORATION v. ATLANTIC COAST LINE RAILROAD COMPANY; SOUTHERN RAILWAY COMPANY; LEIGH R. POWELL, JR., AND HENRY W. ANDERSON, RECEIVERS OF SEABOARD AIR LINE RAILWAY COMPANY; M. S. HAWKINS AND L. H. WINDHOLZ, RECEIVERS OF NORFOLK SOUTHERN RAILROAD COMPANY; AND STANLEY WINBORNE, UTILITIES COMMISSIONER OF NORTH CAROLINA.

(Filed 29 April, 1936.)

1. **Carriers B b: Injunctions A b—Carriers by truck held not entitled to enjoin promulgation of lower rates by rail.**

Plaintiffs, carriers by truck, instituted this action against certain railroad companies and the Utilities Commissioner to enjoin the promulgation of lower rates on a certain product by defendant carriers and the acceptance of such rates by the Utilities Commissioner, in shipments from a designated terminal to other points within the State, alleging that the rates were unjustly discriminatory against other products over the same route and against products shipped from other terminals in the State, in violation of N. C. Code, 1112 (1), *et seq.*, and that such reduction in rates would tend to injure plaintiffs in their business of hauling the product in question by contract with shippers. *Held:* Plaintiffs allege no invasion of property rights entitling them to injunctive relief, since the alleged discrimination against other products over the same route and against other terminals in the State would injure shippers having such other products for shipment over the same route and shippers having products for shipment from such other terminals, and would invade no property rights of plaintiffs, and since the alleged prospective injury to plaintiffs' business is by way of fair competition, against which the law does not protect, such injury being *damnum absque injuria*, defendant carriers being entitled to reduce their rates at will under ch. 134, sec. 16, Public Laws of 1933.

2. **Monopolies C b: Injunctions B c—Injunction held not to lie to enjoin violation of criminal statute against monopolies.**

Plaintiffs alleged that defendant carriers by rail were seeking to lower freight rates on a certain product in intrastate commerce with the intent to drive plaintiffs, carriers by truck, out of business, and then to raise rates after competition by plaintiffs had been destroyed, all in violation of

C. S., 2563. On the facts alleged, plaintiffs sought to enjoin the promulgation of the contemplated lower rates. *Held:* While the facts alleged constitute a violation of C. S., 2563, such violation is made criminal by C. S., 2564, and judgment dissolving the temporary restraining order obtained by plaintiffs and dismissing the action is proper, plaintiffs' remedy for a violation of the statute being by indictment and prosecution under the provisions of C. S., 395 (2), since, ordinarily, the violation of a criminal statute may not be enjoined.

APPEAL by the plaintiffs from *Harris, J.*, resident in the Seventh Judicial District, on 21 March, 1936. From WAKE. Affirmed.

This is an action, instituted by certain contract truck carriers engaged in the transportation of gasoline and kerosene in intrastate commerce from the terminal port at Wilmington, N. C., to certain points in North Carolina, against certain railroad companies and the Utilities Commissioner, seeking to enjoin the railroad companies from putting into effect (and the Utilities Commissioner from accepting) certain proposed reduced rates for intrastate transportation in carload lots of gasoline and kerosene between Wilmington and interior points in North Carolina, for the reason that said proposed rates are discriminatory and monopolistic, and are sought to be put into effect by the railroad companies to injure and destroy the business of the plaintiffs.

Upon the return of the temporary restraining order the court declined to sign judgment tendered by the plaintiffs continuing the restraining order until the Utilities Commissioner could pass upon the legality of the proposed rates, or to the final hearing, and entered judgment dissolving the restraining order and dismissing the action. From this judgment the plaintiffs appealed, assigning errors.

Kenneth C. Royall and Robert A. Hovis for plaintiffs, appellants.

R. B. Gwathmey, James F. Wright, W. N. McGehee, Smith, Leach & Anderson, and Murray Allen for defendants, appellees.

W. B. Rodman and Simms & Simms for Receivers of Norfolk Southern Railroad Company, appellees.

SCHENCK, J. The plaintiffs are contract truck carriers engaged in the transportation of gasoline and kerosene in intrastate commerce from the terminal port of Wilmington to certain interior points in North Carolina, and operating independently of public utility regulations. They contend that they are entitled to have enjoined the promulgation and the putting into effect of the proposed rates for two reasons, first, such rates are unjustly discriminatory and in violation of chapter 307, Public Laws of 1933, N. C. Code of 1935 (Michie), sec. 1112 (1) to (36), commonly known as the Public Utilities Act, and, second, such rates are in violation of chapter 53, Consolidated Statutes, entitled Monopolies and Trusts.

Plaintiffs allege and offer evidence tending to prove that the proposed rates discriminate against (1) crude oil transportation from Wilmington to the same points involved, (2) other commodities transported on basic or standard rates, (3) all other commodities transported by the railroad companies by causing added burdens to the cost of transportation, (4) transportation of gasoline and kerosene from points other than Wilmington, such as Fayetteville, a port terminal, and from places with long established distance proportion rates.

There is neither allegation nor proof that the plaintiffs have crude oil for transportation from Wilmington to other points, or other commodities for transportation on basic or standard rates, or that they have any commodity for transportation upon which added burdens of cost will be placed, or that they have any gasoline or kerosene for transportation from Fayetteville, or from any points with long established proportion rates, or that the plaintiffs have any commodity whatsoever for transportation from any point. Hence, there could be no invasion of any property rights of the plaintiffs by the promulgation and putting into effect the proposed rates.

While plaintiffs have the legal right to solicit and, if they can, to obtain contracts to transport gasoline and kerosene from Wilmington, they have no legal right to have their contract price protected against lawful competition from rail carriers, who may now reduce their rates at will. Public Laws 1933, ch. 134, sec. 16. The price at which the plaintiffs transport gasoline and kerosene is fixed solely by private contracts between them and the shippers, and until these contracts are made they are not cognizable by the courts, and only then when differences arise between the parties thereto. In the event the proposed rates are promulgated and put into effect, there would be no interference with the right of plaintiffs to contract with shippers for the transportation of gasoline and kerosene from Wilmington to other points. Their right to contract for transportation would remain unimpaired. They could continue, as they do now, to contract to transport gasoline and kerosene from Wilmington to other points at such prices as may be agreed upon by them and the shippers.

If it be conceded that the proposed reduced rates would be discriminatory against certain cities and against certain commodities, and that the right to injunctive relief would lie, such right would lie in the shippers in those cities and in the shippers of those commodities, and not in transportation companies operating independently of the Public Utilities Act, since the basis for injunctive relief must be an interference or threatened interference with a legal right of the petitioner, not of a third party. The shippers would be the real parties in interest, C. S., 446, not the contract truck carriers.

It would seem that any loss that the plaintiffs may suffer by the defendants' acts in the premises would be the result of lawful competition, and the law does not protect one against lawful competition. Disturbance or loss resulting therefrom is *damnum absque injuria. Swain v. Johnson,* 151 N. C., 93; *Holder v. Bank,* 208 N. C., 38.

Plaintiffs further allege and offer evidence tending to prove that if the defendant carriers are permitted to promulgate and put in effect the proposed rates their actions would be in restraint of trade and contrary to our laws against monopolies, and in violation particularly of C. S., 2563, in that they would (1) willfully destroy or injure, or undertake to destroy and injure, the business of the plaintiffs, opponents and business rivals of the defendant carriers, with the intent to fix rates when competition was removed; (2) willfully injure and destroy, or undertake to injure or destroy, the business of the plaintiffs by lowering the price of transportation, a "thing of value," so low as to leave unreasonable or inadequate profit for a time, with the purpose of increasing the price when the plaintiffs are driven out of business; (3) willfully sell such transportation at a place where there was competition, Wilmington, at a price lower than is charged for the same service at other places, when there was not good and sufficient reason, on account of the expense of doing business, for charging less at one place than at others, with the view to injuring the business of the plaintiffs, business rivals of the defendant carriers.

While C. S., 2563, declares that all of the above mentioned acts are unlawful, the following section, C. S., 2564, further provides that "Any corporation, either as agent or principal, violating any of the provisions of the preceding section shall be guilty of a misdemeanor, and such corporation shall, upon conviction, be fined not less than one thousand dollars for each and every offense," and that the officers of any corporation violating said provisions, "upon conviction, shall be fined or imprisoned, or both, in the discretion of the court." This statute clearly makes the alleged acts of the defendant carriers complained of by the plaintiffs criminal, and it is the rule with us, subject to certain exceptions that do not here apply, that "there is no equitable jurisdiction to enjoin the commission of a crime," *Hargett v. Bell,* 134 N. C., 394, and that injunctions are "confined to cases where some private right is a subject of controversy." *Patterson v. Hubbs,* 65 N. C., 119; 1 High on Injunctions (4 Ed.), ch. 1, sec. 20.

Individuals who apprehend injury to their person or property by reason of any acts which are criminal are furnished an adequate remedy at law, by having the perpetrator of such acts indicted and prosecuted by the State. Provision for such prosecution is contemplated by C. S., 395 (2). Drastic punishment, well calculated to deter, is provided for

the alleged acts of the defendant carriers complained of by the plaintiffs. However, in this connection, it should be observed that while in considering simply the question as to whether equitable relief of injunction will lie, the averments in the petition are regarded as true, it is not intended to intimate an opinion upon the guilt of the defendant carriers of the charges made against them by the plaintiffs. This issue will be passed upon only when properly presented.

We hold that since the plaintiffs fail to allege or prove that any property or legal rights vested in them would be invaded or illegally interfered with by the promulgation and putting into effect of the proposed rates, and since any alleged monopolistic acts of which the defendants may be guilty appear to be criminal offenses, his Honor ruled properly in both dissolving the restraining order and in dismissing the action.

Affirmed.

GORDON HOLLINGSWORTH, BY HIS NEXT FRIEND, L. G. HOLLINGSWORTH, v. GUY A. BURNS, TRADING AS PARCEL DELIVERY WAGON.

(Filed 29 April, 1936.)

1. Automobiles C j—Testimony held not to disclose contributory negligence, as matter of law, on part of twelve-year-old plaintiff.

Plaintiff's testimony disclosed that at the time of injury he was twelve years old and was playing a game with other boys his age on roller skates, that in the excitement of the game plaintiff was skating at a rapid rate of speed down a driveway towards a street ordinarily not much used, that one of his companions holloed that a car was coming, that plaintiff skated across a plot of grass in a vain attempt to stop before going into the street, that his momentum carried him into the street, where he was hit by defendant's truck. There was ample evidence that at the time of the accident defendant's truck was being driven by his employee at an excessive speed on the wrong side of the street. *Held:* Plaintiff's evidence does not disclose contributory negligence barring recovery as a matter of law, the question of plaintiff's contributory negligence, considering his tender years and the surrounding circumstances, being for the determination of the jury.

2. Negligence C b—

A child of tender years is not held to the same degree of care for his own safety as an adult, but only that degree of care which a child of his years may be expected to possess.

STACY, C. J., dissenting.

CONNOR, J., concurs in dissent.

APPEAL by defendant from *Shaw, J.*, at December Term, 1935, of MECKLENBURG. No error.

Action for damages for personal injury resulting from being struck by the automobile truck of defendant, while plaintiff, a boy of twelve years of age, was playing with some other children on or near a street in the city of Charlotte. It appears that defendant's truck was being driven by his employee on this occasion at a high rate of speed on the left side of the street, at a place where children were playing.

Issues of negligence, contributory negligence, and damages were submitted to the jury, resulting in a verdict thereon in favor of the plaintiff. From judgment on the verdict defendant appealed.

Carswell & Ervin for plaintiff, appellee.
J. Laurence Jones and J. L. Delaney for defendant, appellant.

DEVIN, J. It is conceded that there was ample evidence of negligence on the part of the defendant's driver warranting the verdict on that issue.

But the appellant's principal assignment of error is to the failure of the judge below to hold, as a matter of law, that the plaintiff on his own testimony was guilty of contributory negligence, barring recovery, and that therefore the motion for judgment of nonsuit should have been allowed.

This renders it necessary to examine the plaintiff's testimony. Pertinent to the question involved, the plaintiff testified substantially as follows:

"I got hurt about 4:30 p.m., 9 January, 1935. It was near my home. Four boys were with me playing hockey with a can on Oakland Avenue. Oakland Avenue connects Central and Eighth streets and is not traveled much. We had skates on our feet. The last I remember I was in street, next came to in hospital, did not hear any automobile horn. I was in the street when I got hit. I was on the sidewalk just before I got hit. We were playing hockey with a can, four of us with skates on. I hit the can past them and scored a point. I was going faster. I cut up on the driveway and went on down the street, and started out in the street when Harlan called me, and I couldn't stop. So, I decided to go on over and when I got about the middle of the street that is all I remember. I was in the driveway and I saw I couldn't stop, I couldn't make it across the street. Harlan holloed a car was coming. The car got me before I got across. I had both skates on. I was going out into the driveway and he holloed and I curved and went across the grass, but it didn't stop me, and I just went on out. I was going out the driveway, and when he called I cut to go across the grass, and I cut off a little corner of grass, but it didn't stop me. The grass was between the sidewalk and the curb of the street. I was going to skate down the

driveway into the street. I thought if I could get on the grass I could stop before I got out into the street. I did the best I could to make it across ahead of this automobile. The boy holloed at me just as I was going down the driveway to go into the street, and then I cut across and hit the corner of the grass, but I couldn't stop. Then I went out into the street. I was going pretty fast and Harlan holloed, 'Look out, there's a car coming.' I realized then if I got out into the street I was liable to be hit, and in order to stop I got on the grass, hoping that I could stop. I was going so fast I couldn't, and I went out into the street. I was not hit before I got to the center of the street, more on the left side of the street. When Harlan holloed I realized that I ought not to go out in the street, and that is the reason I jumped on the grass. I didn't know where the car was, I didn't see it when I started. I tried to stop because he holloed at me that a car was coming. I hit the grass before I went into the street. It didn't stop me. I rolled right across the grass plot and over the curbing into the street. I was going so fast down that incline to the street that I rolled over that grass into the street, and couldn't stop. I was already started in the street when he told me an automobile was coming. I was going too fast to help it; I was already started in the street. I did the best I could to stop. I didn't stop in the center. I thought I could make it and missed it."

The rule as to the contributory negligence of a child has been repeatedly laid down by this Court. In the recent case of *Morris v. Sprott,* 207 N. C., 359, *Schenck, J.,* speaking for the Court, thus states the law: "He is not chargeable with the same degree of care as an experienced adult, but is only required to exercise such prudence as one of his age may be expected to possess; and this is usually, if not always, when the child is not wholly irresponsible, a question of fact for the jury." *Rolin v. Tobacco Co.,* 141 N. C., 300; *Alexander v. Statesville,* 165 N. C., 527; *Fry v. Utilities Co.,* 183 N. C., 281; *Ghorley v. R. R.,* 189 N. C., 634; *Hoggard v. R. R.,* 194 N. C., 256; and *Tart v. R. R.,* 202 N. C., 52.

In *Rolin v. Tobacco Co., supra, Connor, J.,* uses this language: "Within certain ages, courts hold children incapable of contributory negligence. We do not find any case, nor do we think it sound doctrine, to say that a child of twelve years comes within that class. Adopting the standard of the law in respect to criminal liability, we think that a child under twelve years of age is presumed to be incapable of so understanding and appreciating danger from the negligent act, or conditions produced by others, as to make him guilty of contributory negligence."

Here the plaintiff was just twelve years of age and was engaged with other boys in a childish game, on roller skates, on or near a connecting street which was ordinarily not much used. In the excitement of play he skated down an inclined driveway leading to the street, with such

speed that he was carried out into the street and struck by defendant's truck, which was being operated with excessive speed, on wrong side of the road, and without sounding the horn. Too late, he was warned by a companion of the approach of the truck and tried to avoid the accident. He said, "I did the best I could to stop." He was struck and permanently injured.

The courts recognize that the love of play is instinctive in childhood, and that children may be expected to act as children and upon childish impulses. One who possessed profound knowledge of the characteristics of human conduct said, long ago: "When I was a child, I spake as a child, I understood as a child, I thought as a child; but when I became a man, I put away childish things." I Cor. 13:11.

The law wisely takes into consideration the fact that a small boy will have only the understanding and the thought of a child, not that of a man. The street was open for all, children as well as adults, and the use thereof by children for the purpose of play and sport is not necessarily an illegitimate use. *Hoggard v. R. R., supra.*

The able counsel for the defendant frankly admitted that the ruling of the court below in submitting the question of contributory negligence to the jury, under appropriate instructions, was in line with the authoritative decisions of this Court, but he argued that the facts here went beyond the principle laid down in the decided cases, and that the Court should hold as a matter of law that plaintiff's contributory negligence barred his recovery, and that his motion for judgment of nonsuit on that ground should be allowed.

We cannot so hold. To do so would be to require of the plaintiff a higher degree of care, judgment, and discretion than one of his age and experience would be expected to possess. That which might have constituted an error of judgment on the part of an experienced adult may not in law be so charged to a child exercising only the prudence to be expected of one of his age. The question of the contributory negligence of the plaintiff, considering his tender years and in the light of all the surrounding circumstances, was properly submitted to the jury.

The exception to the charge of the court below on the issue of damages cannot be sustained.

No error.

STACY, C. J., dissenting: The point is this: When a 13-year-old plaintiff, who is held competent to testify as a witness, admits on the stand, under examination by the court, "I realized that I ought not to go out in the street. . . . I thought I could make it and missed it," What is the effect of such testimony? Clearly, if this evidence be given its usual significance, the plaintiff cannot recover. He proves himself

out of court. *Lincoln v. R. R.,* 207 N. C., 787, 178 S. E., 601. He says he knowingly took a chance and lost. *Stamey v. R. R.,* 208 N. C., 668, 182 S. E., 130. The judge so stated in charging the jury, but left it to them to say what its effect should be, simply because the plaintiff was under fourteen years of age. This is not the test. *S. v. Satterfield,* 207 N. C., 118, 176 S. E., 466. There is no arbitrary rule as to age. *S. v. Edwards,* 79 N. C., 648. See Wigmore's Principles of Judicial Proof (2d Ed.), sec. 156. Plaintiff's capacity to understand the situation and to appreciate the significance of his testimony was apparent to the court, for he told the jury, "If the boy had been the age of fourteen, or an adult, . . . the court would instruct you as a matter of law that he was guilty of contributory negligence."

That the plaintiff is presumed not to have appreciated the danger at the time of the injury is conceded on all hands. *Ghorley v. R. R.,* 189 N. C., 634, 127 S. E., 634; 20 R. C. L., 123; Note, 27 Ann. Cas., 969. The question is, May this presumption be rebutted by his own testimony? He was twelve years of age at the time of the injury and thirteen at the time of trial.

In the court's opinion, "full faith and credit" is given the plaintiff's testimony as it relates to the negligence of the defendant, but the self-inculpatory statements are apparently disregarded. Do the same rules of evidence apply to this case as in other trials, or is the court to abdicate and allow the jury to "take the case and say how it is"?

The record also discloses that the plaintiff was playing in the street, with others, in violation of an ordinance of the city of Charlotte, when he skated in front of the on-coming truck and was injured. C. S., 4174; *S. v. Abernethy,* 190 N. C., 768, 130 S. E., 619; *Reynolds v. Reynolds,* 208 N. C., 428, 181 S. E., 338; *Lloyd v. R. R.,* 151 N. C., 536, 66 S. E., 604.

CONNOR, J., concurs in dissent.

A. M. HICKS v. FRANK NIVENS,
and
W. L. SIMS v. FRANK NIVENS.

(Filed 29 April, 1936.)

1. Appeal and Error G c—

Exceptions not discussed in appellant's brief are deemed abandoned. Rule of Practice in Supreme Court No. 28.

2. Trial E e—

An oral request for instructions may be disregarded. C. S., 565.

3. Pleadings G c—

An objection to competent evidence on the ground that it is not supported by allegation is rendered untenable when the court allows the pleading to be amended so as to allege the supporting facts.

4. Pleadings E c—

The court has discretionary power to allow a pleading to be amended after the introduction of evidence so as to make the pleading conform to the evidence. C. S., 547.

5. Arrest B b—Officer, acting in good faith with reasonable grounds to believe suspects have committed felony may make arrest without warrant.

An officer may make an arrest without a warrant when he acts in good faith and has reasonable grounds to believe that a felony has been committed, and that a particular person is guilty thereof and might escape unless arrested, C. S., 4544, and in this action against an officer for malicious and unlawful arrest, evidence that a robbery had been committed *is held* competent upon the issue, and defendant's evidence tending to show good faith and that he was acting within the provisions of the statute in arresting plaintiffs was properly submitted to the jury.

6. Appeal and Error J d—

The burden is on appellants to show error.

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

APPEAL by the plaintiffs from *Harding, J.,* at January Special Term, 1935, of MECKLENBURG. No error.

Separate civil actions, instituted by the respective plaintiffs against the same defendant, were consolidated for the purpose of trial.

The plaintiffs in their complaints alleged that they were unlawfully and maliciously arrested and imprisoned by the defendant. The defendant in his original answers entered general denials. At the close of the plaintiffs' evidence the plaintiffs demurred to the evidence and moved for a directed verdict, except as to the *quantum* of damages, which motions were denied, and plaintiffs excepted. After the close of the evidence the defendant, by leave of the court, amended his answers so as to allege:

"1. That if the defendant made any statement or did any act or thing which in law or in fact constituted an arrest of the plaintiffs, which is expressly denied, then and in that event the defendant made such statement or statements and did such act or acts in good faith and with justification and for good cause.

"2. That if the defendant arrested the plaintiffs, as alleged in the complaint, which is hereby expressly denied, then the defendant did so as permitted and required by law in the proper discharge of his duties

as sheriff of Union County; that if the defendant arrested the plaintiffs, as alleged in the complaint, which is expressly denied, the facts and circumstances surrounding such arrest rendered it entirely justifiable and proper, whether with or without a warrant, in that on the day referred to in the plaintiffs' complaint the sum of approximately $1,700 had been stolen from the office of the defendant in the city of Monroe, North Carolina, and numerous facts and circumstances tended to incriminate the plaintiffs with reference to the said theft and tended to show and reasonably tended to cause the defendant to believe that the plaintiffs were either guilty of the said theft or directly involved therein, and therefore a person whom the defendant, under the circumstances, should have arrested.

"3. That whatever it may be found that the defendant said or did with reference to the plaintiffs, as alleged in the complaint, was done in good faith, upon reasonable grounds, with justification and in the proper discharge of the defendant's duty as required by law."

To the action of the court in allowing the defendant to amend his answers plaintiffs excepted.

The case was tried upon the following issues, which were answered as indicated, to wit:

"1. Did the defendant unlawfully arrest and imprison the plaintiff W. L. Sims, as alleged in the complaint? Answer: 'No.'

"2. What damages, if any, is the plaintiff W. L. Sims entitled to recover from the defendant? Answer: ....

"3. Did the defendant unlawfully arrest and imprison the plaintiff A. M. Hicks? Answer: 'No.'

"4. What damages, if any, is the plaintiff A. M. Hicks entitled to recover from the defendant? Answer: ...."

From judgment based on the verdict the plaintiffs appealed, assigning errors.

A. A. Tarlton and J. D. McCall for plaintiffs, appellants.

Guthrie, Pierce & Blakeney and Vann & Milliken for defendant, appellee.

SCHENCK, J. The appellants group 32 assignments of error. They mention in their brief only two exceptions. Those exceptions noted in the record, but not set out in their brief, are taken as abandoned. Rule 28, Rules of Practice in the Supreme Court, 200 N. C., 811 (831).

The first exception mentioned in the appellants' brief is the one numbered 25, and is to the court's refusal to give a special instruction, orally requested by counsel, to the effect that if the jury "believed the evidence of the defendant, and especially the evidence of Chief Fesperman, they

would find that the plaintiffs were arrested and that the arrest was unlawful." When a request for special instructions is not in writing the judge may disregard it. C. S., 565.

The second exception mentioned in the appellants' brief is the third exception, which was to the court's overruling the plaintiffs' demurrer to the evidence and allowing certain witnesses to testify relative to a robbery of the sheriff's office in Monroe on the day on which the plaintiffs allege they were unlawfully arrested and imprisoned. If it be conceded that the demurrers should have been sustained and that the evidence should have been excluded had the answers remained as originally filed, the amendment to the answers rendered the evidence competent and the demurrers untenable. If this exception is meant to challenge the right of the court to allow the amendment, as the brief seems to indicate, it cannot be sustained. C. S., 547, provides that "The judge or court may, before and after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, . . . by inserting other allegations material to the case; or when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the fact proved. . . ." Soon after the adoption of the Code of Civil Procedure, *Chief Justice Pearson,* in referring to that portion thereof brought forward as C. S., 547, writes that it allowed "amendments on a scale so liberal that it may well be said 'anything may be amended at any time.'" *Garrett v. Trotter,* 65 N. C., 430.

While there might have been little, if any, ground for debate as to whether the plaintiffs were actually arrested and imprisoned, there was an open question as to whether the defendant, when he arrested and imprisoned the plaintiffs, was acting in good faith and within the provisions of C. S., 4544, relative to when an officer may arrest without a warrant when he has reasonable grounds to believe that a felony has been committed and that any particular person is guilty thereof, and shall apprehend that said person may escape unless immediately arrested. The jury answered this question in favor of the defendant.

The burden was upon the appellants to point out prejudicial error, This they have failed to do, and for that reason we find

No error.

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

MRS. LILLIAN S. BURNS v. CITY OF CHARLOTTE.

(Filed 29 April, 1936.)

Municipal Corporations E c—Evidence held to disclose contributory negligence barring recovery for fall on sidewalk.

Plaintiff's testimony tended to show that she fell and was injured while walking along the sidewalk in defendant city when she stepped down onto a driveway crossing the sidewalk in front of a house, that the driveway was rough, part of the cement having been washed away, and that it was directly in front of a house in an unexpected place, but that at the time of the injury it was broad daylight and that she could have walked in the street with safety. *Held:* Plaintiff's testimony discloses contributory negligence barring recovery as a matter of law, it being evident that plaintiff saw, or should have seen, in the exercise of due care, the condition of the driveway, and that she attempted to walk over the driveway when a safe way was available.

APPEAL by defendant from *Harding, J.*, and a jury, at Regular February Civil Term, 1936, of MECKLENBURG. Reversed.

This is an action for actionable negligence, brought by plaintiff against defendant, alleging damage.

The complaint of plaintiff is, in part, as follows: "That on or about 6 July, 1933, the plaintiff was walking on East Second Street, in the city of Charlotte, on the sidewalk on the southerly side of East Second Street, and going in an easterly direction; that while walking in front of a house in the four/five hundred block on the said southerly side of said street, she stepped in the driveway in the sidewalk immediately in front of a house; that the driveway that crossed the sidewalk was lower than the other part of the sidewalk; that it was immediately in front of said house and not where a driveway is supposed to be, and because of its improper location and because of the way it was constructed, she was caused to fall when she stepped on the driveway that crossed the sidewalk," causing serious injury.

The defendant denied the material allegations of the complaint and set up the plea of contributory negligence.

The plaintiff testified, in part: "I did case work, social work, or investigation for the Salvation Army. I was hurt on 6 July, 1933. . . . I was walking on the sidewalk in the 500 block of East Second Street, on the right-hand side, going east, which would be on the southerly side. A colored woman named Bonnie O'Daniel was with me. She was walking next to the street. I was watching where I was going. I was just walking down the street and stepped in this old broken-up driveway that was right in front of the house, you wouldn't know it was there. . . . I stepped down with my left foot. It turned over and

threw me down. . . . This driveway leads up to the house. It crosses the sidewalk. This driveway is in front of a house. If you walk up the driveway, it would lead you right in the porch of the house. It does not lead in any alley or anything of that kind. The driveway is worn right much, it is an old-fashioned driveway, it is deeper at one end than at the other. If you would step off there as I did, not knowing the place was there, it would turn you over in the street, just like it did me. It must have been ten or ten-thirty in the morning. . . . There are a good many cracks or broken places in the surface of the driveway right where I stepped in. There are more broken places at the bottom of it than at the side. This street and the sidewalk are paved, and the driveway is paved. . . . I hurt my right knee, this left ankle and the extreme end of my backbone in the fall. . . . (Cross-examination.) This happened on 6 July, 1933, about 10:30 in the morning. *The sun was shining on that sidewalk.* It was a clear day. I didn't know that this house where the driveway is used to face on Caldwell Street and they turned the house around to face Second Street. . . . *There was nothing obstructing my view of this driveway.* I didn't see it at all until after I fell, I didn't even know it was there. . . . Some of the concrete is washed away. There are a great many cracks where I stepped off. Down at the bottom of the driveway where I stepped off there are large places washed away. . . . I was walking, but *that street is wide enough for two people to walk on and stay out of danger.* I couldn't say how far back from the curbing I was walking. I might have been one foot back, I don't know how far."

The issues of negligence, contributory negligence, and damage were submitted to the jury, and answered in favor of plaintiff. Judgment was rendered for plaintiff on the verdict. Defendant made several exceptions and assignments of error and appealed to the Supreme Court.

Carswell & Ervin for plaintiff.
Scarborough & Boyd for defendant.

CLARKSON, J. At the close of plaintiff's evidence and at the close of all the evidence the defendant made motions in the court below for judgment as in case of nonsuit. C. S., 567. These motions were overruled, and in this we think there was error. There is not such a defect in the sidewalk as we find in *Gasque v. Asheville,* 207 N. C., 821. Conceding, but not deciding, that there was a material defect in the inclined driveway, now closed for driveway purposes, the injury occurred about 10:30 in the morning. Plaintiff testified, "It was a clear day, the sun was shining." She further testified, "There was nothing obstructing my view of this driveway."

The injury to plaintiff was a sad misfortune. The law required plaintiff to use due care—such care as an ordinarily prudent person would have exercised under such circumstances. She saw, or in the exercise of due care ought to have seen, the nature of the driveway she was to cross. She testified, "That street is wide enough for two people to walk on and stay out of danger." If one way is safe and the other dangerous, and a person knew, or by the exercise of due care ought to have known, of the dangerous way and goes that way, the person is guilty of contributory negligence and cannot recover. *Groome v. Statesville,* 207 N. C., 538.

For the reasons given, the judgment in the court below is

Reversed.

FAIRMONT SCHOOL, INC., v. MRS. JAMES E. BEVIS.

(Filed 29 April, 1936.)

1. Trial F b—

Where the contract sued on is admitted in the answer, an issue as to the existence of the contract does not arise upon the pleadings, and it is error for the court to submit such issue to the jury. C. S., 582.

2. Schools B b—Inadequacy of accommodations and board to maintain health held defense to school's action to recover tuition.

In an action by a private school to recover the balance due for tuition and board of defendant's daughter for the school year, in accordance with the contract between the parties, defendant is entitled to have her defense that the accommodations and board furnished were inadequate to maintain health, and caused the physical condition of defendant's daughter to become such that she was unable to attend school but for half the year, submitted to the jury.

APPEAL by plaintiff from *Finley, Emergency Judge,* at October Special Term, 1935, of MECKLENBURG. New trial.

This is an action to recover the sum of $500.00, the balance due on a contract by which the defendant agreed to pay to the plaintiff, for the tuition and board of her daughter, for the school year 1932-1933, the sum of $1,000.00, said sum being due and payable as follows: On 26 September, 1932, $250.00; on 1 November, 1932, $250.00; on 3 January, 1933, $250.00; and on 1 February, 1933, $250.00.

It is alleged in the complaint and admitted in the answer that the defendant has paid to the plaintiff the sums due on 26 September, 1932, and on 1 November, 1932, and has failed and refused to pay the sums due on 3 January, 1933, and on 1 February, 1933.

In her answer the defendant admits that she entered into the contract with the plaintiff, as alleged in the complaint. In defense of plaintiff's recovery in this action she alleges:

"1. That the defendant allowed her daughter, Mildred Young, to attend plaintiff's school during the fall term of 1932-1933; that her said daughter attended the said school for less than one-half of the school year, and that the defendant has paid to the plaintiff the sum of $500.00 to cover tuition for the said portion of the academic year during which the defendant's daughter attended said school, the said sum of $500.00 having been paid by the defendant to the plaintiff over and above certain other amounts not included in the tuition fee as aforesaid.

"2. That the defendant's daughter became physically unable to continue to attend plaintiff's school, and came to defendant's home in Charlotte, N. C., during the Christmas holidays of 1932; that defendant's said daughter was physically unfit to remain in plaintiff's school at the time she left for the defendant's home in Charlotte, and that she remained in a weak and disabled physical condition for several months after she returned to defendant's home in Charlotte; that the physicians who attended defendant's daughter advised the defendant that they could not approve of her daughter's return to school; that on account of the physical condition of her said daughter, the defendant notified the plaintiff that her daughter could not return to plaintiff's school after the Christmas holidays of 1932; and that thereafter defendant's daughter did not return to said school, nor has she since that time attended the said school for any length of time whatsoever.

"3. That defendant is advised and believes that her daughter's illness was due to the fact that the plaintiff did not provide her with proper food and with a warm and comfortable place in which to live; on the contrary, the defendant avers that the plaintiff failed to keep its dormitories warm enough to be sufficiently comfortable and healthful for defendant's daughter; that the plaintiff failed to provide the proper nourishment for her daughter's health and welfare; and that the plaintiff failed to care for and provide for the health and development of defendant's daughter as the plaintiff was under duty to do so long as defendant's daughter remained in plaintiff's school as a student; and the defendant further avers that this lack of attention and failure to provide her daughter with necessary care and protection was the cause of her daughter's illness as herein mentioned."

At the trial of the action, over the objections and subject to the exceptions of the plaintiff, the court submitted to the jury the following issues:

"1. Was there a contract entered into between the plaintiff and the defendant, as alleged in the complaint? Answer: ....

"2. Did the defendant wrongfully breach the contract, as alleged in the complaint? Answer: ....

"3. Did the plaintiff fail to comply with the terms of the said contract, as alleged in the answer? Answer: ....

"4. What amount, if any, is the plaintiff entitled to recover of the defendant? Answer: ...."

The jury answered the first issue "No," and under instructions of the court that in that event they need not answer the other issues, did not answer said issues.

From judgment that plaintiff recover nothing of the defendant, the plaintiff appealed to the Supreme Court, assigning as error the submission by the court to the jury of the first issue.

Edgar W. Pharr and McDougle & Ervin for plaintiff.
Guthrie, Pierce & Blakeney for defendant.

CONNOR, J. The defendant in her answer admitted the contract sued on by the plaintiff, as alleged in the complaint. No issue was raised by the pleadings with respect to the contract. For that reason, it was error for the court to submit to the jury, over the objection of the plaintiff, the first issue, and to charge the jury that the defendant contended that they should answer the issue "No."

In *Dickens v. Perkins,* 134 N. C., 220, 46 S. E., 490, it is said: "An issue of fact as defined by the Code arises upon the pleadings when a material fact is alleged or maintained by one party and controverted by the other. Code, sec. 391." See C. S., 582.

For the error in submitting to the jury the first issue, the plaintiff is entitled to a new trial. The defendant is entitled to have the jury determine the facts on which she relies for her defense to plaintiff's recovery in this action. See *Horner's Military School v. Rogers,* 167 N. C., 270, 83 S. E., 345.

New trial.

JOHN S. BAUSHAR, ALSO KNOWN AS NIMER BAUSHAR ACHKAR, AND KOWKAB BAUSHAR ACHKAR, HIS WIFE, AND FRED DAVID, THEIR ATTORNEY IN FACT, v. MRS. CAROLINE WILLIS, ADMINISTRATRIX OF GEORGE T. WILLIS, DECEASED, TRUSTEE, AND STEVE CONTOS.

(Filed 29 April, 1936.)

1. Appeal and Error J c—Findings of fact on plea in abatement will not be disturbed when supported by evidence.

The court's findings of fact upon a plea in abatement on the ground of a prior action pending that the parties are not identical nor the actions

substantially alike and his denial of the plea upon his findings will not be disturbed on appeal when the findings are supported by the record and evidence before him.

2. Trial F a—

An exception to the issues submitted will not be sustained when the issues present the determinative questions involved and permit the presentation of all pertinent evidence.

3. Mortgages H p—Foreclosure held properly set aside for fraud and rights of parties adjusted upon verdict of jury in this case.

Plaintiff, the trustor in a deed of trust, instituted this action, claiming that defendant agreed to rent the property at a stipulated price and pay the rent to the *cestui que trust* so as to discharge the deed of trust, that defendant paid the debt but, instead of having the deed of trust canceled as agreed, had the notes assigned to him and procured foreclosure by the trustee. Defendant denied the allegations and set up claim for improvements and taxes paid. *Held:* The evidence of fraud was sufficient to be submitted to the jury, and, in view of defendant's claim for taxes and improvements, the jury was properly called upon to ascertain the entire amount of rents due, and upon the verdict of the jury in plaintiff's favor, judgment was properly entered setting aside the foreclosure and adjusting the rights of the parties upon the several amounts found by the jury on the respective claims of the parties for rents, taxes, and improvements.

APPEAL by defendant Steve Contos from *Small, J.*, at November Term, 1935, of CRAVEN. No error.

This was an action to restrain the delivery of a deed by the trustee under power of sale in a deed of trust executed by the plaintiffs on a house and lot in the city of New Bern. Plaintiffs, who were the owners of the described property, executed, on 24 April, 1929, a deed of trust to George T. Willis, trustee, to secure payment of $500.00, evidenced by their note of even date with said deed of trust, said note being payable to Mrs. Lizzie Rahid. Plaintiff John S. Baushar leased said property to the defendant Steve Contos, who is a brother-in-law, at the agreed rental of $50.00 per month, upon the alleged agreement that out of the rents due by him defendant Contos should pay off said note and deed of trust, and pay taxes and repairs. At the time of the execution of said note and deed of trust the plaintiffs were residents of New Bern, North Carolina, but now reside in Lebanon, Syria.

Plaintiffs allege that the said Contos paid the note out of moneys due the plaintiffs, but, with intent to defraud the plaintiffs, caused said note to be transferred and assigned to himself instead of having same canceled of record, and requested the trustee to advertise and sell the property, and upon such sale became the purchaser and is now seeking to have deed therefor delivered to him by the trustee.

The defendant Contos denied all allegations of fraud, alleged that he paid full value for the note and had same transferred to himself, and

that he had expended large sums in improvements on the property, and asked that the restraining order be dissolved. And the defendant Contos alleged further that at the time this action was begun there was an action pending in the Superior Court of Craven County between the same parties, involving the same cause of action about the same property. With respect to the plea in abatement contained in the answer, the court found certain facts and denied defendant's plea of former action pending between the same parties.

Upon the trial in the Superior Court issues were submitted to the jury and answered as follows:

"1. Did Steve Contos cause the note and deed of trust securing same, that was payable to Mrs. Lizzie Rahid, to be transferred and assigned to himself with intent to cheat and defraud John S. Baushar, as alleged in the complaint? Answer: 'Yes.'

"2. Did Steve Contos procure the land secured by said deed of trust to be sold with the intent to cheat and defraud John S. Baushar, as alleged in the complaint? Answer: 'Yes.'

"3. Is John S. Baushar the owner of and entitled to the immediate possession of the land and building described in the complaint? Answer: 'Yes.'

"4. In what amount is Steve Contos indebted to John S. Baushar for the rents of said property? Answer: '$20.00 per month.'

"5. What amount, if any, is Steve Contos entitled to recover of John S. Baushar for improvements made and taxes paid upon the premises described in the complaint? Answer: '$1,029.42.'

"6. What amount is Steve Contos entitled to recover for amounts paid for and on the note? Answer: '$235.00, with interest.'"

From judgment on the verdict the defendant Contos appealed.

Greer & Greer and R. A. Nunn for plaintiffs.

D. H. Willis, Ward & Ward, and R. E. Whitehurst for defendant Contos, appellant.

DEVIN, J. The appealing defendant excepted to the denial of his plea in abatement on the ground that there was another action pending between the same parties for the same cause.

This case was before this Court at the Fall Term, 1934, upon the defendant's appeal from an order of the Superior Court continuing the restraining order to the hearing, and is reported in 207 N. C., 511. There it is said: "There is no finding that the prior action is for the same cause, and that they are substantially alike. Indeed, the two are apparently dissimilar." Upon the trial in the court below Judge Small made certain findings and adjudged that the defendant's plea of a former

action pending between the same parties in interest over the same subject matter be denied. The findings of the judge upon the record and evidence before him and his conclusions will not be disturbed. *Buchanan v. Clark,* 164 N. C., 56; *Assurance Society v. Lazarus,* 207 N. C., 63. It appears that in the other action Albert Jowdy was plaintiff and Caroline H. Willis, administratrix, and Lizzie Rahid were defendants. *Bowling v. Bank,* 209 N. C., 463; *Bank v. Broadhurst,* 197 N. C., 365.

The defendant's exception to the form of issues submitted cannot be sustained. These issues seem to present the determinative questions litigated so that they could be understood by the jury and all pertinent evidence presented. *Potato Co. v. Jeanette,* 174 N. C., 236.

Nor is there any reversible error in the portions of the charge to which exceptions were taken. There was sufficient evidence to go to the jury on the allegation of fraud and intent to cheat and overreach the plaintiffs to their injury, and there is no sufficient reason to disturb their findings. The judgment was properly entered on the verdict adjusting the amounts found by the jury on the several issues. Nor was it error to ascertain the entire amount of rents due in connection with the defendant's claim for improvements and taxes paid. *King v. Bynum,* 137 N. C., 491.

No error.

STATE v. CLARENCE HATCHER.

(Filed 29 April, 1936.)

1. Automobiles G d—Statute prohibiting operation of vehicle by person under influence of intoxicants imports motion of the vehicle and does not embrace holding vehicle still by putting foot on brake.

In this prosecution under C. S., 4506, for operating a motor vehicle while under the influence of whiskey, defendant testified that he was not driving the truck, but that the driver got out to examine the motor when the truck stalled, and that defendant placed his foot on the brake to keep the truck from rolling backward. The court charged the jury to the effect that holding his foot on the brake to keep the truck from rolling backward was an operation of the truck within the meaning of the statute. *Held:* The instruction entitles defendant to a new trial, operation of a motor vehicle within the meaning of the statute importing motion of the vehicle, and not including the acts of defendant as testified to by him, and defendant having the right to have the theory of the case arising on his testimony presented to the jury.

2. Statutes B c—

Penal statutes must be construed in the light of the mischief against which they inveigh.

APPEAL by the defendant from *Sink, J.*, at January Special Term, 1936, of MECKLENBURG. New trial.

Attorney-General Seawell and Assistant Attorney-General McMullan for the State.
Scarborough & Boyd for defendant, appellant.

SCHENCK, J. This case was heard upon appeal from the county recorder's court of Mecklenburg County upon a warrant charging a violation of C. S., 4506, which reads as follows: "Any person who shall, while intoxicated or under the influence of intoxicating liquors or bitters, morphine or other opiates, operate a motor vehicle upon any public highway . . . or the streets of any city or town in this State, shall be guilty of a misdemeanor, . . ."

Jake Culp, a rural police officer and State's witness, testified that "The defendant Hatcher was under the wheel. I couldn't tell who stopped the truck. It was stopped when we got up beside of it. The car was headed up the hill." . . . "We got him out from under the steering wheel. Mr. Hatcher was under the steering wheel when the truck rolled back down the hill into the curb. The defendant cursed a good deal. Mr. Hatcher was drunk that night."

The defendant testified in his own behalf that "a fellow named Melvin McClure was driving the truck and it stalled or stopped. I was not under the wheel at all when the truck moved backwards. Mr. McClure got out of the car to work on the carburetor and I put my foot on the brake to keep the car from running backwards." . . . "The car did not roll back, not while I was in it. After Mr. Culp, the officer, pulled me out, it rolled back to the curb. I did not have a drop to drink."

The defendant reserved exception to the following excerpts from his Honor's charge: "The court charges you, gentlemen of the jury, that if you are satisfied from the testimony in this case that he drove the car there, that he was intoxicated, or had consumed liquor or drugs or opiates to the extent that his normal functions were interfered with, or if he backed the car partially down the hill, *or if he held the car there on the hill, that was an operation of the car within contemplation of the law,* and if he was drunk at the time he did it, or under the influence of liquor or drugs, and you shall be so satisfied, beyond a reasonable doubt, it would be your duty to return a verdict of guilty." We think this exception is well taken and entitles the defendant to a new trial, since the charge is to the effect that if the defendant did nothing more than to hold the car on a hill, that would constitute an operation of the car within contemplation of the law, and that if the defendant was intoxi-

cated at the time he would be guilty of violation of the statute. All penal statutes must be construed in the light of the mischief against which they inveigh, and we apprehend that it was never the intention of the Legislature to make it unlawful for a person to prevent an automobile from moving on the highway, although such person may be intoxicated at the time. The word "operate," when used in connection with an automobile, clearly imports motion—motion of the automobile. The holding of an automobile still on a hill by placing one's foot on the brake while the driver worked on the carburetor cannot be construed as operating the automobile.

The evidence is conflicting as to what the defendant actually did at the time under investigation, and we do not intimate what the true state of facts was, but only hold that the defendant had a right to have the theory of the case arising on his testimony presented to the jury, which right was denied him by his Honor's charge.

New trial.

STATE v. EDGAR McKNIGHT.

(Filed 29 April, 1936.)

Criminal Law G m—Plea entered by defendant in recorder's court held not determinable in Superior Court by evidence dehors the record.

On appeal by defendant from judgment of the recorder's court, the court heard evidence *dehors* the record offered by the solicitor tending to show that defendant had pleaded guilty in the recorder's court, the record failing to show the plea entered by defendant in that court. The judge of the Superior Court found, from the evidence offered by the solicitor, that defendant had entered a plea of "guilty" in the recorder's court. *Held:* It was error for the judge of the Superior Court to determine the plea entered in the recorder's court upon the evidence *dehors* the record. The court might have resorted to a writ of *certiorari* or *recordari.*

APPEAL by defendant from *Sink, J.*, at January Special Term, 1936, of MECKLENBURG.

Criminal prosecution, tried originally in the recorder's court of the city of Charlotte upon warrant charging the defendant with operating an automobile on a public highway while under the influence of an intoxicant, in violation of C. S., 4506.

From judgment in recorder's court that defendant pay a fine of $50 and costs and assigned to work on the roads for ninety days—the road sentence to be suspended on condition the defendant refrain from driving an automobile in this State for that period—the defendant appealed to the Superior Court of Mecklenburg County.

When the case was called for trial in the Superior Court, the defendant entered a plea of "Not guilty"; whereupon, the solicitor sought to show by evidence *dehors* the record that he had pleaded guilty in the recorder's court. The transcript of the record did not show what plea was entered in the recorder's court.

After hearing evidence, *pro* and *con*, the judge found as a fact that the defendant had entered a plea of guilty in the recorder's court, and declined, in his discretion, to permit the defendant to withdraw his plea entered in the recorder's court and enter a plea of not guilty in the Superior Court.

Judgment was thereupon rendered that the defendant pay the minimum fine of $50 and costs, and surrender his driver's license to the clerk.

Defendant appeals, assigning errors.

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

Carswell & Ervin for defendant.

STACY, C. J. On the record as it came from the recorder's court, the defendant was entitled to a trial *de novo* in the Superior Court. Ch. 338, sec. 3, Private Laws 1909. The solicitor sought to show by evidence *dehors* that the defendant entered a plea of guilty in the recorder's court, and that, therefore, the appeal was only on matters of law, *e.g.*, sufficiency of warrant, validity of statute, or legality of judgment. *S. v. Warren,* 113 N. C., 683, 18 S. E., 498. Compare *S. v. Ingram,* 204 N. C., 557, 168 S. E., 837. Without resorting to *certiorari* or *recordari,* the judge undertook to determine the question for himself. This was in excess of his authority. *S. v. Pasley,* 180 N. C., 695, 104 S. E., 533; *S. v. Koonce,* 108 N. C., 752, 12 S. E., 1032; *Neal v. Cowles,* 71 N. C., 266.

Let the cause be remanded for disposition sanctioned by law.

Error.

PEARL M. GEORGE, ADMINISTRATRIX OF JOHN J. GEORGE, DECEASED, v. ATLANTA AND CHARLOTTE AIRLINE RAILWAY COMPANY, SOUTHERN RAILWAY COMPANY, AND GEO. B. SORRELLS.

(Filed 29 April, 1936.)

1. Appeal and Error L d—

The decision of the Supreme Court on a former appeal constitutes the law of the case, and may not thereafter be attacked in subsequent proceedings.

2. Death B a: Limitation of Actions B g—Where complaint fails to state cause of action, amendment constitutes a new action.

It was determined on a former appeal that plaintiff's complaint in this action for wrongful death failed to state a cause of action against the corporate defendants. Thereafter plaintiff was allowed to amend his complaint. *Held:* The amendment constituted a new action so far as the corporate defendants are concerned, and it appearing upon the face of the record that more than one year had elapsed between the accrual of the cause of action and the filing of the amended complaint, the demurrer of the corporate defendants was properly sustained, the action against them not having been instituted within the limitation prescribed by C. S., 160. The distinction between the defective statement of a good cause of action and the statement of a defective cause of action is pointed out.

3. Same—

The fact that an action for wrongful death is not instituted within the limitation prescribed by C. S., 160, may be taken advantage of by demurrer when the dates appear as a matter of record.

APPEAL by plaintiff from *Finley, J.*, at December Term, 1935, of GASTON. Affirmed.

Action for wrongful death alleged to have resulted from a collision between an automobile in which the plaintiff's intestate was riding and a passenger train of defendants, railway companies.

Plaintiff alleges that the death of her intestate was caused by the joint negligence of defendants, railway companies, and George B. Sorrells, driver of the automobile. Defendants, railway companies, demurred to the amended complaint, and from judgment sustaining the demurrer and dismissing the action as to the corporate defendants, the plaintiff appealed.

S. R. McClurd, E. R. Warren, and Tillett, Tillett & Kennedy for plaintiff.

Clyde R. Hoey, Geo. B. Mason, and Richard C. Kelly for defendants.

DEVIN, J. The facts alleged in the complaint sufficiently appear in the report of this case on a former appeal (*George v. R. R.*, 207 N. C., 457) and need not be restated.

The chronology of the case as shown by the record before us seems to be as follows: The death of plaintiff's intestate is alleged to have occurred 16 September, 1932. This action was instituted 24 August, 1933. Demurrer of the corporate defendants to the original complaint was heard at July Term, 1934, of Gaston Superior Court and was sustained. Upon appeal to this Court, Fall Term, 1934, the ruling of the Superior Court was affirmed (opinion filed 12 December, 1934). Thereafter, at July Term, 1935, plaintiff was granted leave to amend her complaint and the amendment to the complaint was filed 9 August, 1935.

The decision on the former appeal in this case was based on the authority of *Ballinger v. Thomas,* 195 N. C., 517, and that decision must be held to be controlling. It has become the law of the case, and its correctness is not now open to debate.

The result of that decision was the holding that the plaintiff had not stated a cause of action against the railway companies. It was not a defective statement of a good cause of action; it did not state facts sufficient to constitute a cause of action.

It follows, therefore, that an amendment to the complaint, if it be good and available, would relegate the plaintiff to the position of having thereby for the first time stated a cause of action against the demurring defendants; and since it was not filed until August, 1935, nearly three years after the death of the intestate, plaintiff's right of action under the amended complaint cannot be maintained. C. S., 160. Dates which appear as a matter of record may properly be considered by the court upon a demurrer. *Harper v. Bullock,* 198 N. C., 448. And the fact that the action now sought to be maintained on the amended complaint originated more than one year after the death of intestate can be taken advantage of by demurrer. *Capps v. R. R.,* 183 N. C., 181; *Taylor v. Cranberry Iron Co.,* 94 N. C., 525; and *R. R. v. White,* 230 U. S., 507.

In *Lassiter v. R. R.,* 136 N. C., 89, the Court points out the distinction between the defective statement of a good cause of action and the statement of a defective cause of action, but it was held in *Capps v. R. R., supra,* that an amendment introducing a cause of action which had not theretofore been stated, was demurrable if more than twelve months had elapsed from the death of intestate to the filing of such amendment.

We conclude, therefore, that the judgment sustaining the demurrer as to the corporate defendants must be affirmed.

Affirmed.

J. A. TAYLOR, ADMINISTRATOR, v. H. T. CAUDLE, ADMINISTRATOR.

(Filed 29 April, 1936.)

1. Automobiles E a—Owner of car is negligent in permitting reckless, incompetent person to drive his car.

Evidence that the owner of an automobile permitted a person to drive the car who was a reckless and incompetent driver and given to the habitual and excessive use of liquor *is held* sufficient to be submitted to the jury on the issue of the owner's negligence in permitting such person to drive his car.

2. Automobiles D a: Trial D a—Conflicting evidence held to raise issue of fact for jury on question of contributory negligence of guest.

Conflicting evidence as to whether plaintiff's intestate knew the general reputation of the driver of the car as reckless and incompetent and addicted to drink when intestate got into the car as such driver's guest *is held* to raise an issue of fact for the jury on the question of intestate's contributory negligence.

APPEAL by defendant from *Shaw, Emergency Judge,* at January Special Term, 1936, of MECKLENBURG.

Civil action to recover damages for death of plaintiff's intestate, alleged to have been caused by the wrongful act, neglect, or default of defendant's intestate.

The case was tried upon allegation and evidence tending to show that on 2 October, 1932, plaintiff's intestate, a boy sixteen years of age, was killed while riding in an automobile owned by George B. Caudle and negligently driven at the time by Hunter Byrum. It is in evidence that Byrum was a reckless and incompetent driver, given to habitual and excessive use of liquor, and that Caudle permitted him to drive his car, knowing him to be such a person. It is further in evidence that the driver of the Caudle car, in attempting to go around another car, on a rough and dusty road in Montgomery County, at a speed of sixty miles an hour, ran off the road into the ditch, hit a stump, turned the car over, and killed plaintiff's intestate.

The coroner and undertaker testified that they smelled whiskey on Hunter Byrum's breath soon after the accident.

Under defendant's plea of contributory negligence, there was evidence tending to show that plaintiff's intestate was driving the Caudle car at the time of the injury; also that he suggested the ride in question; and that Hunter Byrum's reputation as a reckless and unsafe driver was known to plaintiff's intestate before starting upon the fatal trip.

There was evidence in rebuttal on behalf of the plaintiff.

The usual issues of negligence, contributory negligence, and damages were submitted to the jury and answered in favor of plaintiffs. From judgment thereon defendant appeals, assigning errors.

H. C. Jones and Brock Barkley for plaintiff.
M. K. Harrill and J. F. Newell for defendant.

STACY, C. J. The liability of the owner of the car is predicated upon his alleged negligence in intrusting his automobile to a reckless and incompetent driver, one given to habitual and excessive use of liquor, and known to be irresponsible or untrustworthy. *Eller v. Dent,* 203 N. C., 439, 166 S. E., 330; *Robertson v. Aldridge,* 185 N. C., 292, 116

S. E., 742; *Tyree v. Tudor,* 183 N. C., 340, 111 S. E., 714; *Elliott v. Harding,* 107 Ohio St., 501, 140 N. E., 338; 36 A. L. R., 1128. There was ample evidence to support this allegation.

While it would seem the jury might well have answered the issue of contributory negligence in favor of the defendant, in view of the evidence tending to show plaintiff's intestate's knowledge of Byrum's general reputation and character as a reckless and unsafe driver, still there is evidence to the contrary, and the issue was one for the twelve. *Lincoln v. R. R.,* 207 N. C., 787, 178 S. E., 601.

The record presents no exceptive assignment of error upon which a new trial could be awarded, hence the result will not be disturbed.

No error.

IN RE APPLICATION OF N. B. BROUGHTON ESTATE TO BUILD FILLING STATION IN CITY OF RALEIGH.

(Filed 29 April, 1936.)

Municipal Corporations H b—

The approval by the Board of Adjustment of a denial of a permit to erect a filling station on certain land does not constitute *res judicata* upon a second application made therefor three years after the first application upon substantial change of the traffic conditions.

APPEAL by petitioner from *Parker, J.,* at October Term, 1935, of WAKE.

Certiorari to review ruling on application for permit to build filling station.

In April, 1935, permit was issued to "N. B. Broughton Estate" to erect a filling station at the southeast corner of Edenton and Person streets in the city of Raleigh. Objection was made and the matter appealed to the board of adjustment on the ground that such permit was in violation of the zoning act and ordinances, and that a similar application had been denied in April, 1932. Protest overruled and issuance of permit sustained on ground of "changed conditions and in view of the fact that this property has heretofore been zoned for neighborhood business"; whereupon, *certiorari* was had to review the action of the board of adjustment by the Superior Court of Wake County, as provided by statute. 3 C. S., 2776 (r), *et seq.*

Upon evidence offered in the Superior Court, and from a personal inspection of the *locus in quo,* his Honor concluded that there had been no substantial change in conditions and that the adverse ruling in April,

1932, "was and is *res judicata* in the present proceeding." The action of the board of adjustment was reversed and the permit declared null and void.

Petitioner appeals, assigning errors.

John W. Hinsdale, J. M. Broughton, and W. H. Yarborough, Jr., for petitioner.

Charles U. Harris for respondents.

STACY, C. J. The single question presented by the appeal is whether the board of adjustment was precluded, on the principle of *res judicata,* from approving issuance of building permit in April, 1935, by reason of its approval of a denial of a similar application in April, 1932.

The trial court held that the case was controlled by the decision in *Little v. Raleigh,* 195 N. C., 793, 143 S. E., 827. The two cases are not alike. In the first place, the cited case was on application "to reopen and rehear" a former decision which had received judicial approval *sub nomine Harden v. Raleigh,* 192 N. C., 395, 135 S. E., 151. Not so here. In the next place, *Little's case, supra,* was not only identical in allegation and fact with the original case, but was in truth the same case. Here, the traffic conditions as found by the board, "have materially changed since the former application was acted on in 1932."

There was error in holding the principle of *res judicata* applicable to the facts of the present record. 34 C. J., 808; 43 C. J., 356, *et seq.*

Error.

STATE v. GEORGE SMITH, BENJAMIN TUDOR, ALIAS DICK TUDOR, AND JEWEL GRAY.

(Filed 29 April, 1936.)

1. **Kidnaping A a—Evidence disclosing that witness voluntarily went with defendants held insufficient to support charge of kidnaping.**

The State's evidence tended to show that two of defendants accosted the State's witness at a dance hall and expressed a desire to talk with him, that the witness voluntarily accompanied them, and got in the car with all three defendants and was driven to a spot where he was accused of having taken a pistol belonging to one of defendants, and that upon his denial he was assaulted by two of defendants and thereafter put back in the car and returned to the dance hall, there being no evidence that the purpose of defendants was other than to question him about the pistol and to assault him upon his denial, *is held* insufficient to support a charge of kidnaping, it appearing that neither force nor fraud was exerted to compel the witness to accompany defendants.

2. Conspiracy B b—

Evidence *held* sufficient to be submitted to the jury on question of guilt of two of defendants on charge of unlawful conspiracy to assault the State's witness.

3. Assault B c—

Evidence *held* sufficient to be submitted to the jury on question of guilt of one of defendants on charge of simple assault.

APPEAL from *Parker, J.*, at January Term, 1936, of HALIFAX.

Defendants Smith, Tudor, and Gray were indicted for kidnaping one Frank Mitchell, and also for unlawful conspiracy to assault and beat said Mitchell.

At the close of the State's evidence, and again at the close of all the evidence, the defendants moved for judgment of nonsuit and excepted to the refusal to grant said motion.

There was verdict of guilty as to the three defendants on the charge of kidnaping, verdict of guilty as to defendants Smith and Tudor on charge of conspiracy, and verdict of guilty of simple assault as to defendant Gray.

From judgment on the verdicts defendants appealed.

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

J. Winfield Crew, Jr., and Geo. C. Green for defendants Smith and Tudor.

Gholson & Gholson and Cromwell Daniel for defendant Gray.

DEVIN, J. An examination of the evidence in this case leads us to the conclusion that the defendants' motion for judgment of nonsuit on the charge of kidnaping should have been allowed.

It appears that defendants suspected the State's witness Mitchell of having taken a pistol belonging to Tudor, who is his wife's first cousin. Defendants Smith and Tudor accosted him at a dance hall in Roanoke Rapids, North Carolina, and expressed the desire to talk with him. He testified that he went across street with Tudor of his own free will, though Tudor held his arm, and that he got in an automobile with Smith, Tudor, and two women; that he was then driven across the river a short distance to a secluded place, and there charged with taking the pistol. Upon his denial, Smith struck him on the ear with his fist, and he ran. He testified he was pursued, overtaken, and struck again in the back, and was put back in the automobile by Smith and Tudor and finally brought back to the dance hall, where he got out. It did not appear that either force or fraud was exerted to compel Mitchell to enter the automobile with defendants, nor that they had any other purpose

than to question him about the pistol, and upon his denial to beat him. No weapons of any kind were used, and no serious injury was done him.

The evidence falls short of the definition of kidnaping given in *S. v. Harrison,* 145 N. C., 408, and *S. v. Marks,* 178 N. C., 730.

There was, however, evidence sufficient to warrant the verdict and judgment against defendants Smith and Tudor on charges of unlawful conspiracy to assault the witness Mitchell, and to sustain the conviction of Gray for simple assault.

The conviction and judgment as to defendants Smith and Tudor on charges of conspiracy and the conviction and judgment as to defendant Gray on charge of simple assault are affirmed.

The judgment and sentences as to the other defendants on charge of kidnapping must be stricken out in accordance with this opinion.

Modified and affirmed.

R. W. McNAIR v. DR. KILMER & COMPANY, INC., AND CHARLES E. ROCHFORD.

(Filed 29 April, 1936.)

Automobiles C a: C e—Evidence held to disclose contributory negligence of plaintiff in attempting to pass defendant's parked car.

The evidence disclosed that the car owned by the corporate defendant and operated by the individual defendant was parked on the hard surface of the highway, in daylight, that plaintiff turned his car to the left to pass the parked car when he saw another car approaching from the opposite direction, apprehended he could not pass the parked car without hitting the oncoming car, turned back to the right and was unable to stop before hitting the parked car. *Held:* Conceding defendants were negligent in parking the car on the hard surface in violation of C. S., 2621 (66), the evidence discloses contributory negligence of plaintiff as a matter of law in attempting to pass the parked car without first ascertaining that he could pass the car in safety.

Appeal by defendants from *Moore, Special Judge,* at September Term, 1935, of Halifax. Reversed.

This is an action to recover damages for injuries suffered by the plaintiff, both to his person and to his automobile, and caused, as alleged in the complaint, by the negligence of the defendants.

The defendants in their answer denied that the plaintiff's injuries were caused by their negligence, as alleged in the complaint, and in further defense of plaintiff's recovery in this action alleged that the plaintiff by his own negligence contributed to his injuries.

The jury answered the issues submitted by the court in accordance with the contentions of the plaintiff, and assessed his damages at $587.50.

From judgment that plaintiff recover of the defendants the sum of $587.50, with interest and costs, the defendants appealed to the Supreme Court, assigning as error the refusal of the court to allow their motion at the close of all the evidence for judgment as of nonsuit.

Dunn & Johnson and E. L. Travis for plaintiff.
Allsbrook & Benton for defendants.

CONNOR, J. As a witness in his own behalf at the trial of this action, the plaintiff testified as follows:

"On the morning of 12 December, 1934, I left my home in Norfolk, Virginia, in my automobile, intending to drive to Rocky Mount in this State. As I was approaching the town of Enfield, in Halifax County, North Carolina, from the north, at about 12:45 p.m., I passed over the top of a hill and saw, at a distance of about 65 yards ahead of me, an automobile on the highway, headed in the same direction that I was traveling. At first I could not tell whether the automobile was moving or standing still. I was then driving at a speed of about 25 miles per hour. I decided to pass the automobile, and speeded up my automobile. I soon discovered that the automobile was not moving, but was parked on the highway. When I was within about 30 feet of the parked automobile, I turned to my left to pass it. As I did so, I saw an automobile approaching from the south. I realized at once that I could not pass the approaching automobile on the highway in safety. I then turned to my right, and put on my brakes, which were in good condition, but was unable to stop my automobile before I struck the defendants' automobile, which was still parked on the highway ahead of me. As the result of my striking the defendants' parked automobile with my automobile, I suffered injuries both to my person and to my automobile. I attempted to pass defendants' automobile before I saw the automobile approaching from the south."

Conceding that there was evidence at the trial of this action tending to show that the defendant Charles E. Rochford, while driving the automobile owned by the defendant Dr. Kilmer & Company, Inc., in the performance of his duty as its employee, was negligent in parking the automobile on a State Highway in Halifax County, North Carolina, in violation of C. S., 2621 (66), and that such negligence was a proximate cause of plaintiff's injuries, as alleged in the complaint, we are of opinion that all the evidence, including the testimony of the plaintiff, showed that the plaintiff contributed to his injuries by his own negligence in failing to stop his automobile when he discovered that defend-

ants' automobile was parked on the highway ahead of him, and in attempting to pass said parked automobile without first ascertaining that no automobile or other vehicle was approaching from the opposite direction. For this reason, there was error in the refusal of the trial court to allow defendants' motion, at the close of all the evidence, for judgment as of nonsuit. The motion should have been allowed and the action dismissed. The judgment is

Reversed.

THE NORTH CAROLINA MASONIC FOUNDATION ET AL. v. GURNEY P. HOOD, COMMISSIONER, ET AL.

(Filed 29 April, 1936.)

Banks and Banking H e—Deposit by fiduciary in bank acting as custodian of its funds held not to constitute preferred claim.

The foundation of a benevolent society selected a bank to act as custodian of its funds, agreeing that the bank acting as custodian should receive a stipulated sum annually for its services and should treat the funds like other savings deposits, the foundation retaining control over the funds and receiving interest thereon. At the time the bank became insolvent and closed its doors, the funds were represented by certificates of deposit. *Held:* The foundation is entitled to prove its claim against the bank for the deposit as a common claim, but is not entitled to a preference thereon.

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

APPEAL by plaintiffs from *Cowper, Special Judge,* at October Term, 1934, of WAKE.

Civil action to establish preference, or priority of claim, to funds in hands of liquidating agent of insolvent bank.

In January, 1931, funds and investments held by the "Masonic Temple Committee" were transferred to plaintiff, North Carolina Masonic Foundation, which corporation, in July of that year, selected the North Carolina Bank and Trust Company "as custodian of its securities and cash principal, the committee deposits to be treated like other savings deposits, and to be held subject to the orders of the trustee," compensation to the bank for so acting being fixed at $50.00 per annum. The bank operated both a trust department and a savings department under charter authorization.

With knowledge of the plaintiffs, all moneys placed with the bank were deposited by the custodian in its regular savings department, and were "treated like other savings deposits," *i.e.,* commingled with the general assets of the bank, used as such, and interest was paid thereon.

When the bank reduced its interest rate on savings deposits to 3%, the form of the account, which then amounted to $100,000, was changed to certificates of deposit (four of $25,000 each), bearing interest at the rate of 4% per annum.

In January, 1932, on instructions from the plaintiffs, the bank purchased out of said funds and for said account $50,000 of Liberty Bonds, reducing the cash account to $50,000—represented by two certificates of $25,000 each, at which figure it stood until the bank closed in 1933. The Liberty Bonds have been turned over to plaintiffs.

Five per cent of plaintiffs' cash claim has been paid, and defendants concede the balance is properly provable as a common claim. The plaintiffs seek a preference.

From judgment denying a preference, and reserving all other matters for future determination, plaintiffs appeal, assigning errors.

Dunn & Johnson, Pou & Pou, and J. L. Emanuel for plaintiffs.
Brooks, McLendon & Holderness for defendants.

STACY, C. J. Is plaintiffs' claim one of preference or one of commonalty? This is the only question. The amount is agreed upon, and all other matters were reserved for future determination.

It is not perceived upon what theory the case can be distinguished in principle from a general deposit by any other legally self-depositing fiduciary, *e.g.*, fiscal or financial agent (*Trust Co. v. Hood, Comr.*, 206 N. C., 268, 173 S. E., 601; *Underwood v. Hood, Comr.*, 205 N. C., 399, 171 S. E., 364), executor (*In re Garner Banking and Trust Co.*, 204 N. C., 791, 168 S. E., 813), guardian (*In re Home Savings Bank*, 204 N. C., 454, 168 S. E., 688; *Bank v. Corp. Com.*, 201 N. C., 381, 160 S. E., 360; *Hicks v. Corp. Com.*, 201 N. C., 819, 161 S. E., 545; *Roebuck v. Surety Co.*, 200 N. C., 196, 156 S. E., 531), trustee (*Parker v. Hood, Comr.*, 209 N. C., 494), "Mortgage Pool Account" made up of sums due guardians, executors, administrators, and other fiduciaries (*Cocke v. Hood, Comr.*, 207 N. C., 14, 175 S. E., 841). Especially is this so when, as here, the *cestui* agrees that the cash deposits in the hands of the custodian shall be "treated like other savings deposits," retains control over the disposition of the funds, and receives interest thereon.

Under the foregoing authorities, the trial court was justified in holding plaintiffs' claim properly provable as one of commonalty, and not one of preference.

The cases of *Andrews v. Hood, Comr.*, 207 N. C., 499, 177 S. E., 636; *Zachery v. Hood, Comr.*, 205 N. C., 194, 170 S. E., 641; *Cocke v. Hood, Comr.*, 205 N. C., 832, 170 S. E., 637; *Lauerhass v. Hood, Comr.*, 205 N. C., 190, 170 S. E., 655; *Flack v. Hood, Comr.*, 204 N. C., 337, 168

S. E., 520, cited and relied upon by plaintiffs, are distinguishable by reason of different fact situations.

The judgment is supported by the decisions first above cited.

Affirmed.

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

HARDWARE MUTUAL FIRE INSURANCE COMPANY v. J. W. STINSON, TREASURER-TAX COLLECTOR OF MECKLENBURG COUNTY, N. C., AND MECKLENBURG COUNTY, N. C.

(Filed 29 April, 1936.)

1. Appeal and Error J g—Where rights of parties are determined by holding on one exception, other exceptions need not be considered.

Where it is determined on appeal that a taxpayer is not liable for the tax levied on certain reserves deducted by the taxpayer from solvent credits, the question of whether the taxing county could add such reserves to the taxable property after the taxpayer's tax return had been approved by the County Board of Equalization and Review need not be considered.

2. Taxation B d—

Under our constitutional and statutory provisions all property, real and personal, is subject to taxation, unless exempt from taxation by the Constitution. Art. V, sec. 3; N. C. Code, 7971 (13).

3. Taxation B a—Insurance company may deduct "unearned premiums" from solvent credits in listing property for taxation.

Unearned premiums are a liability of an insurance company, N. C. Code, 6437, 6294, and an amount set apart by a mutual company as a reserve for the rebate of unearned premiums to its policyholders upon cancellation of policies in accordance with its by-laws is properly deducted by the insurance company in listing its solvent credits for taxation, N. C. Code, 7971 (13), 7971 (46), subsec. 25.

APPEAL by plaintiff and defendants from *Harding, J.,* at Regular March Term, 1936, of MECKLENBURG. Reversed on plaintiff's appeal. Affirmed on defendants' appeal.

This is a submission of controversy without action. N. C. Code, 1935 (Michie), sec. 626. Jurat by the litigants.

"1. That the said Mecklenburg County is, and was at the times herein set forth, a political subdivision of the State of North Carolina, with power, through its proper officers, to levy and collect proper county taxes of Mecklenburg County in the manner provided by law.

"2. The said J. W. Stinson, treasurer-tax collector of Mecklenburg County, is, and was at the times herein set forth, the duly elected and

acting treasurer-tax collector of said Mecklenburg County, who by law has, and had at such times, the duty and power to collect and receive all proper taxes duly levied and due Mecklenburg County for the benefit, under the authority and by request of the said Mecklenburg County and its duly constituted authorities.

"3. During the years 1934 and 1935 the duly constituted authorities of said Mecklenburg County duly levied an *ad valorem* tax on all real property and all personal property, including in the latter all choses in action in said Mecklenburg County which were on the tax list and assessment roll of Mecklenburg County.

"4. The said Hardware Mutual Fire Insurance Company is and was at the times herein set forth a corporation, duly created, organized, and existing under the laws of North Carolina, being a mutual fire insurance company without capital stock, the contingent liability of the members and policyholders of the company being limited during the year 1934 to five times the annual premium written in the policy, and during the year 1935 to one time said annual premium; the said company is, and was at the times herein set forth, doing the business of issuing policies insuring such members and policyholders against all direct loss and damage by fire and by removal from premises endangered by fire to property of such members and policyholders, in accordance with the Standard Fire Insurance Policy of the State of North Carolina; a copy of said policy is hereto attached, marked 'Exhibit A,' and, by reference, made a part thereof.

"5. Such policies of fire insurance issued by said Hardware Mutual Fire Insurance Company are, and were at the times herein set forth, issued and made subject to the following provision of the By-Laws of said Hardware Mutual Fire Insurance Company, which was duly adopted by said Hardware Mutual Fire Insurance Company and which is, and was at the times herein set forth, in full force and effect, and applying to all such policies of fire insurance issued by said Hardware Mutual Fire Insurance Company:

" 'ARTICLE XVII.

" 'DIVIDENDS.

" 'The Board of Directors may from time to time fix and determine the amount to be paid as a dividend upon policies expiring each year, or any existing surplus on hand after payment of all losses and expenses may be passed on to a reserve fund. Renewal policies may be issued by the Company at expiration of policies in force, and in case of termination by either party where protection has been afforded the assured by such renewal policy, the Company may deduct the earned premium thereon from any unabsorbed premium deposit in the hands of the Com-

pany; but, in cases where no protection could be afforded under such policy, upon surrender of such renewal policy the Company shall return said unabsorbed premium deposit to the policyholder without deduction for earned premium upon such renewal deposit.'

"6. The said Hardware Mutual Fire Insurance Company, during the years 1934 and 1935, and for many years prior thereto, paid its members and policyholders a dividend of 40 per cent on all premiums paid by them.

"7. The said Hardware Mutual Fire Insurance Company regularly collects, and at the times herein set forth did regularly collect, from each member or policyholder in advance a standard fire insurance premium on each policy issued by it, and maintains, and at the times herein set forth did maintain, an unearned premium reserve fund, being and representing the unearned premiums due members or policyholders as set forth in the said policy marked 'Exhibit A,' under the heading, Cancellation of Policy, and as provided in said by-law, which amount of unearned premium reserve was regularly reported to the Insurance Commissioner of North Carolina, as required by said Insurance Commissioner; out of such unearned premium reserve the said Hardware Mutual Fire Insurance Company regularly pays, and did at the times herein set forth pay, to each member or policyholder whose policy was canceled the amount due under clause in the policy marked 'Exhibit A,' under the heading, Cancellation of Policy. The amount of such unearned premium reserve as of 1 April, 1934, was $29,188, and the amount of such unearned premium reserve as of 1 April, 1935, $32,735.

"8. The said Hardware Mutual Fire Insurance Company, on 18 May, 1934, made its tax return for the year 1934, listing with the list taker for Charlotte Township, Mecklenburg County, in said tax return the property of said Hardware Mutual Fire Insurance Company as follows:

Total solvent credits		$60,280.00
Deducting therefrom amount of unsecured book accounts and bills payable April 1, 1934	$13,234.00	
Unearned premiums	29,188.00	41,422.00
Leaving net solvent credits		$18,858.00
To which the list taker added		2.00
		$18,860.00
Personal property		350.00
Grand total		$19,210.00

"9. The Board of Equalization and Review of Mecklenburg County met on 19 July, 1934, for the equalization and review of the property on the tax list and assessment roll of said Mecklenburg County, and after adjournment from time to time completed its duties on 4 September, 1934. At said meeting said Board of Equalization and Review made no correction or change in said tax return of the said Hardware Mutual Fire Insurance Company for the year 1934, in the property so listed for taxation, in the valuation of such property, in the net value of said solvent credits or in the grand total listed therein, or in the assessment of said property of the Hardware Mutual Fire Insurance Company which had been made by the duly constituted authorities of Charlotte Township and Mecklenburg County on the basis of said tax return, but the said property of said Hardware Mutual Fire Insurance Company which had been so returned and assessed was so placed upon the tax list and assessment roll of Mecklenburg County. The said tax list and assessment roll containing such assessment and valuation was approved and certified to by said Board of Equalization and Review, as provided by law, and delivered to the treasurer-tax collector of Mecklenburg County, to whom said Hardware Mutual Fire Insurance Company, on 30 October, 1934, paid the sum of $109.50, being a tax levied by the board of county commissioners of Mecklenburg County at the rate of 57 cents on the one hundred dollars on the said grand total of $19,210.

"10. Thereafter, Fred R. Young, who was investigating the tax books and returns for Mecklenburg County, suggested to the board of county commissioners of Mecklenburg County that the said unearned premium reserve of $29,188 of said Hardware Mutual Fire Insurance Company be placed on said tax return of said Hardware Mutual Fire Insurance Company as unlisted property, and after notice had been mailed to the taxpayer by the clerk of said board that such property had been discovered and listed for taxation, and that said board would proceed to assess same at its next regular meeting, said board of county commissioners, at its next regular meeting, assessed said unearned premium reserve for the year 1934; thereupon, the board of county commissioners of Mecklenburg County, and J. W. Stinson, treasurer-tax collector of Mecklenburg County, demanded that the said Hardware Mutual Fire Insurance Company pay the county tax of $166.37 at said rate of 57 cents on the hundred dollars for the year 1934 on said unearned premium reserve of $29,188, which was levied, assessed, and charged by the board of county commissioners of Mecklenburg County on said unearned premium reserve, to the said J. W. Stinson, treasurer-tax collector of Mecklenburg County.

"11. Pursuant to such demand, the said Hardware Mutual Fire Insurance Compa[illegible] 8 March, 1935, paid said tax of $166.37 for the year 1934 on sai[illegible]arned premium reserve of $29,188 to the said J. W. Stinson, treas[illegible]-tax collector of Mecklenburg County, notifying said J. W. Stinson, [illegible]easurer-tax collector at the time of said payment that it [illegible] said [illegible] said unearned premium reserve under protest.

[illegible] days after such payment under protest the said Hardware M[illegible] Fire Insurance Company demanded in writing from the said J. W. S[illegible]inson, treasurer-tax collector of Mecklenburg County, [illegible] tax [illegible] $16[illegible] paid by the said Hardware Mutual Fire Insurance Company under protest.

"13. The said tax of $166.37 was not refunded within ninety days thereafter, and has not up to the present time been refunded to the said Hardware Mutual Fire Insurance Company, or to anyone for said Company.

"14. The said Hardware Mutual Fire Insurance Company, on 24 April, 1935, made its tax return for the year 1935, listing in said tax return with the list taker for Charlotte Township, Mecklenburg County, the pr[illegible]per[illegible] of [illegible]id Hardware Mutual Fire Insurance Company as [illegible]s:

Total solvent credits		$73,918.00
Deductions therefrom:		
Amount of unsecured book accounts and bills payable April 1, 1935	$ 5,857.00	
Unearned premiums	32,735.00	38,592.00
Net value of solvent credits		$35,326.00
Personal property		800.00
Grand total		$36,126.00

"15. Thereafter, before the Board of Equalization and Review of Mecklenburg County had adjourned, and before the tax list and assessment roll of Mecklenburg County for the year 1935 had been approved, notice having been mailed to the taxpayer by the clerk of said board of county commissioners of Mecklenburg County that the unearned premium reserve had been discovered and listed for taxation, and that said board would proceed to assess same at its next regular meeting, said board of county commissioners, at its next regular meeting, assessed for the year 1935 said unearned premium reserve of said Hardware Mutual Fire Insurance Company, amounting to $32,735, which had been de-

ducted by said company from its solvent credits in its tax return, and thereupon said treasurer-tax collector of Mecklenburg County and said board of commissioners of Mecklenburg County demanded that said Hardware Mutual Fire Insurance Company pay a tax on said unearned premium reserve of said Hardware Mutual Fire Insurance Company amounting to $32,735, at the rate of 61 cents on the hundred dollars on said unearned premium reserve levied, assessed, and charged by the board of county commissioners of Mecklenburg County on said unearned premium reserve, the tax so demanded being $199.68, subject to discount of 2½% if paid in July, 1935, net amount being $194.69.

"16. Pursuant to such demand the said Hardware Mutual Fire Insurance Company, on 23 July, 1935, paid to said J. W. Stinson, treasurer-tax collector, said net amount of tax of $194.69 for the year 1935 on said unearned premium reserve of $32,735, notifying said treasurer-tax collector at the time of said payment that it paid said tax on said unearned premium reserve under protest.

"17. Within 30 days after such payment under protest the said Hardware Mutual Fire Insurance Company demanded in writing from the said J. W. Stinson, treasurer-tax collector of Mecklenburg County, the said tax of $194.69 so paid by the said Hardware Mutual Fire Insurance Company under protest.

"18. The said tax of $194.69 was not refunded within ninety days thereafter and has not up to the present time been refunded to the said Hardware Mutual Fire Insurance Company, or to anyone for said company.

"The question in difference between said parties arising upon the facts herein set forth is:

"1. Whether the said county tax of $166.37 on the said unearned premium reserve of said Hardware Mutual Fire Insurance Company of $29,188 for the year 1934 levied, assessed, and charged, paid under protest and demanded back, as herein set forth, is for any reason invalid or excessive; and whether the said Hardware Mutual Fire Insurance Company is entitled to recover from the said J. W. Stinson, treasurer-tax collector of Mecklenburg County, N. C., the said county tax of $166.37 on such unearned premium reserve, with interest.

"2. Whether the said county tax of $199.69, subject to discount of 2½ per cent if paid in July, 1935, net amount being $194.69 on the said unearned premium reserve of $32,735 for the year 1935 levied, assessed, charged, paid under protest and demanded back, as herein set forth, is for any reason invalid or excessive, and whether the said Hardware Mutual Fire Insurance Company is entitled to recover from the said

J. W. Stinson, treasurer-tax collector of Mecklenburg County, N. C., the said county tax of $194.69 on such unearned premium reserve, with interest.

HARDWARE MUTUAL FIRE INSURANCE COMPANY,
By W. W. WATT, *President*.

"Attest:
ARTHUR R. CRAIG, *Secy.*
(Seal of Hardware Mutual
Fire Insurance Company.)

MECKLENBURG COUNTY,
By B. J. HUNTER, *Chm. Co. Comm.*
J. W. STINSON, *Treasurer-Tax Collector for Mecklenburg County, N. C.*"

The judgment of the court below is to the effect: "(1) That said county tax of $166.37 upon said unearned premium reserve of the Hardware Mutual Fire Insurance Company paid by the Hardware Mutual Fire Insurance Company for the year 1934 is invalid, and that the said Hardware Mutual Fire Insurance Company recover of the said J. W. Stinson, treasurer-tax collector of Mecklenburg County, the sum of $166.37, being the amount of the county tax on said unearned premium reserve of said Hardware Mutual Fire Insurance Company as aforesaid, together with interest thereon from 8 March, 1935, until paid. (2) It is further ordered, adjudged, and decreed that said county tax of $194.69 upon said unearned premium reserve of the said Hardware Mutual Fire Insurance Company paid by said Hardware Mutual Fire Insurance Company for the year 1935 is valid, and that the Hardware Mutual Fire Insurance Company recover nothing of said J. W. Stinson, treasurer-tax collector of Mecklenburg County, on account of the county tax of $194.69 on said unearned premium reserve of the Hardware Mutual Fire Insurance Company for the year 1935 paid by said Hardware Mutual Fire Insurance Company as aforesaid."

There are two exceptions and assignments of error in the record: (1) By J. W. Stinson, treasurer-tax collector of Mecklenburg County, N. C., and Mecklenburg County, N. C., that the court erred in giving judgment in favor of the Hardware Mutual Fire Insurance Company for repayment of the 1934 county tax, amounting to $166.37, and interest; and (2) by Hardware Mutual Fire Insurance Company that the court erred in refusing to give judgment in its favor for repayment of the 1935 county tax, amounting to $194.69, and interest. Both parties appealed to the Supreme Court. Affirmed on the 1st exception and assignment of error; reversed on the 2nd exception and assignment of error.

Chase Brenizer and Cansler & Cansler for plaintiff.

J. Clyde Stancill and Henry E. Fisher for J. W. Stinson, Treasurer-Tax Collector for Mecklenburg County, and for Mecklenburg County, N. C.

CLARKSON, J. As we answer the *second* exception and assignment of error in favor of plaintiff, we see no reason to discuss the question involved in the *first* exception and assignment of error, as to whether, under the facts and circumstances of this case, the taxing authorities can go behind the returns. We may say, however, that the plaintiff's tax returns for the year 1934 showed clearly a deduction for "unearned premiums" and the amount of same. This was approved by the Board of Equalization and Review of Mecklenburg County. The amount plaintiff was due for tax was placed on the tax list and assessment roll for Mecklenburg County. In the findings of fact is the following: "The said tax list and assessment roll containing such assessment and valuation was approved and certified to by said Board of Equalization and Review as provided by law, and delivered to the treasurer-tax collector of Mecklenburg County, to whom said Hardware Mutual Fire Insurance Company on 30 October, 1934, paid the sum of $109.50, being a tax levied by the Board of County Commissioners of Mecklenburg County at the rate of 57 cents on the one hundred dollars on the said grand total of $19,210."

The plaintiff, like any other taxpayer, in good faith gave in its tax. The authorities, in clear written language and knowledge of the "unearned premiums" being deducted, and with this knowledge they accepted the "returns" and levied the tax and collected same. Plaintiff paid its tax as assessed, and later the additional tax on the "unearned premiums," and, in conformity to the statute, paid this amount assessed under protest and sues to recover the amount back. The court below decided this aspect in plaintiff's favor, and we see no error from the position we take on the *second* exception and assignment of error.

On the *second* exception and assignment of error, we think the court erred in not giving judgment for plaintiff. The record discloses that a tax investigator concluded that plaintiff's return was not correct as to it deducting the "unearned premiums" as a liability from its solvent credits and had the proper tax authorities to make assessment disallowing same. Plaintiff paid the tax for 1935 under protest, in conformity to the statute, and sues to recover the amount back. The court below held that the tax authorities could tax this "unearned premiums"—in this we think there was error. This is practically the only question involved on this appeal.

Constitution of North Carolina, Art. V, sec. 3, in part, is as follows: "Laws shall be passed taxing, by a uniform rule, all moneys, credits,

investments in bonds, stocks, joint stock companies, or otherwise; and, also, all real and personal property, according to its true value in money," etc.

N. C. Code, 1935 (Michie), sec. 7971 (13): "Property subject to taxation—All property, real and personal, within jurisdiction of the State, not especially exempted, shall be subject to taxation." See sections 7971 (18), (19), (36).

Section 7971 (46), subsec. 25: "It is the purpose of this section to require, and it shall be the duty of each and every taxpayer to furnish, a complete and itemized list of the solvent credits, property, or things of value owned or possessed by him or in his control." Section 7971 (50), subsecs. 1, 2, 3, and 4, provides for discovery of taxable property not listed, by certain tax authorities, and listing same.

The Constitution and the above acts and the other acts on the subject are broad and comprehensive that all real and personal property shall be subject to taxation except that which is exempt by the Constitution. Section 7971 (47) provides: "All *bona fide* indebtedness owing by any taxpayer as principal debtor may be deducted by the list taker or assessor from the aggregate amount of the taxpayer's credits, shown in items twenty and twenty-one of section 7971 (46)." Section 7971 (46), subsec. (21)—(what tax list shall contain): "All solvent credits with accrued interest thereon, whether money on deposit, mortgages, bonds, notes, bills of exchange, certified checks, accounts receivable, or in whatever other form or credit and whether owing by any state or government, county, city, town, township, person, persons, company, firm, or corporation within or without the State."

The policy written by the plaintiff is the Standard Fire Insurance Policy required by the North Carolina statute (N. C. Code, 1935 [Michie], sec. 6437), in part, provides as follows: (Under Cancellation of Policy) "This policy shall be canceled at any time at the request of the insured, in which case the company shall, upon demand and surrender of this policy, refund the excess of paid premium above the customary short rates for the expired time. This policy may be canceled at any time by the company by giving to the insured a five days' written notice of cancellation with or without tender of the excess of paid premium above the pro rata premium for the expired time, which excess, if not tendered, shall be refunded on demand. Notice of cancellation shall state that said excess premium (if not tendered) will be refunded on demand."

Section 6294 provides, in regard to this unearned premium reserve, as follows: "*Liabilities and reserve fund determined.* To determine the liability of an insurance company, other than life and real estate title insurance, upon its contracts, and thence the amount such company

must hold as a reserve for reinsurance, the Insurance Commissioner shall take the actual unearned portion of the premium written in its policies. In case of the insolvency of any company, the reserve on outstanding policies may, with the consent of the Commissioner, be used for the reinsurance of its policies to the extent of their pro rata part thereof."

From a reasonable construction of the above statutes we think the unearned premiums a liability of the company. This statute in no way impinges on the Constitution. Unearned premiums, *ipso facto,* to some extent denote a liability. "Unearned premium—That portion which must be returned to insured on cancellation of policy. *Ætna Ins. Co. v. Hyde,* 315 Mo., 113, 285 S. W., 65, 71." Black's Law Dictionary (3d Ed.), p. 1404.

The cases cited by the litigants are in woeful conflict, and we see no necessity to discuss them; but where statutes are in existence in the different states on the subject, as in this State, by the weight of authority the courts seem generally to hold that unearned premiums are a liability and can be deducted from solvent credits. We see no reason why the statutes in this State should be nullified. Plaintiff, within its legal rights recognized by statutory enactment, deducted its unearned premium as a liability from its solvent credits. The taxing authorities recognized this method, until the tax investigator decided otherwise, hence this controversy.

It goes without saying that no tax should be imposed which is not just, on either corporation or individual. The ideal of government is equal justice, under law. Later, when the premiums are earned or returned, they will be taxed, and no escape from tax can take place by deducting unearned premiums from solvent credits. We have set forth the lengthy agreed statement of facts—the controversy without action—in full, so as to show the *bona fide* contentions of the litigants. The able brief of counsel for defendants, citing cases in different jurisdictions, was persuasive but not convincing, as in this State we have statutes on the subject.

On the first exception and assignment of error, made by defendants, we find no error. On the second exception and assignment of error, made by plaintiff, we find error. The judgment of the court below is affirmed on the first exception and assignment of error, made by defendants, and reversed on the second exception and assignment of error, made by plaintiff.

Reversed on plaintiff's appeal.

Affirmed on defendants' appeal.

COUNTY OF MECKLENBURG AND THE BOARD OF COUNTY COMMISSIONERS FOR MECKLENBURG COUNTY v. STERCHI BROTHERS STORES, INC., A CORPORATION.

(Filed 29 April, 1936.)

1. **Taxation B a—Personalty of nonresidents is taxable by this State when such personalty has a taxable situs here.**

N. C. Code, 7971 (18) (6), does not exempt from *ad valorem* taxes in this State personal property owned by nonresidents when such personal property has a taxable *situs* in this State, it being the intent of the statutes construed *in pari materia* to subject all property within the jurisdiction of the State to *ad valorem* taxation, unless such property is exempt from taxation by the Constitution. N. C. Code, 7971 (18), subsec. 10; 7971 (36), subsec. 1; 7971 (13); Constitution of North Carolina, Art. V, sec. 3.

2. **Constitutional Law I b—Taxation of personalty of nonresidents having "business situs" in this State does not violate 14th Amendment of Federal Constitution.**

The taxation of personal property of nonresidents by this State when such personal property has acquired a taxable *situs* here does not violate the provisions of the 14th Amendment of the Federal Constitution, the rule that personal property follows the domicile of the owner being subject to an exception when such personalty is held in such a manner as to create a "business *situs*" for the purpose of taxation.

3. **Taxation B a—Held: Under facts of this case, personalty of nonresident had acquired "business situs" in this State for purpose of taxation.**

Defendant, a nonresident corporation operating several stores, and having its principal office in another state, maintained one store in this State, which sold merchandise for cash or upon installments under conditional sales contracts. The contracts to pay were collected by the store in this State selling the merchandise, and collections therefrom deposited here to the credit of the home office, the current expenses of the store being paid by its checks on another account furnished by the home office out of its general fund. Some of the conditional sales contracts were registered in this State, and the laws of this State resorted to, when necessary, to enforce collection. *Held:* The conditional sales contracts and promises to pay acquired a "business *situs*" here, and are solvent credits subject to an *ad valorem* tax in this State.

4. **Taxation C b—Defendant held not entitled to complain of assessment of personal property for taxation by plaintiff county.**

Plaintiff county ascertained the amount of personal property of defendant nonresident corporation having a "business *situs*" in this State, and liable for taxation as solvent credits by the county by ascertaining the total assets of the defendant and the percentage of such assets found in the county, and allowing the same per cent of its total liabilities to be deducted therefrom. Defendant complained that defendant county had made its own rule in ascertaining the solvent credits in the county subject to taxation in violation of Art. I, sec. 8, of the State Constitution. *Held:*

Defendant failed to list its solvent credits for taxation as required by law, N. C. Code, 7971, 18, subsecs. 6 and 10, in which event it could have deducted its liabilities in the county, N. C. Code, 7971 (47), and defendant was not prejudiced by the assessment of its personal property for taxation as determined by the county.

APPEAL by defendant from *Shaw, Emergency Judge,* at March Term, 1936, of MECKLENBURG. Affirmed.

This is a submission of controversy without action. N. C. Code, 1935 (Michie), sec. 626. Jurat by litigants.

The agreed statement of facts is as follows:

"1. Sterchi Brothers Stores, Inc., is, and was at all times hereinafter mentioned, a corporation duly chartered, organized, and existing under and by virtue of the laws of the State of Delaware, with its main office and principal place of business located in Knoxville, Tennessee.

"2. That Mecklenburg County is a political subdivision of the State of North Carolina, and body corporate. That B. J. Hunter, H. W. Harkey, A. D. Cashion, R. F. Dunn, and A. H. Wearn are the duly elected, qualified, and acting members of the board of commissioners of said county, and as such have the power and authority to assess *ad valorem* taxation of property located in said county lawfully subject to taxation.

"3. That the defendant corporation operates a number of stores in several states, but has no store in the State of Delaware, and that all stores are operated under the direct supervision and control of the Knoxville, Tennessee, office. They also own and operate a store located in the city of Charlotte, Mecklenburg County, North Carolina, for the sale of furniture and other types of merchandise in the nature of home furnishings.

"4. That all of the said merchandise is sold either for cash or for an initial cash payment and a conditional sales contract or agreement to pay for the balance of said purchase price, in which said contract or agreement to pay the debtor agrees to pay in weekly or monthly installments the balance of said purchase price. That the execution of the contracts or agreements to pay is in such manner as to enable the defendant to record said contracts or agreements to pay, some of which are recorded in Mecklenburg County, and some of which are not. The Charlotte store of the defendant sells to purchasers in Mecklenburg and other counties of North Carolina, and also to purchasers who reside in the State of North Carolina. All of these contracts or agreements to pay are retained in the Charlotte office and are collected by the Charlotte office. Where necessary, the laws of the location of the debtor are used to enforce the collection.

"5. That all funds collected, either by cash or on the contracts or agreements to pay by the Charlotte office, are deposited to the account

of Sterchi Brothers Stores, Inc., in the Union National Bank of Charlotte, North Carolina, and are subject to withdrawal only by Knoxville office of the defendant.

"6. Local operating expenses, such as salaries, water, light, telephone, and heat, but exclusive of rent and the purchase of merchandise, are paid by checks drawn by the local store on the American Trust Company, out of an account which is supplied by the home office out of its general fund. The rent is paid direct by the home office at Knoxville, and all merchandise is bought and paid for direct by the home office, including accounts payable incurred for merchandise sent to the local store, said accounts payable not being entered on the books of the local unit as an obligation of said local unit.

"7. The defendant pays *ad valorem* taxes on merchandise and cash on hand each year on the tax listing date.

"8. On the tax return date in 1935, the defendant owned, and held in physical custody of their Charlotte store, contracts and agreements to pay as hereinabove referred to in amounts aggregating in excess of $36,295.

"9. That the defendant did not list for taxation for the year 1935 the above mentioned contracts and agreements to pay as hereinabove referred to for *ad valorem* taxes in Mecklenburg County; however, at the time of said listing, the defendant called attention to the tax listing authorities to said contracts or agreements to pay, but contended that under the law of North Carolina said contracts or agreements to pay were not subject to *ad valorem* taxes in Mecklenburg County; that thereafter the county of Mecklenburg, through its duly elected and qualified board of county commissioners, listed the said contracts or agreements to pay hereinbefore referred to and assessed the same for taxation against the defendant, notwithstanding the objection made at the time by the defendant; that thereafter the defendant gave notice of appeal, filed the necessary bond, all as required by law, and in accordance with the statutes pertaining thereto, and appealed from the listing and assessment made by the county of Mecklenburg, acting through its board of county commissioners and the Board of Equalization and Review in connection with the said contracts or agreements to pay to the Superior Court of Mecklenburg County, North Carolina.

"10. The contracts or agreements to pay are not listed as such for *ad valorem* taxes in the State of Tennessee, or elsewhere, but the State of Tennessee has a capital stock tax, which defendant contends taxes these accounts indirectly as part of the assets back of the capital stock.

"11. It is agreed that the amount of $32,295 is net solvent credits, which the plaintiff seeks to tax, was arrived at as follows: The tax supervisor ascertained the total assets of the defendant and the percentage of such assets in Mecklenburg County; the defendant was

allowed as deductions against solvent credits the same percentage of its total liabilities as its assets in Mecklenburg County bore to the total assets of the defendant.

"12. It is stipulated and agreed by and between the parties to this action that all legal formalities have been complied with and that this case is properly before the court for adjudication.

"CONTENTIONS OF THE PARTIES.

"1. Sterchi Brothers Stores, Inc., contends that the aforesaid contracts or agreements to pay are not subject to *ad valorem* taxation in Mecklenburg County, North Carolina.

"2. Mecklenburg County contends that the above mentioned contracts or agreements to pay are subject to *ad valorem* taxation in Mecklenburg County, North Carolina.

H. E. FISHER,
J. CLYDE STANCILL,
Attorneys for Mecklenburg County and Board of County Commissioners.
E. A. HILKER,
Attorney for Sterchi Brothers Stores, Incorporated."

The judgment of the court below is as follows: "This cause coming on to be heard before his Honor, Thomas J. Shaw, judge holding extra courts in Charlotte, North Carolina, and being heard on the agreed statement of facts, as appears in the record in this cause, and the court being of the opinion that the solvent credits of $36,295 in question, as set out in the agreed statement of facts, are subject to *ad valorem* taxation in Mecklenburg County, N. C. It is therefore ordered, adjudged, and decreed that the action of the board of county commissioners of Mecklenburg County in listing said contracts or agreements to pay and assessing same for taxation against the defendant be and is hereby affirmed. This 25 March, 1936. Thos. J. Shaw, Judge presiding."

The defendant excepted and assigned error to the judgment as signed, and appealed to the Supreme Court.

J. Clyde Stancill and Henry E. Fisher for plaintiffs.
E. A. Hilker for defendant.

CLARKSON, J. In the agreed statement of facts (3) is the following: "That the defendant corporation operates a number of stores in several states, but has no store in the State of Delaware, and that all stores are operated under the direct supervision and control of the Knoxville, Tennessee, office. They also own and operate a store located in the city of Charlotte, Mecklenburg County, North Carolina, for the sale of furniture and other types of merchandise in the nature of home furnishings." The defendant is a Delaware corporation.

The merchandise from the Charlotte store is sold to purchasers in Mecklenburg County and other counties in North and South Carolina, for either cash or partly cash and the balance in weekly or monthly installments, under conditional sales contracts or agreements, some of which are recorded. These contracts to pay are retained and collected by the Charlotte office and, when necessary, the laws where the debtor resides are resorted to to enforce collection. The funds are deposited in defendant's name in a Charlotte bank and subject to withdrawal by the Knoxville office. Local operating expenses, exclusive of rent and the purchase of merchandise, are paid by check drawn by the local store on a Charlotte Bank, out of an account which is supplied by the Knoxville office out of its general fund. The Knoxville office pays the rent and furnishes the merchandise, this is not entered on the books of the local unit as an obligation. The contracts or agreements are not listed for *ad valorem* tax in Tennessee or elsewhere, but the State of Tennessee has a capital stock tax which defendant contends taxes these accounts indirectly as part of the assets back of the capital stock. The defendant pays *ad valorem* taxes on merchandise and cash on hand each year on the tax listing date. *Facts:* (8) "On the tax return date in 1935 the defendant owned and held in physical custody of their Charlotte store contracts and agreements to pay as hereinbefore referred to in amounts aggregating in excess of $36,295."

Plaintiffs, the governing authorities of Mecklenburg County, N. C., listed these contracts or agreements and assessed the same for taxation against the defendant. The defendant made objection, in conformity to law, and appealed to the Superior Court of Mecklenburg County, N. C. The court below held that these solvent credits were subject to an *ad valorem* tax in North Carolina, and in this we see no error.

Does such a tax levy contravene the State Constitution and the 14th Amendment of the Federal Constitution? We think not.

As a general rule, the principle "*mobilia personam sequuntur*" governs the *situs* of tangible property for the purpose of taxation. In other words, movables follow the law of the person. There is a well recognized and just exception to this rule where there is a "business *situs*" of intangibles separate and apart from the domicile of the owner. When the manner of doing business establishes this *situs,* the intangibles are taxable, and this does not contravene Art. XIV, sec. 1, of the Federal Constitution (in part), as follows: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

"Business *situs*—A *situs* acquired for tax purposes by one who has carried on a business in the state more or less permanent in its nature.

Endicott, Johnson & Co. v. Multnomah County, 190 P., 1109, 1111, 96 Or., 679. A *situs* arising when notes, mortgages, tax sale certificates and the like are brought into the state for something more than a temporary purpose, and are devoted to some business use there, and thus become incorporated with the property of the state for revenue purposes. *Honest v. Gann,* 244 P., 233, 235, 120 Kan., 365; *Lockwood v. Blodgett,* 138 A., 520, 525, 106 Conn., 525." Black's Law Dictionary (3d Ed.), p. 261.

In Cooley Taxation, Vol. 2 (4th Ed.), sec. 465 (pp. 1031-37), speaking to the subject, it is said: "Business *situs*—In General. While 'the undoubted rule is that, for the purposes of taxation, a debt is property at the residence or domicile of the creditor,' it is also true that a debt may acquire a *situs* elsewhere. 'Business *situs*' has come to be a well recognized term in the law of taxation. Primarily, it is an exception to the rule that the *situs* of intangible personal property is at the domicile of the owner, so as to make property which has acquired a 'business *situs*' in a state other than the domicile of the owner taxable in such state. The rule is settled that credits belonging to a nonresident may acquire a business *situs* so as to be taxable; but just what will constitute a business *situs* is not susceptible of precise definition. This 'business *situs*' means, it would seem, what the words indicate, *i. e.,* a *situs* in another state where a nonresident is doing business through an agent, manager, or the like, in which business and as part thereof business credits, such as open accounts, notes, mortgages, deposits in bank, etc., are used and come within the protection of the state. The question arises in connection with various business transactions conducted by a person or corporation, generally through an agent, in another state; but the most common application of the rule is where a resident of one state has an agent in another state who loans money of the nonresident, more or less as a regular business, and takes care of the collections and reinvestments, in which case the notes, mortgages, etc., taken by the agent are held to be subject to taxation although the owner is a nonresident. The rule of business *situs* has been applied also to credits arising from loans made by agents of foreign insurance companies; credits arising from premiums due in connection with the local business of an insurance company; credits arising from a business in the state as a branch of the business of a foreign corporation or partnership; a branch brokerage business conducted through a local agent; and the sale of lands through agents."

In *Redmond v. Commissioners,* 87 N. C., 122, we find: *Facts:* "The plaintiffs are domiciled in the State of New York, but were owners of lands lying in several of the counties of this State, which had been sold by their agent, who keeps an office in the town of Rutherfordton in this

State, and had power to sell and execute covenants for title and to collect the money. The covenants to pay the purchase moneys are solvent only because of the fact that the title to the lands is retained as a security. These covenants for the purchase money amount to many thousands of dollars, and are all kept in the office of said agent at Rutherfordton; and the single question presented in the record is, whether they are liable to a State, county, and corporation tax." At p. 123 it is said: "The theory of taxation is, that the right to tax is derived from the protection afforded to the subject upon which it is imposed. . . . The actual *situs* and control of the property within this State, and the fact that it enjoys the protection of the laws here, are conditions which subject it to taxation here; and the legal fiction, which is sometimes for other purposes indulged, that it is deemed to follow the person of the owner, and to be present at the place of his domicile, has no application. In such case, the maxim *mobilia personam sequuntur* gives way to the other maxim in *fictione juris semper æquitas existat.*" This Court held in the above case that the intangibles were taxable, citing many cases in other jurisdictions. This decision was rendered in 1882 and has been the unquestioned law of this State ever since. 76 American Law Reports (Anno.), p. 820. *Ransom v. Board of Comrs. of Town of Weldon,* 194 N. C., 237.

Cooley, *supra,* cites a wealth of authorities to support the text, both state and Federal authorities: *New Orleans v. Stempel,* 175 U. S., 309, 22 L. Ed., 174; *Bristol v. Washington County,* 177 U. S., 133, 44 L. Ed., 701; *State Board of Assessors v. Comptoir National D'Escompte,* 191 U. S., 388, 48 L. Ed., 232; *Metropolitan Life Ins. Co. v. New Orleans,* 205 U. S., 395, 51 L. Ed., 853.

The defendant contends that *Farmers' Loan & Trust Co. v. Minnesota,* 280 U. S., 204, 74 L. Ed., 371, is authority for its contention. We think not. On the contrary, we find that opinion an affirmation of the above "business *situs*" principle. At page 218 it is said: "*New Orleans v. Stempel, supra, Bristol v. Washington County, supra,* and *Liverpool & L. & G. Ins. Co. v. Board of Assessors,* 221 U. S., 346, 55 L. Ed., 762, recognize the principle that choses in action may acquire a *situs* for taxation other than at the domicile of their owner if they have become integral parts of some local business. The present record gives no occasion for us to inquire whether such securities can be taxed a second time at the owner's domicile." There are numerous decisions in different states that have adopted the "business *situs*" of intangibles for taxation.

We think the case of *Wheeling Steel Corporation v. Fred L. Fox, Tax Comr. of West Va.,* delivered by *Chief Justice Hughes* 18 May, 1936, fully sustains the position we have taken, and the Court has added same to the opinion after being handed down, as the matter involves a Federal question.

Art. V, sec. 3, of the N. C. Const., provides: "Laws shall be passed taxing, by a uniform rule, all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise; and, also, all real and personal property, according to its true value in money," etc. In accordance with this constitutional mandate, the North Carolina Legislature has enacted the following statutes: N. C. Code, 1935 (Michie), sec. 7971 (13)—"All property, real and personal, within jurisdiction of the State, not especially exempted, shall be subject to taxation." Sec. 7971 (18)—"Personal property shall include: (10) All other personal property not herein enumerated and not expressly exempted by law."

In *Latta v. Jenkins,* 200 N. C., 255 (258), it is said: "By virtue of the provisions of section 3 of Article V of the Constitution of North Carolina, all property, real and personal, in this State is subject to taxation, in accordance with a uniform rule, under laws which the General Assembly is required by the Constitution to enact, without regard to its ownership, and without regard to the purposes for which specific property is held."

In *Town of Benson v. County of Johnston,* 209 N. C., 751, it is declared: "Taxation is the rule and exemption the exception. The rule has repeatedly been laid down by this Court, the exemptions from taxation are to be strictly construed," citing authorities.

Defendant cites section 7971 (18) (6): "All notes, bonds, accounts receivable, money on deposit, postal savings, securities, and other credits of every kind belonging to citizens of this State over and above the amounts respectively owed by them, whether such indebtedness is due them from individuals or from corporations, public or private, and whether such debtors reside within or without the State." It contends that the tax is limited "to citizens of this State"—"whether such debtors reside within or without the State," but section 7971 (18) (10) declares, "All other personal property not herein enumerated and not expressly exempted by law."

Section 7971 (36) (1)—(How to list property), in part, says: "Every person owning property, real or personal, is required to list and shall make out, sign, and deliver to the assistant supervisor, list taker, or assessor a statement, verified by his oath, of all the real and personal property, money, credits, investments in bonds, annuities, or other things of value," etc. The above section distinctly says, "*Every person owning property, real or personal,*" etc. Further: "Which was in the possession or control of such person or persons on the 1st of April, either as owner or holder thereof, or as . . . agent, factor, or in any other capacity." These sections, construed *in pari materia,* clearly include intangible property to be the subject of taxation under the laws of this State.

Defendant contends that the *Redmond case, supra,* is based on a dissimilar revenue statute from the present ones, and contends that the 1879 law, under which the decision is based, "phraseology of 1879 is all inclusive." From the present statutes, taken *in pari materia,* we think is all inclusive, and the position taken by defendant is at least a "distinction without a difference."

In the agreed statement of facts is the following: "11. It is agreed that the amount of $36,295 is net solvent credits, which the plaintiff seeks to tax, was arrived at as follows: The tax supervisor ascertained the total assets of the defendant and the percentage of such assets in Mecklenburg County; the defendant was allowed as deductions against solvent credits the same percentage of its total liabilities as its assets in Mecklenburg County bore to the total assets of the defendant." The defendant contends that the plaintiffs made a rule of their own, contrary to the Constitution of North Carolina, Art. I, sec. 8, and the statute, in taxing defendant's property. If this was done, we cannot see how defendant can complain. Defendant, under section 7971 (18) (6) and (10), and other sections referred to, was required to return all solvent credits. This was taxable. The defendant was entitled as against the solvent credits to deduct liabilities, *bona fide* indebtedness. Sec. 7971 (47). *Hardware Mutual Fire Ins. Co. v. Stinson et al., ante,* 69.

The defendant denied that it has such a "business *situs*" in Mecklenburg County, N. C., that was subject to taxation. If it had made its returns in Mecklenburg County, N. C., as it was required to do by law, it could have deducted its liabilities. We can see no prejudicial injury to defendant from the assessment as made by plaintiffs. We think from the agreed case that this was such a "business *situs*" as was subject to tax by the plaintiffs, the taxing authorities. If the defendant was allowed to escape tax in this jurisdiction, under the facts and circumstances of this case, a foreign corporation, by establishing a "business *situs*," as in the present case, would have a special privilege over other installment stores of like nature located and doing business in Mecklenburg County, N. C. Defendant could undersell them at least to the amount it escapes taxation on intangibles—which the other installment stores have to pay under the law.

We think the tax valid, and the intangibles are taxable under the Constitution of North Carolina and the North Carolina Revenue Act. The tax does not contravene the Constitution of North Carolina, Art. V, sec. 3; Art. I, sec. 8, nor the 14th Amendment to the Constitution of the United States.

For the reasons given, the judgment of the court below is

Affirmed.

CARL HEATER, BY HIS NEXT FRIEND, MRS. EFFIE HEATER, v. CAROLINA POWER AND LIGHT COMPANY.

(Filed 29 April, 1936.)

Negligence A c—Burned-out light bulb held not inherently dangerous, and doctrine of attractive nuisance held inapplicable.

The complaint alleged that defendant light company replaced a burned-out bulb in a street light with a new bulb and left the old bulb on the side of the street, where it was picked up by a small child, carried into a yard and broken while it was being played with, that thereafter plaintiff, a fourteen-year-old boy, stepped on the broken glass and cut his foot, resulting in serious injury. Plaintiff alleged that the burned-out bulb was inherently dangerous and attractive to children, and that defendant was negligent in allowing it to remain where it was accessible to children. *Held:* Defendant's demurrer *ore tenus* to the complaint was properly sustained, the allegation that the bulb was inherently dangerous being a mere conclusion of the pleader, the bulb being described in the pleadings, and a light bulb not being inherently dangerous, and defendant's negligence, if any, in leaving the bulb on the side of the street, not being the proximate cause of plaintiff's injury.

APPEAL by plaintiff from *Barnhill, J.*, at Regular Term, 2 February, 1936. From WAKE. Affirmed.

This is a civil action, brought by Carl Heater, by his next friend, Mrs. Effie Heater, against defendant Carolina Power and Light Company for actionable negligence, alleging damage.

Facts: The defendant operated and maintained a street lighting system in the town of Cary, North Carolina, and as a part thereof maintained a street light at the intersection of Harrison Street and the Durham highway (State Highway No. 10, U. S. No. 70), in which was used a large glass electric light bulb, cylindrical in shape.

On or about 1 May, 1933, the light bulb at the aforesaid intersection of Harrison Street and the Durham Highway became burned out or otherwise defective, and was by the defendant removed and replaced by a new one, and the defendant left the old bulb lying on the side of the street and highway, near the intersection, in view of and accessible to passersby; and shortly thereafter it was picked up by a young child and was by him carried to a nearby yard and broken while he was playing with it.

Shortly thereafter the plaintiff, a boy about 14 years old, was playing with some other small boys in the yard where the light bulb had been broken, and came into contact with the pieces of sharp, curved glass and as a result his left foot was seriously, painfully, and permanently injured.

The said light bulb was made of thin, brittle, and very fragile glass, and was so constructed that it was very easily broken, leaving pieces of sharp, curved, and dangerous glass.

The plaintiff alleged: "That shortly thereafter the plaintiff, knowing nothing of the aforesaid occurrence, was playing with some other small boys in the yard where the said bulb had been broken, and, without fault on his part but by reason of defendant's negligence, came into contact with the pieces of sharp, curved, and dangerous glass from the aforesaid broken light bulb and suffered a serious, painful, and permanent cut and injury on his left foot. That the aforesaid injuries of the plaintiff were directly and proximately caused by the negligence of the defendant in the following particulars, among others, to wit:

"(a) In that the defendant failed to use proper care to dispose of the used light bulb which was removed from the light fixture at the said intersection of Harrison Street and the Durham highway.

"(b) In that the defendant left the said used light bulb, or caused or permitted the same to be left, where it was available to small children, and attractive to them.

"(c) In that the defendant permitted the said light bulb, although of an inherently dangerous nature, to be broken, and the sharp, curved, and dangerous pieces thereof to be left without warning in a place where small boys were accustomed to play and did play, and where this plaintiff did play, and where the plaintiff, while so playing, would and did come in contact with and was cut by the same.

"(d) In that the defendant, with reckless disregard for the safety of the public (including this plaintiff), failed to take such bulb and break and dispose of it in such manner and place as to reasonably protect the public (including this plaintiff) from being injured thereby.

"(e) In that the defendant negligently, carelessly, wrongfully, and recklessly permitted the said inherently dangerous instrumentality to become broken and the pieces thereof to be left where this plaintiff came into contact with the same, and was thereby seriously, painfully, and permanently injured."

The defendant denied the material allegations of the complaint, denied that it was guilty of negligence and set up the plea of contributory negligence.

The judgment of the court below is as follows: "This cause coming on to be heard before his Honor, M. V. Barnhill, judge presiding, and a jury, at this the Second February Term, 1936; after the reading of the pleadings the defendant demurred *ore tenus* to dismiss the action upon the ground that the complaint failed to set up facts sufficient to constitute a cause of action; and, after hearing argument of counsel, the court being of the opinion that said demurrer *ore tenus* should be sustained:

Now, therefore, upon motion of Messrs. MacLean, Pou & Emanuel, counsel for the defendant, it is ordered and adjudged that defendant's said demurrer *ore tenus* be and hereby is sustained, and this action is dismissed. M. V. Barnhill, Judge presiding."

The plaintiff excepted, assigned error to the ruling of the court and to the judgment as signed sustaining the demurrer and dismissing the action, and appealed to the Supreme Court.

Simms & Simms for plaintiff.
MacLean, Pou & Emanuel and A. Y. Arledge for defendant.

PER CURIAM. The defendant demurred *ore tenus* to the complaint on the ground that "The complaint does not state facts sufficient to constitute a cause of action." N. C. Code, 1935 (Michie), sec. 511 (6). The court below sustained the demurrer of defendant and dismissed the action. In this we see no error.

The allegations of plaintiff that the bulb was "inherently dangerous" does not make it so. The bulb was described and the description does not make it inherently dangerous. It is not like gunpowder, gasoline, dynamite, uninsulated electric wires, etc. These discarded electric bulbs are in the homes of every user of electric lights. Suppose a neighbor's young child comes into a home and picks up a discarded bulb, takes it into the yard of another and breaks it, and a 14-year-old boy cuts his foot on it. Is it possible that there would be any liability to the owner of the home from which the bulb came? We think not. Although defendant is a corporation, the principle is the same. If the defendant had been negligent, its negligence was not the proximate cause of the injury. *Lineberry v. R. R.,* 187 N. C., 786; *Stephens v. Lumber Co.,* 191 N. C., 23.

The judgment of the court below is
Affirmed.

BENJAMIN GERKS v. HARRY WEINSTEIN
and
C. N. HINER v. HARRY WEINSTEIN.

(Filed 29 April, 1936.)

Parties A c—

A motion by a party to be allowed to intervene and claim the property involved in the action is correctly denied where movant fails to identify the property claimed by her as the property in suit.

APPEAL by Emma Mayer, movant, from *Barnhill, J.,* at February Term, 1936, of WAKE. Affirmed.

The above entitled causes were consolidated in the Superior Court for the purpose of hearing the motion of Emma Mayer that she be allowed to intervene in each of said causes, and to set up therein her claim under a chattel mortgage to certain personal property on which the sheriff of Wake County had levied under an execution issued to him on the judgment against the defendant in each cause.

The motion was denied, and Emma Mayer, the movant, appealed to the Supreme Court, assigning error.

Little & Wilson for plaintiffs.
A. B. Breece for movant.

PER CURIAM. In the absence of any evidence at the hearing tending to show that the property on which the sheriff has levied is the same property as that described in the chattel mortgage, there was no error in the order denying the motion.

The motion was not supported by affidavit or other proof that the movant has any interest in or title to the property on which the sheriff had levied. The movant failed to show that she had a right to intervene, and for that reason the order denying her motion is

Affirmed.

MRS. A. D. N. HUNTER, TRUSTEE OF THE ESTATE OF R. N. HUNTER, DECEASED, ET AL., v. McCLUNG REALTY COMPANY, J. W. McCLUNG, AND J. W. McCLUNG, JR.

(Filed 29 April, 1936.)

Usury B c—

The statutory penalty for usury may not be recovered against the payee of notes secured by deed of trust upon evidence showing that a certain sum was paid the trustee in the deed of trust, but not paid to or received by the payee of the notes.

APPEAL by defendants from *Moore, Special Judge,* at February Term, 1936, of MECKLENBURG. No error.

This is an action to recover on notes executed by the defendant McClung Realty Company, a corporation, and endorsed by the defendants J. W. McClung and J. W. McClung, Jr., and for the foreclosure of the deed of trust by which the said notes are secured. The notes sued on are payable to the order of the Independence Trust Company and Mrs.

A. D. N. Hunter, executors of R. N. Hunter, deceased, and are now owned by Mrs. A. D. N. Hunter, trustee of the estate of R. N. Hunter, deceased, and the Independence Corporation.

At the trial the defendants admitted the execution of the notes, as alleged in the complaint, and relied upon the plea of usury, as alleged in their answer.

The issue submitted to the jury was answered as follows:

"In what amount, if any, are the defendants indebted to the plaintiffs? Answer: '$10,000, with interest from 17 March, 1933.' "

From judgment in accordance with the verdict, the defendants appealed to the Supreme Court, assigning errors in the trial.

Stancill & Davis for plaintiffs.
H. L. Taylor for defendants.

PER CURIAM. There was no evidence at the trial of this action tending to show that the payees of the notes sued on received from the defendants interest at a rate in excess of six per centum per annum, or that they charged the defendants interest on said notes at such rate, and thereby became liable for the statutory penalties for usury. C. S., 2306.

All the evidence showed that the sum of $217.50 was paid by the defendants to the Independence Trust Company, and that said sum was not paid to or received by the executors of R. N. Hunter, deceased, to whom the notes are payable.

For that reason, there was no error in the refusal of the court to submit to the jury the issue tendered by the defendants, or in the peremptory charge of the court to the jury on the issue submitted by the court.

The judgment is affirmed.

No error.

T. D. SHARPE ET AL. v. E. P. SHARPE ET AL.

(Filed 20 May, 1936.)

Wills E f: Partition A a—It is necessary that three appraisers or commissioners act in partitioning or dividing property.

The will in this case provided that the children of testator should select three appraisers, and that appraisers chosen by the children, or a majority of them, should divide the real and personal property equally among testator's children. Testator's children selected three appraisers in accordance with the will, but prior to final report one of the appraisers died, and some of the children moved that three new appraisers or com-

missioners be appointed by the court, but the other children objected to motion, and prayed that the court appoint only one appraiser or commissioner to take the place of the deceased appraiser, whereupon the court ordered the two surviving appraisers to complete the appraisal and file report, which report was later approved by the court. *Held:* Under the terms of the will and under the statutory provisions relating to partition, N. C. Code, 3219, it is necessary that three appraisers act in the matter, although two of them may file the report, N. C. Code, 3228, and the Superior Court should have appointed a third appraiser or commissioner, N. C. Code, 637, and the confirmation and approval of the report based upon the findings of but two appraisers is reversible error.

APPEAL by defendants from *Pless, J.*, at October Term, 1935, Civil Term of GUILFORD. Reversed.

This is a special proceeding, brought by plaintiffs against defendants, to partition certain property under the last will and testament of Julius H. Sharpe, who died on 24 February, 1930. The last will and testament was admitted to probate on 1 March, 1930.

The 4th Item of said will and testament is as follows: "It is my will and desire that all the property, both real and personal, of which I may be seized, shall be appraised by three disinterested men to be chosen by my children, or a majority of them; and said property, after paying the bequest to my wife aforesaid, shall be equally divided between my beloved children, share and share alike; but the shares of Terry D. Sharpe, Gertrude Dawson, Edna Sharpe McLean, and Nellie Sharpe Jobe, shall be charged with the payment of the sum of money hereinafter set out; and my said children are to have and to hold said property in fee simple absolute except as hereinafter provided."

It is alleged by plaintiffs and admitted by defendants "That on or about ...... March, 1930, the children of the said Julius H. Sharpe met at the home of the deceased and appraisers were duly nominated and an election held; that upon counting the ballots cast by said children it was found that David J. White, J. O. McNairy, and R. C. Causey were duly elected as appraisers, having been chosen by a majority of the children of the said Julius H. Sharpe, deceased."

The prayer is as follows: "Wherefore, your petitioners pray that you will appoint David J. White, R. C. Causey, and J. O. McNairy, the appraisers heretofore selected by a majority of the children, to divide the estate, both real and personal, of the testator, between his children, share and share alike, as provided by the last will and testament of the said J. H. Sharpe, deceased, and if an equal division cannot otherwise be made, then to charge the more valuable dividends with such sums of money as they shall think necessary, to be paid to the dividends of inferior value in order to make an equitable partition, as contemplated by the testator in his will, and to report to your court their proceedings

under their hands, or the hands of any two of them, within a reasonable time, not exceeding sixty days after the notification of their appointment."

The defendants in their answer, among other things, set forth that "there were gross mistakes in the valuation of some or all of the tracts described in the petition," etc., and allege, among other things: "That said mistakes and errors are so gross, and it is so apparent that they are the result of the ignorance of the appraisers as to the comparative values of said tracts of land, and/or to their partiality, that they shock the conscience of the court; and were the court to permit the appraisal to stand, it would result in great injustice and hardship to the defendants, and would be unconscionable and inequitable as to them."

The case was transferred to the civil issue docket. Judge Thos. J. Shaw made the following order:

"This cause coming on for a hearing before the Honorable Thomas J. Shaw, judge presiding, at the 4 April, 1932, Term of Guilford County Superior Court, and upon the reading of the pleadings it appearing to the court that the appraisers selected by the children of the testator under the provisions of paragraph four of the will of Julius H. Sharpe, deceased, have not completed the appraisal of the properties referred to in said will, and the plaintiffs having moved for an order directing said appraisers to complete and file their report:

"Now, therefore, it is ordered:

"1. That David J. White, J. O. McNairy, and R. C. Causey, appraisers selected by the children of the said Julius H. Sharpe, deceased, by virtue of the power set out in his last will and testament, be and they are hereby directed to complete the appraisal of all the properties, both real and personal, of the testator, and make a partition of the same among the devisees named in said will, as provided thereby; and if said appraisers do not have the power under the terms of said will to partition the properties among the various devisees, the court hereby appoints the said David J. White, J. O. McNairy, and R. C. Causey commissioners, and directs them to partition the properties, both real and personal, of the testator between the devisees named in the will, as thereby provided, and to such end the said appraisers shall file a report as such setting forth therein the values of the dividends allotted to the devisees in partitioning and setting apart to them the shares in said estate to which they are entitled, according to the terms of the last will and testament of the said J. H. Sharpe. They are further directed to file a report as appraisers and commissioners partitioning among the various devisees the shares to which they are entitled under the terms of said will and allotting to them such dividends, to the end that the properties, both real and personal, of the testator may be equally divided between his children, share and share alike, as provided by his last will and testament.

"2. It is further ordered that the defendant E. P. Sharpe, as executor of J. H. Sharpe, deceased, shall exhibit to the appraisers all notes, mortgages, and other personal property of every kind and nature belonging to said estate, to the end that said appraisers and commissioners heretofore named may appraise and partition said properties and make their reports to the next term of this court.

"And this cause is retained for further directions, and this order is made without prejudice to the rights and all of plaintiffs and defendants."

The defendants excepted to the foregoing order, and, on 28 March, 1935, made the following motion: "For and on account of the matters set out in the answer and amendment thereto, and on account of the death since the partial appraisal was made of one of the appraisers making the same, to wit, J. O. McNairy, and to the end that a new, complete, fair, and impartial appraisal and partition of the property described in the petition be made; the defendants move that the court appoint three new and disinterested appraisers and commissioners to partition the property described in the petition in accordance with the will of J. H. Sharpe and the provisions of law relating to partitions."

The matter came on for hearing on 24 May, 1935, before Judge P. A. McElroy, who made the following order:

"This cause coming on for a hearing before the Hon. P. A. McElroy, judge presiding at the 19 May, 1935, Term of Superior Court, upon the motion of the defendants that the court appoint three appraisers in lieu of the three appraisers named in the order made by the Hon. T. J. Shaw, and entered in this cause at the April Term, 1932, for that one of said appraisers, to wit, J. O. McNairy, is now dead, and the petitioners having come into court and opposed such motion, but having agreed that the court might appoint one disinterested appraiser to serve in the place and stead of J. O. McNairy, deceased, and the defendants having opposed the appointment of only one appraiser and having insisted on their motion:

"Now, therefore, it is ordered that the defendants' motion be and the same is hereby denied, and the surviving appraisers named in the order of Hon. T. J. Shaw, dated 4 April, 1932, to wit, David J. White and R. C. Causey, are ordered to proceed with the performance of the duties imposed upon them and make their report to the court within thirty days from this date."

The defendants except to the foregoing order, and also to the ruling of the court overruling their motion to appoint three new appraisers and commissioners to partition the property described in the petition in accordance with the will of J. H. Sharpe and the provisions of law relating to partitions, and to his ruling that David J. White and R. C. Causey,

survivors of the appraisers and commissioners heretofore appointed to partition said property have the power and authority to complete the partition."

David J. White and R. C. Causey made the report, and at the close of same is the following: "We further state that we have made a diligent effort to make the division in such manner as was contemplated by the last will and testament of the said Julius H. Sharpe." Numerous exceptions were made to the report by defendants.

In the record is the following: "It is agreed between the parties hereto that any questions of fact arising upon this proceeding may be heard and determined by the court without the assistance of a jury."

Judge J. Will Pless, Jr., heard the matter, found the facts, and made his conclusions of law, and rendered judgment thereon. In the finding of fact is the following: "The Hon. Thomas J. Shaw, judge presiding, ordered said appraisers to complete the appraisal of all the properties, both real and personal, of the testator, and make a partition of the same among the devisees named in said will, as provided thereby; that thereafter J. O. McNairy died, and the Hon. P. A. McElroy, judge holding the courts of the Twelfth Judicial District, directed the two remaining appraisers to file their report in obedience to the orders of the Hon. T. J. Shaw. That on 24 July, 1935, the said appraisers filed their report in the office of the clerk of the Superior Court of Guilford County, in which report the real and personal property of the testator, J. H. Sharpe, was appraised and divided among the legatees and devisees mentioned in his will, as therein provided; that the defendants E. P. Sharpe, executor, and E. P. Sharpe, individually, together with W. H. Sharpe and Robert N. Sharpe, filed exceptions to said report on the ground that the appraisers were not disinterested and proper appraisers or commissioners. That said appraisers were wholly disinterested in the estate of said J. H. Sharpe; that they were fair and impartial; that no mistake appears upon the face of their award; that said award, as shown by their report, is fair and just to the legatees and devisees named in the will of the late J. H. Sharpe, and is in full conformity to the provisions of said will requiring an appraisal of the testator's property, both real and personal."

In the judgment is the following: "That the said report of the commissioners, David J. White and R. C. Causey, copy of which is hereto attached, is hereby in all respects confirmed, and it is further ordered that said report and the plat appended be enrolled in the records of this court, and that the same, together with this decree, be certified to the register of deeds for Guilford County and registered in his office, and that said report and this decree shall be binding among and between the said claimants, their heirs and assigns."

In the exceptions and assignments of error made by defendants is the following: "That the court erred in directing the two surviving appraisers (after the death of J. O. McNairy) to proceed with the appraisal and partition, . . . and for the further reasons that the will of J. H. Sharpe required three appraisers and the law requires three commissioners in partition."

Frazier & Frazier and Spruill & Olive for plaintiffs.
Hoyle & Hoyle and Hines & Boren for defendants.

CLARKSON, J. Item 4 of the last will and testament of Julius H. Sharpe provides: "That all the property, both real and personal, of which I may be seized, shall be appraised by three disinterested men to be chosen by my children, or a majority of them," etc.

Under the terms of the will the children of Julius H. Sharpe selected David J. White, J. O. McNairy, and R. C. Causey. Before the duties of these appraisers were completed, J. O. McNairy died. Was the appraisal made by David J. White and R. C. Causey legal? We think not. Exceptions were duly made by defendants, in apt time, to the two appraisers acting after the death of J. O. McNairy. The language of the will was *that the appraisal shall be "by three disinterested men."*

N. C. Code, 1935 (Michie), sec. 637, is as follows: "Whenever a civil action or special proceeding begun before the clerk of a Superior Court is for any ground whatever sent to the Superior Court before the judge, the judge has jurisdiction; and it is his duty, upon the request of either party, to proceed to hear and determine all matters in controversy in such action, unless it appears to him that justice would be more cheaply and speedily administered by sending the action back to be proceeded in before the clerk, in which case he may do so." *Hall v. Artis,* 186 N. C., 105; *In re Estate of Wright & Wright v. Ball,* 200 N. C., 620; *Spence v. Granger,* 207 N. C., 19.

N. C. Code, *supra,* sec. 3219, is as follows: "The Superior Court shall appoint three disinterested commissioners to divide and apportion such real estate, or so much thereof as the court may deem best, among the several tenants in common, or joint tenants. *Provided,* in cases where the land to be partitioned lies in more than one county, then the court may appoint such additional commissioners as it may deem necessary from counties where the land lies other than the county where the proceedings are instituted."

We think the court must appoint three disinterested appraisers or commissioners, as set forth in the will of Julius H. Sharpe, or in accordance with the statute.

N. C. Code, *supra,* sec. 3228, is as follows: "The commissioners, within a reasonable time, not exceeding sixty days after the notification of their appointment, shall make a full and ample report of their proceedings, under the hand of any two of them, specifying therein the manner of executing their trust and describing the land or parcels of land divided, and the share allotted of each tenant in severalty, with the sum or sums charged on the more valuable dividends to be paid to those of inferior value. The report shall be filed in the office of the Superior Court clerk."

Under the statute, *two* can make the report, but the parties whose rights are to be effected have the right to have *three* disinterested parties appointed under the will or statute, so that the three can consider the questions involved.

There are other serious matters controverted on the record, but we do not think they are necessary now to be considered.

For the reasons given, the judgment is

Reversed.

JOHN S. McEACHERN, JR., Petitioner, Appellee, v. PHYLLIS ALBRIGHT McEACHERN, Respondent, Appellant.

(Filed 20 May, 1936.)

1. Habeas Corpus B a—Denial of motion for change of venue of habeas corpus proceeding is not reviewable.

Since any judge of the Superior Court or Justice of the Supreme Court has the power to issue a writ of *habeas corpus* at any time or any place, N. C. Const., Art. I, sec. 21; C. S., 2208, 2210, he has the discretionary power to make the writ returnable at such place as he may determine, which discretion will not be reviewed in the absence of a showing of abuse or failure to afford full opportunity to be heard, and therefore an exception to the refusal of a motion for change of venue of *habeas corpus* proceedings cannot be sustained. Statutes as to venue, C. S., 463, *et seq.*, all refer to "actions" and have no application to *habeas corpus* proceedings.

2. Appeal and Error J c—

The findings of fact by the court in proceedings in *habeas corpus*, to determine the custody of minor children of the parties, are conclusive when based on evidence.

3. Habeas Corpus A b: Parent and Child A c—

Where the parents are separated but not divorced, the right to the custody of the children of the marriage may be determined by a writ of *habeas corpus.* C. S., 2241.

4. Parent and Child A c—Decree awarding, in effect, custody of child to paternal grandparents as against mother, held error.

In this proceeding to determine the custody of minor children as between their parents, the trial court found that their father was a suitable person to have their custody so long as they remained in the home of their paternal grandparents, and that their mother was a suitable person to have their custody so long as they remained in the home of their maternal grandmother, and entered judgment that the children should stay in the home of their paternal grandparents for nine months of each year comprising the county school term, and that they should stay in the home of their maternal grandmother for the balance of each year, the court finding that this arrangement was to the best interests of the children. It appeared that their father did not live in the home of his parents, but that their mother did live in the home of her mother. *Held:* The decree in effect awarded the custody of the children for nine months of each year to their paternal grandparents, and the findings are insufficient to support the decree denying their mother the custody of the children for nine months of each year, and the cause is remanded for further findings of fact.

Stacy, C. J., concurring in part and dissenting in part.

Connor, J., concurs in opinion of Stacy, C. J.

Appeal by respondent from an order entered by *Cranmer, J.,* at Chambers in Southport, North Carolina, 15 February, 1936, as of 12 October, 1935. Remanded.

This was a proceeding under C. S., 2241, to determine the custody of the two small children of petitioner and respondent.

At the instance of petitioner, John S. McEachern, a writ of *habeas corpus* was issued out of New Hanover Superior Court by Cranmer, J., on 24 September, 1935, commanding the respondent, Phyllis Albright McEachern, living in Raleigh, North Carolina, to produce the said children before him in Southport, North Carolina, on 28 September, 1935.

It was admitted that petitioner and respondent were married in 1928, and that at the time of the issuance of the writ herein they were living separate and apart from each other, without being divorced.

There was a motion by respondent to remove the proceeding and the hearing to Wake County, where the respondent resides, on the ground that the petitioner was not a resident of New Hanover County nor of any county in the Eighth Judicial District, and also for the convenience of witnesses and parties. This motion was overruled and respondent excepted.

It was in evidence at the hearing that after their marriage in 1928 the petitioner and respondent lived in the home with respondent's parents in Raleigh, where both of said children were born. Since said marriage respondent's father, Major R. Mayne Albright, has died.

In May, 1934, petitioner and respondent separated. By agreement, the custody of the children was granted the mother, the father agreeing to contribute a certain amount to their support, which he failed to do; that in November, 1934, petitioner and respondent were reconciled and lived together in Charlotte, North Carolina, until April, 1935, when respondent returned with the children to her mother's home in Raleigh; that in May, 1935, she and the children went with petitioner's father to the latter's home in Wilmington, North Carolina, where they remained until 29 June, 1935, when respondent went to New York to get a position. She returned to Raleigh 6 September, and on 9 September, 1935, went to Wilmington and obtained possession of the children in the absence of petitioner's father and returned with them to Raleigh, where they remained with their mother at the home of their grandmother until the institution of this proceeding. One of the children is three years of age and the other six.

There was evidence that petitioner had lived elsewhere than Wilmington continuously during the entire period referred to, except for occasional visits to his parents, and that since November, 1934, he has been living in Charlotte and at the O'Henry Hotel in Greensboro, engaged in the insurance business, though claiming Wilmington as his residence.

There was abundant evidence that both petitioner and respondent are of excellent character.

After hearing the evidence, the judge below found facts and rendered judgment thereon as follows:

"1. The respondent requested a continuance, which was granted prior to filing her motion to remove.

"2. The court finds that there are no grounds for the removal of the case to Wake County, and the motion to remove is denied.

"3. The court finds that the petitioner, John S. McEachern, Jr., and the respondent, Phyllis Albright McEachern, are married, but living in a state of separation, and that there is no probability of reconciliation.

"4. That the petitioner and the respondent are the parents of two children, Nancy and John S. McEachern, III.

"5. That the separation agreement entered into between the parties was subsequently dissolved by the parties voluntarily resuming the relationship of husband and wife, and living together.

"6. That after the children were placed in the home of the father of the petitioner, and in his care and custody, that the respondent went to New York and remained until 6 September, when, being unable to find a position, she returned to the home of her mother in Raleigh.

"7. That the respondent, without the knowledge or consent, but contrary to the desire of the petitioner, went to the home of the father of the petitioner, where the children were in the legal custody of petitioner,

and surreptitiously and in the absence of both grandfather and grandmother took the children and carried them to the home of her mother, in Raleigh, N. C.

"8. The court finds as a fact that the petitioner is a fit and suitable person to have the custody of said two children only so long as they remain in the home of their paternal grandfather, John S. McEachern, Sr., of the city of Wilmington, N. C. The court finds as a fact that John S. McEachern, Sr., and his wife, have a Christian home in the city of Wilmington, and that it is a fit and suitable place for children of the age of petitioner's children to reside in, and to be reared in, and that the petitioner, with the assistance of his father, is amply able to provide for and maintain the said children.

"9. The court finds as a fact that the respondent is a fit and suitable person to have the custody of the children only so long as they remain in the home of her mother, Mrs. R. M. Albright, in the city of Raleigh, N. C. The court finds as a fact that Mrs. Albright has a Christian home, and that it is a suitable place for the said two children to reside in, and to be reared in, and that Mrs. Albright is able to provide for the children during the time they are in her home.

"Upon the foregoing facts, it is ordered, adjudged, and decreed:

"a. That the motion to remove is denied.

"b. That the children are not to be removed from the jurisdiction of this court.

"c. The court awards the custody of the children to their father only so long as they remain in the home of and in the charge of John S. McEachern, Sr., in Wilmington, New Hanover County, North Carolina, over the period of time from 1 September to 31 May of each year, which is the school term of New Hanover County.

"d. The court awards the custody of the children to their mother only so long as they remain in the home of and in the custody and charge of Mrs. R. M. Albright, of Raleigh, Wake County, North Carolina, over the period of time from 1 June to 31 August of each year, which is the vacation period of the schools of New Hanover County.

"e. It is further ordered and adjudged that the children be forthwith delivered into the custody of the petitioner, to be at once delivered to the home of and in charge of John S. McEachern, Sr. It is further ordered that the petitioner will deliver the two said children at the home of Mrs. R. M. Albright at the time specified in this judgment.

"f. Upon the hearing, the petitioner and his father, John S. McEachern, Sr., the paternal grandfather of the two said children, the respondent, and her mother, Mrs. R. M. Albright, the maternal grandmother of the two said children, and the two children, were present in court. The court had the opportunity of observing, and did observe, and the court

is of the opinion that the foregoing judgment is for the best interest of the two said infants.

"This 15 February, 1936, as of 12 October, 1935."

From the judgment rendered, respondent appealed.

Cleves M. Symmes and R. L. McMillan for petitioner, appellee.

MacLean, Pou & Emanuel and R. Mayne Albright for respondent, appellant.

Devin, J. The respondent, Mrs. Phyllis Albright McEachern, excepted to the judgment and contends that it is erroneous in two particulars:

(1) In denying respondent's motion to remove the cause to Wake County; and (2) in awarding custody of children for portion of each year to the paternal grandparents of the children in violation of the natural rights of the mother.

(1) What is the proper venue for the hearing on a writ of *habeas corpus?*

The statutes as to venue, C. S., 463, *et seq.,* all refer to "actions" and have no reference to proceedings of this kind. The writ of *habeas corpus* has been denominated a "high prerogative writ." Its suspension is prohibited by the Constitution of North Carolina, Art. I, sec. 21. By statute the application for the writ may be made to any one of the Justices of the Supreme Court or to any one of the Superior Court judges, either at term or in vacation, or may be issued by any judge of either court without application in certain cases. C. S., 2208 and 2210. The provisions with respect to writs of *habeas corpus* are by statute made applicable to a controversy as to the custody of children when the parents are separated and there has been no divorce, and in this instance only is an appeal allowed. If any judge refuse to grant the writ when legally applied for he is subjected to a severe penalty. C. S., 2212.

Since any judge, anywhere, has power to issue the writ, he may ordinarily make it returnable before himself at such place and time as in his sound discretion would seem to serve the ends of justice and the convenience of all parties as well as that of the court, and his discretion will not be reviewed in the absence of showing of abuse or failure to afford full opportunity to be heard. *Ex parte Schenck,* 74 N. C., 607; *Jain v. Priest,* 30 Idaho, 273, 164 Pac., 364. The writ may be, and often is, made returnable for convenience before some other judge or court. 29 C. J., 151. In the instant case the judge below found that a motion for continuance was made before filing of motion for removal, which, ordinarily in civil actions, would be held to constitute waiver of right of removal to the proper county.

The exception to the ruling of the court below in this respect cannot be sustained.

(2) The respondent assigns as error failure to comply with the provisions of C. S., 2241, requiring the judge to award the custody of the children "either to the husband or to the wife for such time and under such regulations and restrictions as will best promote the interest and welfare of the children"; and she contends that the facts found are not sufficient to support the judgment. On this point we think the exception to the judgment must be sustained.

The findings of fact of the court, based on evidence, are conclusive on appeal, and this rule applies to proceedings to determine the custody of children. *Stokes v. Cogdell,* 153 N. C., 181.

The eighth finding by the court below is in part as follows:

"The court finds as a fact that the petitioner is a fit and suitable person to have the custody of said two children only so long as they remain in the house of their paternal grandfather, John S. McEachern, Sr., in the city of Wilmington." This finding as to the fitness of the father to have the custody of the children seems to be qualified and conditional. It further appeared in evidence that the petitioner is living in Greensboro or Charlotte, though claiming his residence in Wilmington. There was no finding by the court below on this point. If the petitioner is living in Greensboro, the award of custody of the children for a portion of each year to petitioner so long as the children remain in the home of John S. McEachern, Sr., in Wilmington, would seem to be, in effect, an award to the paternal grandfather.

There was no finding that the respondent was not a fit and suitable person to have the custody of her children, but, on the contrary, it was found that the home in which she lived with her mother and the children was a suitable place for them.

The findings are insufficient to deprive the mother of the natural right which she shares with the father to the custody of her small children (one of them being but three years of age), nor to deprive the children of the tender care and loving ministrations of their mother, for nine months in the year. *Clegg v. Clegg,* 187 N. C., 730; *In re Alderman,* 157 N. C., 512.

The cause is remanded to the Superior Court of New Hanover County for further findings and conclusions in accordance with the provisions of the statute and this opinion.

Remanded.

STACY, C. J., concurring in part and dissenting in part: Conceding the statutory *habeas corpus* to be an appropriate writ in determining the custody of children as between married parents, living in a state of

separation, C. S., 2241, but not when they are divorced, C. S., 1664; *In re Blake,* 184 N. C., 278, 114 S. E., 294 ("the writ of *habeas corpus* cannot be used as a claim and delivery of the person"—*In re Parker,* 144 N. C., 170, 56 S. E., 878), it does not follow the motion for change of venue, made in the instant case, was ill-advised or not well founded.

It is provided by 2 C. S., 5039 (enacted 1919) that "The Superior Courts shall have exclusive original jurisdiction of any case of a child less than sixteen years of age, residing in or being at the time within their respective districts, . . . whose custody is subject to controversy." As the children, whose custody is here in controversy, were in the Seventh Judicial District at the time of the application of the writ, it would seem, under this statute, that the Superior Court of such district has exclusive original jurisdiction of the case. *In re Hamilton,* 182 N. C., 44, 108 S. E., 385; *In re Coston,* 187 N. C., 509, 122 S. E., 183.

Nothing was said in *Clegg v. Clegg,* 186 N. C., 28, 118 S. E., 824; *S. c.,* 187 N. C., 730, 122 S. E., 756, or the *TenHoopen Case,* 202 N. C., 223, 162 S. E., 619, which militates against this position. Cases decided prior to the enactment of 2 C. S., 5039, are inapplicable or not controlling.

I concur in the disposition of the second question raised by the appeal.

CONNOR, J., concurs in dissenting opinion.

A. M. CHINNIS v. MAY WRIGHT COBB, BEVERLY C. COBB, MARGARET C. COBB, MAY COBB BUTT, AND KATHERINE C. PICKETT.

(Filed 20 May, 1936.)

1. Wills E b—Devise in this case held to create spendthrift trust.

A devise to the testatrix' grandson to be held by him in trust for testatrix' daughter, with direction that he should pay the income arising therefrom to testatrix' daughter during her lifetime, but that neither the income nor the *corpus* of the estate should be liable for the debts of the daughter, existing or thereafter contracted, but that the income should be used for the maintenance and support of the daughter during her lifetime, and after her death the *corpus* to be equally divided among the daughter's children, *is held* to create a valid spendthrift trust under the provisions of C. S., 1742, the income therefrom being less than five hundred dollars a year. The prerequisites for the creation of a valid spendthrift trust discussed by DEVIN, J.

2. Trusts B a—

The statute of uses, C. S., 1740, converting the beneficial use into the legal ownership and uniting the legal and equitable titles, applies only to simple or passive trusts and not to active trusts.

3. Same—

A spendthrift trust directing the trustee to collect the rents and profits and pay same over to the beneficiary is an active trust so far as the *corpus* of the estate is concerned, upon which the statute of uses, C. S., 1740, does not operate to unite the beneficial and legal interests.

4. Attachment B b—

The interest of the *cestui que trust* in a spendthrift trust is not subject to attachment, C. S., 798, *et seq.*, since by express provision of C. S., 1742, the property is not liable for the debts of the *cestui que trust* in any manner.

5. Attachment B a: Wills E b—Where will is probated devising all the property, attachment against heir prior to probate is invalid.

Plaintiff attached property which had belonged to defendant's mother prior to her death. Thereafter, within one year after the death of defendant's mother, the will was probated in the county, which will devised the property in trust for defendant under a spendthrift trust. *Held:* Defendant took nothing as heir at law of her mother, and her interest in the land under the spendthrift trust was not subject to attachment, and the fact that the attachment was attempted to be levied prior to the probate of the will created no lien on the land.

6. Parties A a: Trusts G a—Trustee of spendthrift trust may defend action seeking to enforce claim against cestui.

The trustee of a spendthrift trust may defend an action seeking to attach the interest of the *cestui que trust*, both in the Superior Court and in the Supreme Court on appeal, without the appearance of the *cestui*, the preservation and protection of the property being incumbent upon him under the terms of the trust.

APPEAL by defendants, other than May Wright Cobb, from *Williams, J.*, at December Term, 1935, of NEW HANOVER. Reversed.

Motion to vacate an attachment levied on an interest in certain real property in the city of Wilmington, North Carolina, as the property of defendant May Wright Cobb.

The facts, as they appear from the pleadings and findings of fact of the court below, are substantially as follows:

All the defendants are nonresidents of North Carolina.

The plaintiff, a resident of Brunswick County, North Carolina, is the owner and holder of seven bonds of one thousand dollars each, executed by defendant May Wright Cobb and secured by deed of trust, executed by her and her codefendants, on certain real property in the city of Norfolk, Virginia. From foreclosure sale of said property in 1935,

credits were applied on the bonds held by plaintiff, leaving a balance of about five thousand dollars due and unpaid. Katherine F. Wright, a resident of Virginia, mother of defendant, May Wright Cobb, and grandmother of the other defendants, died 17 March, 1935, seized and possessed of real and personal property, including the real estate in the city of Wilmington, North Carolina, an interest in which was sought to be attached in this action. The said Katherine F. Wright left a last will and testament, which was duly probated and is now of record in New Hanover County. Item 3 of the will is as follows:

"The residue of my estate of whatsoever kind shall be divided in five equal shares. To each of my children, James F. Wright, Lucy Wright Hatcher, Lois Wright, and Thomas Hasel Wright, I give absolutely one of said shares. The remaining one-fifth share of my estate I give to Beverly C. Cobb, my grandson, said share, however, to be held by him in trust for my daughter, May Wright Cobb, and he shall pay the income arising therefrom to my said daughter during her lifetime, but during the life of this trust the *corpus* of the estate shall not be sold nor the income therefrom taken for the debts of the said May Wright Cobb, nor be liable for any indebtedness which she now may owe or hereafter contract, it being my express intention that the bequest made for the benefit of the said May Wright Cobb is to be used solely for her support and maintenance during her natural life and to be free from the claims of her creditors. At the death of my daughter, May Wright Cobb, I direct the said fifth share to be divided equally among Margaret C. Cobb, May Cobb Butt, Beverly C. Cobb, and Katherine C. Pickett, the children of my daughter, May Wright Cobb."

On 8 November, 1935, this action was instituted, and at the same time warrant of attachment was issued and levied on the interest of May Wright Cobb in the Wilmington real property and publication of summons and warrant of attachment, under order, was begun. On 7 December, 1935, the said will of Katherine F. Wright was duly recorded in New Hanover County.

No personal service was had on any of the defendants.

The defendants entered special appearance and moved to dismiss the action for want of prosecution bond, but upon sufficient finding this motion was denied. At the same time the defendants, other than May Wright Cobb, entered special appearance and moved to vacate the attachment.

The court below found that Katherine F. Wright left surviving her five children, including defendant May Wright Cobb, and that the other defendants are said May Wright Cobb's only children. The court further found that the undivided one-fifth interest of the property of the

testatrix situated in North Carolina does not and has not for more than a year yielded an annual income as much as five hundred dollars.

The court further being of opinion that the said will did not create a valid spendthrift trust under the law of North Carolina, denied the motion to vacate the attachment and dismiss the action, and from this ruling defendants, other than May Wright Cobb, appealed.

Isaac C. Wright for plaintiff.
E. K. Bryan and Beverly C. Cobb for defendants.

DEVIN, J. The first question presented by this appeal is whether the will of Katherine F. Wright created a spendthrift trust under the law of North Carolina.

The prerequisites for the creation of a valid spendthrift trust have been stated as follows:

(1) The legal title must be vested in a trustee; (2) the gift to the beneficiary must be only of income, and he must take no estate, have no power of alienation, no right to possession, no beneficial interest in the property save the qualified right to support and an equitable interest in the income; and (3) the trust must be an active one. *Kessner v. Phillips,* 189 Mo., 515, 25 R. C. L., 356-57; 65 C. J., 233.

It is not necessary that the *cestui que trust* be denominated nor in fact be a spendthrift. Perry on Trusts, sec. 386 (a).

The court will not inquire into the reason or wisdom of the creation of a spendthrift trust. 65 C. J., 233. The trust is upheld not out of consideration for the beneficiary, but for the protection of the right of a competent devisor to dispose of his property to whom and in any manner he sees fit, not repugnant to law. To hold otherwise would impair the testator's statutory right to dispose of his property to take effect after death. *In re Morgan,* 223 Pa., 228; 65 C. J., 239.

In North Carolina the right to create a spendthrift trust is specifically recognized and the limitations upon and the incidents to its exercise are set forth in C. S., 1742, as follows:

"It is lawful for any person by deed or will to convey any property, which does not yield at the time of the conveyance a clear annual income exceeding five hundred dollars, to any other person in trust to receive and pay the profits annually or oftener for the support and maintenance of any child, grandchild, or other relation of the grantor, for the life of such child, grandchild, or other relation, with remainder as the grantor shall provide; and the property so conveyed shall not be liable for or subject to be seized or taken in any manner for the debts of such child, grandchild, or other relation, whether the same be contracted or incurred before or after the grant."

This statute has been often considered and applied by this Court.

In *Lummus v. Davidson,* 160 N. C., 484, the devise to a trustee of a certain lot and building in the city of Charlotte was expressed to be in trust for the following purposes: "To collect the rents and profits arising therefrom and pay the same over to my son," with certain deductions for taxes and repairs. This was held to be an active trust and the property not subject to levy and sale on execution.

While the Statute of Uses, 27 Hen. VIII, now in force in North Carolina and codified as C. S., 1740, converted the beneficial use into the legal ownership and united the legal and equitable estates in the beneficiary, this rule applies only to passive or simple trusts and not to active trusts. *Lee v. Oates,* 171 N. C., 717; *Patrick v. Beatty,* 202 N. C., 454.

An active trust is one where there is a special duty to be performed by the trustee in respect to the estate, such as collecting the rents and profits, or selling the estate, or the execution of some particular purpose. Tiedeman on Real Property, sec. 494; *Perkins v. Brinkley,* 133 N. C., 154.

In Underhill on Wills, sec. 773, quoted with approval in *Lummus v. Davidson, supra,* we find this language: "In other words, when any control is to be exercised or any duty performed by the trustee, however slight it may be, . . . the trust is active." Since it would be impossible for the trustee to perform the duties imposed upon him unless permitted to retain the legal estate in himself, equity will not permit it to be transferred to the beneficiary under the statute of uses.

An illustration of an active trust is found in *Cole v. Bank,* 186 N. C., 514, where a fund was directed by will to be placed in a bank with directions to pay the interest to a son of the testator. It was held this in effect appointed the bank a trustee, and that it was an active trust and not a gift of the *corpus. Rouse v. Rouse,* 167 N. C., 208.

The distinction between an active and passive trust is clearly pointed out in *Patrick v. Beatty, supra.*

In *Fowler v. Webster,* 173 N. C., 442, there was a proceeding to garnishee the trustee in order to subject the income resulting from the fund in his hands to the payment of a debt of the *cestui que trust,* who was a nonresident. But it was held that the trust was created in compliance with the object and language of the statute authorizing spendthrift trusts (C. S., 1742), and that garnishment would not lie. In the opinion of the Court, written by *Chief Justice Clark,* in that case it is stated:

"The language of this trust is not to receive and pay the profits annually to W. M. Webster, which would make it a passive trust as to the income, but the language is 'to receive and pay the profit for the support and maintenance of my son during his lifetime.' This is, therefore, an active trust in regard to income as well as to the *corpus* of the fund."

In the instant case the property was devised to the trustee to be held in trust to pay the income to the beneficiary during her lifetime (with remainder over) "to be used solely for her support and maintenance," and the attachment was levied not upon the income but upon the *corpus*, the real estate itself.

We conclude that the devise created a valid spendthrift trust under the statute, which equity will not permit to be disregarded.

2. Is the beneficiary's interest in the property in North Carolina subject to attachment?

Attachment had its origin in the civil law and was resorted to in order to compel the attendance of the debtor as well as to afford a security to the creditor. *Grocery Co. v. Bag Co.,* 142 N. C., 174.

Under the code it is not an original proceeding, but ancillary to a pending action, and is intended to bring property of the defendant within the custody of the court and to apply it to the satisfaction of a judgment rendered in the action. It is a proceeding *in rem,* or *quasi in rem,* and the court, in the absence of personal service of process, can only proceed against the property attached. It is in the nature of a preliminary execution against the property, not so much to compel the appearance of the defendant as to afford satisfaction of plaintiff's claim. McIntosh, 920; *Mohn v. Cressey,* 193 N. C., 568; *Johnson v. Whilden,* 166 N. C., 104; *Currie v. Mining Co.,* 157 N. C., 209. Attachment has been called execution in anticipation. Attachment laws are "legal modes of acquiring title to property by operation of law. *Green v. Van Buskirk,* 7 Wall., 139. Only that property which may become subject to execution is attachable. *Willis v. Anderson,* 188 N. C., 479.

In C. S., 678, it is provided that upon sale under execution of trust estates whereof the judgment debtor is beneficiary, the purchaser holds the property discharged from all encumbrances of the trustee. But in *Mayo v. Staton,* 137 N. C., 670, it was held that this statute did not apply to an active trust, and that the trustee's estate could not be divested by execution sale. *Evans v. Brendle,* 173 N. C., 149; *Hardware Co. v. Lewis,* 173 N. C., 290.

Attachment may be levied on land as under execution, and whatever interest the debtor has subject to execution may be attached, but the debtor must have some beneficial interest in the land. *Willis v. Anderson, supra.*

It is expressly provided by our statute, C. S., 1742, on spendthrift trusts that the property so conveyed in trust "shall not be liable for or subject to be seized or taken in any manner for the debts" of the *cestui que trust,* "whether the same be contracted or incurred before or after the grant."

Hence, it follows that property conveyed to a trustee in trust for the purposes permitted by the statute, C. S., 1742, is not subject to attachment in a suit against one for whose benefit the trust was created.

(3) The fact that the attachment was attempted to be levied on the interest of May Wright Cobb in the real property in question before the will of the testatrix was recorded could not have the effect to establish a lien thereon contrary to the expressed will of the devisor, who had the unquestionable right to dispose of her property as she saw fit.

Even a conveyance by May Wright Cobb could not have affected the testamentary disposition of the owner of the land. Nor could this result be accomplished by levying an attachment before the will was recorded. Upon the probate and filing of the will of the testatrix, within less than a year of her death, the property passed to her devisee, and there was in law no interest therein in May Wright Cobb upon which a valid attachment could be levied. As heir she could take only undevised property. *Gosney v. McCullers,* 202 N. C., 326.

(4) Can the question of the invalidity of the attachment levied on property as that of May Wright Cobb be presented to this Court on an appeal by the trustee?

We think so. The defendant Beverly C. Cobb, trustee, and the named defendants, other than May Wright Cobb, have entered general appearance in this case and are now in court. The defendant May Wright Cobb entered special appearance in the court below only for the purpose of moving to dismiss the action for lack of prosecution bond. She did not join in the motion to vacate the attachment, nor did she appeal from the judgment denying the motion.

But it is not only the right but the duty of a trustee to protect and defend the title to the trust estate. He is not only a proper party but a necessary party. He holds the property under the will as trustee for the purposes expressed in the devise. He holds it in trust for all the *cestuis que trustent,* the ultimate beneficiaries, in remainder as well as for the benefit of May Wright Cobb. In order to carry out the purposes of the trust and perform the duties imposed upon him, it is incumbent on him to preserve and protect the trust property, and for that purpose may appear and defend the action for all purposes in this Court as well as the court below. 26 R. C. L., 1281; 2 Beach on Trusts, sec. 501; I Perry on Trusts, sec. 328; 65 C. J., 694.

We conclude, therefore, that there was error in declining to vacate the attachment, and in that respect the judgment of the Superior Court is

Reversed.

ANNIE LEE ALBRITTON v. B. G. ALBRITTON.

(Filed 20 May, 1936.)

1. **Evidence D f—Evidence held competent as corroborating plaintiff's testimony.**

In this action for alimony without divorce, plaintiff testified that her husband had repeatedly struck her in the face and that she was in constant fear of him. A witness for plaintiff was allowed to testify that plaintiff had a black eye and appeared to be nervous. *Held:* The testimony was competent as tending to corroborate plaintiff's testimony.

2. **Divorce D d—Evidence of defendant's good treatment of first wife held irrelevant to issue and was properly excluded.**

In this action for alimony without divorce, plaintiff testified that defendant, while beating her, stated he had killed his first wife and got away with it, and that he was going to kill her, and another witness for plaintiff testified that defendant's reputation was good as to outsiders, but was cruel to both his wives. Defendant excepted to the exclusion of his testimony to the effect that his treatment of his first wife was good. *Held:* Defendant's treatment of his first wife was irrelevant to the issue and was properly excluded, and such evidence was not rendered competent as tending to contradict plaintiff's witnesses, defendant having availed himself of the proper method of contradicting their testimony by denying he had made the statement to his wife and by showing that his general reputation was good.

3. **Appeal and Error J e—**

The exclusion of testimony, if erroneous, is rendered harmless when the same witness is thereafter allowed to testify to the same import on redirect and cross-examination.

4. **Evidence M a—**

While the questioning of a character witness must be limited to the general character of the party in question, the witness may voluntarily qualify his testimony by giving the party's reputation, good or bad, for particular traits.

5. **Trial E f—**

An objection to the statement of the contentions of a party by the trial court must be brought to his attention in apt time to afford an opportunity for correction in order to be considered on appeal.

6. **Trial E c—**

The statement of the contentions of a party in the charge in this case *is held* to clearly designate them as contentions, and appellant's assignment of error on the ground that the court should have further explained that they were not statements of law or an expression of opinion by the court, is untenable.

7. **Divorce E c—Adultery prior to marriage is no defense to suit for alimony without divorce.**

In this suit for alimony without divorce, the court charged the jury that evidence of plaintiff's misconduct prior to marriage was immaterial,

and that the question for them to determine upon the defense of adultery was whether plaintiff had been guilty of adultery subsequent to her marriage to defendant. *Held:* The instruction correctly stated the law applicable to the issue, and did not eliminate from the jury's consideration the evidence of plaintiff's misconduct subsequent to the marriage.

8. Trial E f—

An exception to the charge on the ground that more time was taken in stating plaintiff appellee's contentions than in stating defendant appellant's contentions is untenable as a "broadside exception," in the absence of a statement of instructions or contentions of appellant which should have been contained in the charge.

9. Divorce E c—Plaintiff need establish but one ground for divorce a mensa in suit for alimony without divorce.

In this suit for alimony without divorce, the first issue related to the marriage of the parties, the next three issues to separate alleged acts of defendant, each of which would constitute grounds for divorce *a mensa et thoro,* and the fifth issue to the alleged adultery of plaintiff. Upon the jury's failure to reach an agreement, the court instructed them that if they had reached an agreement on the first and fifth issues and on any one of the second, third, or fourth issues, they should return such answers as their verdict. *Held:* An exception to the action and charge of the court is untenable, since plaintiff would be entitled to recover if the issue of marriage and the issue of adultery were found in her favor, together with a favorable finding on any one of the other issues, C. S., 1667, only one ground for divorce *a mensa et thoro* being necessary to support a judgment for alimony without divorce.

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

APPEAL by defendant from *Barnhill, J.,* at February Term, 1935, of PITT. No error.

This is an action instituted by a wife to have a reasonable subsistence and counsel fees allotted and paid or secured to her from the estate or earnings of her husband, under section 1667 of the Consolidated Statutes. The plaintiff alleged and offered evidence tending to prove that her husband, the defendant, offered such indignities to her person as to render her condition intolerable and her life burdensome, and maliciously turned her out of doors, and wrongfully abandoned her. The defendant made general denial of the plaintiff's allegations and, by amended answer, alleged that the plaintiff had committed adultery since her marriage to him, and offered evidence tending to establish such allegation.

The court submitted the following issues:

"1. Were the plaintiff and the defendant legally married, as alleged in the complaint?

"2. Did the defendant offer such indignities to the person of the plaintiff as to render her condition intolerable and life burdensome, as alleged in the complaint?

"3. Did the defendant, on 6 November, 1933, wrongfully, unlawfully, maliciously, and without cause upon the part of the plaintiff, turn the plaintiff out of doors, as alleged in the complaint?

"4. Did the defendant wrongfully and unlawfully abandon the plaintiff, as alleged in the complaint?

"5. Did the plaintiff commit adultery, as alleged in the answer?"

The jury answered the first and third issues "Yes," and the fifth issue "No," and under instructions of the court left the second and fourth issues unanswered.

From judgment directing that he allot, pay, and secure reasonable subsistence and counsel fees to the plaintiff, the defendant appealed, assigning errors.

Albion Dunn and Cooley & Bone for plaintiff, appellee.

Gaylord & Hannah, Charles Whedbee, and Julius Brown for defendant, appellant.

SCHENCK, J. The appellant makes nine assignments of error and brings them all forward in his brief. The first four are to the court's rulings upon the admission and the exclusion of evidence, the next four to portions of the charge, and the last to the refusal of the court to set aside the verdict and to the judgment as rendered.

The first assignment of error to the rulings upon the evidence (exceptions 2 and 3) is to the court's permitting a witness, Mrs. Stokes, to testify that she saw the plaintiff and saw that she had a black eye and that she was nervous. This evidence was competent to corroborate the plaintiff, who had previously testified that her husband had repeatedly struck her in the face, and that she was in constant fear of him. "Evidence which would be inadmissible to prove the main facts in issue may often be admitted to corroborate a witness." Lockhart's N. C. Handbook of Evidence, par. 282, p. 334.

The second assignment of error to the rulings upon the evidence (exceptions 4, 5, 6, and 7) is to the refusal of the court to allow certain witnesses to testify in effect that the treatment by the defendant of his first wife, now deceased, was good. The defendant contends that such testimony was rendered competent because the plaintiff had testified that the defendant had told her, while beating her, that he killed his first wife and got away with it, and that he was going to kill her, and because Mrs. Tucker, a witness for the plaintiff, had testified: "It (the general character of the defendant) is very good as to outsiders, but very cruel to both of his wives, is what I have always heard." This assignment is untenable. The issues in this case involved the defendant's treatment of

the plaintiff, his present wife, and not his treatment of his former wife, now dead. It was competent for the plaintiff to testify what the defendant said to her as tending to establish an "indignity to her person," and the defendant was at liberty to deny, as he did, the making of such statement. The statement made by Mrs. Tucker was admissible as a voluntary qualification of her testimony as to the general character of the defendant. It was open to the defendant to meet this evidence, as he did, with evidence tending to show his good character and general reputation.

The third assignment of error to the rulings upon the evidence (exception 9) is to the court's sustaining an objection to the question propounded to and the answer made by the witness Parkerson, as follows: "Q. Have you seen them there before? A. Several times before she was married." The persons referred to in the question were the plaintiff and a man not her husband and the place referred to was the place where the witness had testified that he had seen the plaintiff and this man in the act of adultery about 20 days before her separation from her husband, the defendant. It would seem that this evidence was incompetent, since the issue was whether the plaintiff had committed adultery after her marriage to the defendant, but, however that may be, any error, if committed, was rendered harmless by the later testimony of the same witness, both on cross and redirect examination, when he said that he had seen the plaintiff and this same man go to the same place three or four times and have sexual intercourse before the plaintiff married the defendant. *Baynes v. Harris,* 160 N. C., 307; *Eaves v. Coxe,* 203 N. C., 173 (177).

The fourth assignment of error to the rulings upon the evidence (exception 10) is to the court's overruling an objection to the testimony of the witness, Mrs. Tucker, as to the character of the defendant. The record is as follows: "Q. Do you know his (defendant's) general reputation? A. Yes, sir. Q. What is it? A. Very good to outsiders, but very cruel to both wives, is what I have always heard." This assignment is untenable. While a witness on direct examination can only be asked about general character, "the witness may say on his own motion what a person's character is good or bad for—give particular traits—but cannot be asked about such particular traits on direct examination." Lockhart's N. C. Handbook of Evidence, par. 195, p. 231.

The fifth assignment of error (exception 11) is to that portion of the charge as follows: "Plaintiff contends that even if you find that she had been unfaithful to him on the occasion testified to by one of the witnesses, that the defendant himself testified that he did not know it at that time, and didn't find out until after the separation, and that, therefore,

his conduct was not caused by her infidelity, and his treatment was not provoked and not caused by any conduct of hers, and that you should answer that issue 'Yes.'" The objection upon which this assignment is based cannot be sustained since it was a statement of a contention and was not called to the attention of the court during the course of the trial. An objection to a statement of a contention must be made promptly in order to give the court an opportunity to make correction, and if not so made, such objection will be considered as waived. *S. v. Sinodis,* 189 N. C., 565 (571). We do not agree with the appellant that this contention was so stated as to call for an explanation from the court that he was not stating the law or was not expressing an opinion. The contention was clearly presented and was amply supported by the evidence.

The sixth assignment of error (exception 12) is to the charge and is directed to the following statement: "The fifth issue is based upon the affirmative defense set out in the answer. He alleges that during the period of coverture the plaintiff committed adultery. The fifth issue is, 'Did the plaintiff commit adultery, as alleged in the answer?' That is, did she commit adultery during the period of coverture, that is, after she was married? There is some evidence of her misconduct prior to the marriage. Even if that was so, that would be no defense to this question. The question is for you to say whether after she was married to him she was unfaithful, that is, whether she had carnal knowledge of some other man."

The appellant says in his brief that "This statement of the court completely eliminated the evidence of the witness Parkerson that he had seen the plaintiff and Coy Smith at or near his hog pen a number of times, prior to her marriage, it being the same place where he testified he saw them have intercourse after her marriage." We are at a loss to see how this statement "eliminated" any evidence. It appears to us, and we so hold it to be a correct statement of law applicable to the fifth issue.

Under the seventh assignment of error (exception 13), which is to the charge, the appellant urges as error that, in stating the contentions of the parties, the court utilized only two-thirds of a page in stating the defendant's contentions and utilized two pages in stating the plaintiff's contentions. The defendant presented no written request for special instructions and asked for the presentation of no other contentions, and does not now state what instructions or contentions not given should have been given. "Unpointed" and "broadside" exceptions to the charge cannot be maintained. *Rawls v. Lupton,* 193 N. C., 428, and cases there cited.

The eighth assignment of error (exception 14) is to the action and charge of the court, as indicated from the following excerpt from the record: "After the jury had been out for some time, the court sent for the jury and inquired of them in open court whether they had been able to agree. The jury responded that they had not. The court then inquired whether the jury could agree on either one of the 2d, 3d, or 4th issues. They responded in the affirmative. The court then instructed the jury that if they could agree upon the first and fifth issues and on either the 2d, 3d, or 4th issues, and they answered either the 2d, 3d, or 4th issues 'Yes,' then they could return that as their verdict."

The second, third, and fourth issues presented three separate grounds for divorce *a mensa et thoro*. All of these grounds were alleged in the complaint, but it was not necessary for the plaintiff to establish all of them in order to sustain her action. It was sufficient under the statute, C. S., 1667, if she established the defendant's guilt of any of the acts that would constitute a cause for divorce from bed and board as enumerated in C. S., 1660.

By its affirmative answer to the third issue, the jury found that the defendant unlawfully, maliciously, and without cause turned the plaintiff out of doors, as alleged in the complaint. The establishment of this fact, together with the fact of the marriage and the finding against the defendant on his defense of adultery, was all that was necessary to support a judgment in favor of the plaintiff for alimony without divorce. This being true, it was useless to have the jury continue its consideration of the second and fourth issues. Even if the jury had answered both of these issues against her, the plaintiff would still have been entitled to judgment, and for that reason the defendant suffered no harm by the failure of the jury to answer the second and fourth issues.

The ninth assignment of error (exception 16) is directed to the refusal of the court to set aside the verdict and to the judgment as rendered. This assignment is formal and its disposition follows the disposal made of the assignments that preceded it.

This is an action in which the evidence was conflicting and in which clear cut issues of fact were presented. The jury, in a trial free from prejudicial error, have answered these issues in favor of the plaintiff and against the defendant, and the defendant must abide the consequences.

No error.

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

STATE v. J. F. MORRISON.

(Filed 20 May, 1936.)

1. **Criminal Law A c—Statute imposing no penalty and failing to provide that noncompliance should be unlawful, held not criminal statute.**

A statute prescribing that persons engaged in a certain business should obtain a license from the Commissioner of Revenue, but which does not provide that failure to comply with its provisions should be a misdemeanor, nor impose any penalties, and which is separate and distinct from the general Revenue Act, is not a criminal statute, and a person refusing to comply with its provisions cannot be charged with crime.

2. **Statutes A d—Statute prescribing license for certain dealers in scrap tobacco held void for uncertainty.**

Ch. 360, Public Laws of 1935, prescribing that certain classes of persons dealing in scrap tobacco should first procure a license from the Commissioner of Revenue, *is held* void for uncertainty, the statute failing to stipulate the time when the license prescribed should be paid and failing to prescribe for how long a time the license should run.

APPEAL by the State from *Daniels, Emergency Judge,* at March Special Term, 1936, of ROBESON. No error.

The defendant was charged with a criminal offense, under the following warrant:

"STATE OF NORTH CAROLINA—ROBESON COUNTY.

"W. B. Parham, being duly sworn, complains and says that at and in said county, Lumberton Township, on or about the ...... day of September, 1935, J. F. Morrison did unlawfully and willfully engage in the business of buying and/or selling scrap tobacco, without applying to the Commissioner of Revenue of North Carolina for a license to engage in such business, and stating in application the place and purpose of business and counties or county in which he intended to do business, and without paying the license tax, provided by law, and did engage in business of purchasing such scrap tobacco from those other than the landlords who, or on whose property the said tobacco was grown and from places other than on the warehouse floors, contrary to the form of the statute and against the peace and dignity of the State.

W. B. PARHAM.

"Sworn to and subscribed before me, this the 2d day of October, 1935.

JAMES R. NANCE, *Solicitor.*"

"Defendant makes motion to quash indictment on grounds that it fails to charge a crime. After a hearing on the matter, the motion is granted

and the bill is quashed. Notice of appeal from the judgment is given by the State. JOHN G. PROCTOR,
Recorder Lumberton District."

The State appealed to the Superior Court. The jury, on the trial in the court below, rendered a special verdict, as follows:

"We, the jury, return the following special verdict, and find these facts:

"1. Defendant J. F. Morrison, residing in the town of Lumberton, North Carolina, was, at the time of this indictment, engaged in the business of purchasing tobacco, and on the 1st day of August, 1935, procured from the United States Government the following certificate, as required by the Federal law:

" 'D..

Certificate of Registry.
Dealer in Leaf Tobacco
Fiscal Year Ending June 30

" 'Form 282—Revised.
Feb. 1926.
Treasury Department
U. S. Internal Revenue.

For failure to register within the month of commencing business and July each year a penalty of $50.00 will be incurred.

" 'For the period 1936, commencing July 1st, 1935.

" 'Issued by the Collector................District, State of North Carolina.

" 'To: J. F. Morrison, Lumberton, N. C.

" 'This certificate must be posted conspicuously in registrant's place of business.'

"2. Defendant J. F. Morrison did, on 1 September, 1935, in the county of Robeson, purchase scrap tobacco from a farmer without paying the State license required under chapter 360, Public Laws of 1935.

"3. At the time of this purchase of scrap tobacco by defendant, tobacco warehouses in the town of Lumberton, paying license tax under section 142 of the Revenue Act of 1935, were engaged in the purchase and sale of scrap tobacco and were not required to pay such tax, because in the purchase and sale of such tobacco said warehouse at all times complied with the provisions of chapter 360, Public Laws of 1935, as well as with section 142 of Revenue Act of 1935, and therefore did not pay the $1,000.00 license tax.

"If, upon this special verdict and findings, the court is of the opinion that defendant is guilty, we find him guilty. If the court is of the opinion that he is not guilty, we find him not guilty. Thereupon, the court finds defendant not guilty. F. A. Daniels, Judge presiding."

Judgment: "Upon the special verdict returned into court, after argument of counsel for the State and the defendant, the court adjudges the defendant not guilty. It is ordered that the defendant be discharged. By consent, argument heard and judgment rendered at Chambers, out of term. 21 April, 1936. F. A. DANIELS,
Judge Presiding."

The State excepted and assigned error to the foregoing judgment, and appealed to the Supreme Court.

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

W. E. Timberlake, J. B. Eure, and McLean & Stacy for defendant.

CLARKSON, J. The defendant is charged with the crime of violating chapter 360, Public Laws 1935. Section 1 is as follows: "Every person, firm, or corporation engaging in the business of buying or selling scrap tobacco shall apply to the Commissioner of Revenue of North Carolina for license to engage in such business, and such applicant shall state the counties in which the said person, firm, or corporation proposes to do business, and the place where the principal office of the applicant or warehouse of the applicant is situated, and shall pay to the said Commissioner of Revenue for the benefit of the State a license tax of one thousand ($1,000.00) dollars for each and every county in which the applicant proposes to do business: *Provided,* this shall not apply to scrap tobacco sold on floors of warehouses paying a license tax under section one hundred and forty-two of the Revenue Act of one thousand nine hundred and thirty-five, or to tobacco scrapped by reason of processing by a manufacturer or processor of tobacco: *Provided,* this shall not apply to any person, firm, or corporation regularly engaged in the business of buying, selling, or processing leaf tobacco and properly licensed therefor: *Provided,* scrap tobacco bought by such person, firm, or corporation is delivered by the landlord thereof to the place of business of such purchaser." Section 2 provides that on or before 10th of each month report to be made to Commissioner of Revenue. Sec. 3 provides for display of license.

The defendant sets forth many contentions why the act should be declared unconstitutional, inoperative, and void, one of which is as follows: "For that the defendant has committed no offense under the pro-

visions of chapter 360, Public Laws of 1935, for the statute fixes no time when the license is required to be paid, nor how long the license shall run, and is, therefore void for uncertainty."

In "An Act to Raise Revenue," ch. 371, Public Laws of N. C., 1935, the failure to comply with the provisions of that act is made a misdemeanor, and also in certain cases penalties are imposed. The present act is a separate and distinct act and the noncompliance is not made unlawful or a crime. Therefore, no crime can be charged against the defendant.

In *S. v. Pierce,* 123 N. C., 745 (747), it is said: "Indeed, the doctrine is well settled that where the statute either makes an act unlawful or imposes a punishment for its commission, such act becomes a crime without any express declaration that it shall be a crime or of its grade. In the former case it is a misdemeanor, and in the latter a felony or a misdemeanor, according to the nature of the punishment prescribed."

We think the act is also void for uncertainty and vagueness—it is so loosely and obscurely drawn as to be incapable of enforcement, and therefore void for uncertainty.

Speaking to the question, in *Drake v. Drake,* 15 N. C., 110, *Chief Justice Ruffin,* delivering the opinion of the Court, said: "Whether a statute be a public or private one, if the terms in which it is couched be so vague as to convey no definite meaning to those whose duty it is to execute it, either ministerially or judicially, it is necessarily inoperative. The law must remain as it was, unless that which professes to change it be itself intelligible."

In *S. v. Partlow,* 91 N. C., 550 (553), we find: "'A statute must be capable of construction and interpretàtion; otherwise, it will be inoperative and void. The court must use every authorized means to ascertain and give it an intelligent meaning; but if, after such effort, it is found to be impossible to solve the doubt and dispel the obscurity, if no judicial certainty can be settled upon as to the meaning, the court is not at liberty to supply—to make one. The court may not allow "conjectural interpretation to usurp the place of judicial exposition." There must be a competent and efficient expression of the legislative will.'"

Not only is this the law in North Carolina, it is also the law in other jurisdictions, the general rule being stated in Re. Di. Torio, 8 F. (2d), 279, as follows: "An act which is so uncertain that its meaning cannot be determined by any known rules of construction cannot be enforced. If no judicial certainty can be settled upon as to the meaning of a statute, the courts are not at liberty to supply one. It must be capable of construction and an interpretation; otherwise, it will be inoperative and void. An act is void where its language appears on its face to have a

meaning, but it is impossible to give it any precise or intelligible application in the circumstances under which it is intended to operate."

The general rule is well stated in 25 R. C. L., 810: "When an act of the Legislature is so vague, indefinite, and uncertain that the courts are unable to determine with any reasonable degree of certainty what the Legislature intended, or is so incomplete, or is so conflicting and inconsistent in its provisions that it cannot be executed, it will be declared inoperative and void." *Stacy, C. J.*, in *Boyd v. Brooks,* 197 N. C., 655.

In *S. v. Gooding,* 194 N. C., 271 (273), it is declared: "Again, in *Yu Cong Eng v. Trinidad,* 271 U. S., 500, *Chief Justice Taft,* speaking to the constitutionality of an act of the Philippine Legislature, which undertook to prohibit any person, firm, or corporation, engaged in commerce or other activity for profit in the Philippine Islands, from keeping its account books in any language other than English, Spanish, or some local dialect, said 'that a statute which requires the doing of an act so indefinitely described that men must guess at its meaning, violates due process of law.' "

For the reasons given, we find in the judgment of the court below

No error.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES v. GUS RUSSOS AND WIFE, KATINA RUSSOS.

(Filed 20 May, 1936.)

1. **Homestead B b—Judgment debtor may claim homestead in property conveyed by him when he obtains reconveyance prior to execution sale.**

   Plaintiff obtained judgment against defendants, who are husband and wife. Thereafter, the defendants conveyed certain vacant lots owned by the *feme* defendant to a nonresident, all legal requirements being complied with in making such conveyance. Plaintiff caused execution to issue on its judgment, but before final process of sale the nonresident reconveyed the lots to the *feme* defendant, and she claimed her homestead exemption in said lots, they being the only real estate owned by her. *Held:* Upon the conveyance of the lots by defendants their homestead right therein was terminated, and plaintiff could have sold same to satisfy the judgment, but upon the reconveyance of the lots to the *feme* defendant prior to final process of sale, she was entitled to have her homestead allotted therein. N. C. Code, 614, 729, N. C. Constitution, Art. X, sec. 2.

2. **Homestead A a—**

   Where the only real property owned by a judgment debtor consists of vacant lots, he may claim his homestead therein, since he may thereafter build a habitable structure thereon.

APPEAL by defendants from *Barnhill, J.*, at Second January Term, 1936, of WAKE. Reversed.

The agreed statement of facts:

"(1) That on 18 June, 1934, the Equitable Life Assurance Society secured a judgment against the defendants Gus Russos and wife, Katina Russos, in the amount of $736.96, with interest thereon from 16 May, 1932, and for costs, said judgment having been secured in the Superior Court of Wake County, N. C., and properly docketed and indexed in the office of the clerk of said court on 26 June, 1934, and will be found in Judgment Docket Book 41, on page 54, in said clerk's office.

"(2) That at the time said judgment was docketed, Katina Russos, one of the defendants, was the owner of two lots of land in Raleigh Township, Wake County, North Carolina, known as Lots Nos. 517 and 583, Part 5, of Bloomsbury, according to a certain map made by Riddick and Mann, recorded in the registry of Wake County, in Book of Maps 1911, at page 120.

"(3) That after the docketing of said judgment, the said Katina Russos and her husband, by a regular warranty deed in proper and regular form and execution, dated 30 October, 1934, and filed for registration 2 November, 1934, and recorded in Book 678, at page 386, in the office of the register of deeds for Wake County, North Carolina, conveyed said lots of land to Mrs. Christine Roukis, a resident of the city of Brooklyn, New York.

"(4) That thereafter, on 19 August, 1935, the plaintiff herein caused execution to be issued on said judgment, reference being made to said execution and the returns and proceedings thereunder, the original of which appears herein.

"(5) That on 19 August, 1935, the sheriff, after receiving said execution, gave notice to said Katina Russos of same, and made demand on her and posted an advertisement of the sale of said property and proceeded to advertise said sale in the *Raleigh Times*, a newspaper published in the city of Raleigh, Wake County, N. C., under said execution.

"(6) That thereafter, by deed dated 20 August, 1935, and filed for registration in the office of the register of deeds for Wake County, North Carolina, on 29 August, 1935, the said Christine Roukis and her husband reconveyed said property to the defendant Katina Russos.

"(7) That on Monday, 7 October, 1935, at the request of the defendants, N. F. Turner, sheriff of Wake County, caused the personal property exemption of said defendants to be allotted and the homestead of said defendant Katina Russos to be allotted, and that said lots of land were valued by the appraisers at $1,000, and allotted to said Katina Russos as her homestead exemption, reference being made to the returns appearing herein.

"(8) That the plaintiff filed its exceptions to the allotment of said lands to said Katina Russos as a homestead, and gave notice of appeal to the Superior Court, the original of which said exceptions and defendants' response thereto appear herein.

"(9) It is admitted that Katina Russos is a citizen and resident of Wake County, and has been a citizen and resident of Wake County for more than ten years, and was at the time said homestead was allotted, and still is, a citizen and resident of Wake County, but does not reside upon said lots, and that there are no buildings on said lots.

"(10) It is further agreed for the purpose of this action that at the time said homestead was allotted said Katina Russos did not own any other real estate, had never owned any other real estate, and still does not own any other real estate, in North Carolina.

"This 27 January, 1936.

S. BROWN SHEPHERD,
N. G. FONVILLE,
Attorneys for Plaintiff.
R. L. MCMILLAN,
R. ROY CARTER,
Attorneys for Defendants."

The judgment of the court below is as follows: "This cause coming on to be heard at the Second January Term, 1935, of the Superior Court of Wake County, before his Honor, M. V. Barnhill, upon exceptions filed to the laying off of homestead for the defendant Katina Russos in said lots in Raleigh Township, known as Lots Nos. 517 and 583, Part 5 of Bloomsbury, and upon the facts as stated in an agreement appearing of record herein signed by counsel for both parties; and the court being of the opinion that the said defendant Katina Russos is not entitled to a homestead in the said lots above referred to, which was laid off for her upon execution of judgment by the plaintiff: Now, therefore, it is ordered and adjudged that the exceptions filed by the plaintiff to the allotment of said homestead in said lots be and the same are hereby sustained, and the allotment of said homestead is hereby set aside and adjudged to be of no effect: And the sheriff of Wake County is directed to proceed to advertise and sell the said lots above referred to, following the usual procedure provided by law, under execution of the judgment of the plaintiff, and to sell the same free of any homestead or claim of the said Katina Russos of right to homestead in said lots. It is further ordered that the costs of these proceedings be paid from the proceeds of the sale. This 28 January, 1936. M. V. Barnhill, Judge presiding."

The defendants excepted, assigned error to the judgment as signed, and appealed to the Supreme Court.

S. Brown Shepherd and N. G. Fonville for plaintiff.
R. Roy Carter and R. L. McMillan for defendants.

CLARKSON, J. After a careful investigation of the controversy, we think there was error in the opinion of the court below that Katina Russos was not entitled to a homestead exemption in the lots in controversy.

The plaintiff had a duly docketed judgment, on 18 June, 1934, for $736.96, and interest, against the defendants Gus Russos and wife, Katina Russos, in the office of the clerk of the Superior Court for Wake County, North Carolina, and at the time Katina Russos was the owner of two lots of land in said county.

N. C. Code, 1935 (Michie), sec. 614, in part, says that such judgment "is a lien on the real property in the county where the same is docketed of every person against whom any such judgment is rendered, and which he has at the time of the docketing thereof in the county in which such real property is situated, or which he acquired at any time thereafter, for ten years from the date of the rendition of the judgment."

Constitution of North Carolina, Art. X, sec. 2, is as follows: "Every homestead, and the dwellings and buildings used therewith, not exceeding in value one thousand dollars, to be selected by the owner thereof, or in lieu thereof, at the option of the owner, any lot in a city, town, or village with the dwelling and buildings used thereon, owned and occupied by any resident of this State, and not exceeding the value of one thousand dollars, shall be exempt from sale under execution or other final process obtained on any debt. But no property shall be exempt from sale for taxes or for payment of obligations contracted for the purchase of said premises."

On 30 October, 1934, Katina Russos and her husband conveyed, in accordance with the Constitution, the lots in controversy to one Christine Roukis, and by so doing Katina Russos parted with her homestead rights and the judgment creditor could have sold the lots if done before the property was reconveyed to Katina Russos.

N. C. Code, 1935 (Michie), sec. 729, is as follows: "The allotted homestead is exempt from levy so long as owned and occupied by the homesteader or by anyone for him, but when conveyed by him in the mode authorized by the Constitution, Art. X, sec. 8, the exemption ceases as to liens attaching prior to the conveyance. The homesteader who has conveyed his allotted homestead may have another allotted, and as often as is necessary. This section shall not have any retroactive effect." This section seems to deal with "allotted homesteads." See

Sash Co. v. Parker, 153 N. C., 130. In *Cheek v. Walden,* 195 N. C., 752 (758), it is said: "Upon conveyance by the homesteader the exemption ceases." *Duplin County v. Harrell,* 195 N. C., 445.

If nothing else appeared in the record, the plaintiff's contention would be correct, and it could sell the land in controversy on which it had a lien—for defendants Katina Russos and her husband had conveyed her land and parted with her right to a homestead exemption.

The execution on plaintiff's judgment was issued on 19 August, 1935, and in the hands of the sheriff. The record discloses that the lots, on 20 August, 1935, were reconveyed to Katina Russos, she then being a citizen and resident of Wake County, North Carolina. We think she was entitled to her homestead exemption in said lots. Katina Russos did not reside upon said lots and there were no buildings on said lots. They were the only real estate she owned. From a liberal construction of the Constitution, we think she was entitled to the homestead exemption in same. The plaintiff in its brief nowhere controverts this aspect, its contention was that she had conveyed same.

In *Murchison v. Plyler,* 87 N. C., 79 (81), *Ruffin, J.,* said: "In short, there can be no homestead without a home or the immediate possibility of a home upon the land itself."

In *McCracken v. Adler,* 98 N. C., 400 (404), it is declared: "But if the land proposed to be sold is all that the execution debtor has, he is entitled to have his homestead therein laid off to him, although there be no dwelling house or other habitable building thereon, because he may build a house and other buildings on the land, and thus have the beneficent provision of the Constitution. *Flora v. Robbins,* 93 N. C., 38; *Murchison v. Plyler,* 87 N. C., 79; *Spoon v. Reid,* 78 N. C., 244." *Farris v. Hendricks,* 196 N. C., 439.

In *New Amsterdam Casualty Co. v. Dunn,* 209 N. C., 736, *Devin, J.,* for the Court, said: "The right to the homestead exemption is guaranteed to every resident of North Carolina by the Constitution, and this right is not forfeited by a fraudulent conveyance."

In the present action, defendants had reacquired ownership before final process of sale, and we think entitled to the homestead exemption allowed by the Constitution.

For the reasons given, the judgment below is

Reversed.

STATE OF NORTH CAROLINA, ON BEHALF OF WILLIAM CHARLES BEAMAN, AND WILLIAM CHARLES BEAMAN, INDIVIDUALLY, v. NATIONAL SURETY CORPORATION, A CORPORATION; MORDECAI VANN, GUARDIAN OF WILLIAM CHARLES BEAMAN; MORDECAI VANN, INDIVIDUALLY; FANNIE VANN, BONDSMAN; FANNIE VANN, INDIVIDUALLY; HENRY VANN, INDIVIDUALLY; HENRY VANN AND I. M. VANN, EXECUTORS OF THE ESTATE OF A. VANN, DECEASED, AND GURNEY P. HOOD, COMMISSIONER OF BANKS OF THE STATE OF NORTH CAROLINA.

(Filed 20 May, 1936.)

Guardian and Ward H a—Second guardianship bond held in substitution of first, and bonds were not cumulative under facts of this case.

The findings of fact, supported by evidence, were to the effect that, upon the refusal of the clerk to issue letters of guardianship prior to the filing of the statutory bond, applicant filed a bond with an individual surety pending the filing of a bond by a corporate surety, the individual surety being the local agent of the corporate surety, that thereafter bond with the corporate surety was duly filed before any funds were placed in the hands of the guardian, and that thereupon the clerk made a notation on the original bond to the effect that the individual surety was released therefrom upon the filing of the bond with the corporate surety. It further appeared that the corporate surety alone received the premium for the bond, and that upon the later insolvency of the corporate surety, its successor corporation filed an assumption agreement of record. *Held:* The release of the individual surety appearing of record at the time of the filing of the assumption agreement by the successor corporate surety, the successor corporate surety is alone liable on the bond and is not entitled to contribution from the individual signing the original bond, the bonds not being cumulative, but the corporate surety bond being substituted for the individual surety bond to the knowledge of the successor corporate surety.

APPEAL by the National Surety Corporation from *Barnhill, J.*, at October Term, 1935, of SAMPSON. Affirmed.

This is an action brought by plaintiffs to recover from defendants Mordecai Vann, guardian of William Charles Beaman, and his surety, the National Surety Corporation, for certain amounts alleged to be due them. The matter was referred to Hon. Charles G. Rose, referee, who heard the evidence, found the facts, and on the facts made conclusions of law. The matter came on for hearing before Barnhill, J., who found certain supplemental facts. The material facts necessary to be considered are:

The referee found the following facts:

"On 22 January, 1931, Mordecai Vann applied to the clerk of the Superior Court of Sampson County, North Carolina, for appointment as guardian of William Charles Beaman, minor son of Llewellyn Bea-

man, . . . and the value of the estate of the minor was stated to be about five thousand ($5,000) dollars. . . . The guardian, Mordecai Vann, as principal, and his sister, Fannie E. Vann, as surety, on 22 January, 1931, signed the usual form of guardian bond in the penal sum of five thousand ($5,000) dollars (duly justified).

"At the time the application for letters of guardianship was made, the guardian and Fannie E. Vann (who was local agent of the National Surety Company), requested that the letters be issued pending the return from New York of a corporate bond to be signed by that company as surety. John B. Williams, the then clerk of the Superior Court of said county, declined to issue the letters until the bond of the guardian was actually signed and filed in his office. Thereupon, the bond was signed, and, at that time, the guardian and Fannie E. Vann understood that, when the corporate bond was filed, Fannie E. Vann would be released as surety on the bond which she signed.

"On 28 January, 1931, a corporate bond as guardian of Charles Beaman in the penal sum of five thousand ($5,000) dollars, signed by the National Surety Company of New York, as surety, . . . was filed with and accepted by the clerk of said court. . . . On said date Annie Ferrell, assistant clerk of said court, made the following entry on the margin of the record: 'A surety bond having been this day filed by M. Vann, as Gdn. for Chas. Beaman, Fannie E. Vann is hereby released from said bond. This 28 January, 1931. (s) Annie Ferrell, Ass't. CSC.'

"Subsequent to 28 January, 1931, and prior to 1 May, 1933, the National Surety Company, the surety on the guardian's bond, was declared insolvent, and on or about 1 June, 1933, the defendant National Surety Corporation, through Fannie E. Vann, as agent of the corporation, filed with the clerk of the Superior Court an 'Assumption of liability certificate,' which document, together with what purports to be the letter of transmittal signed by Harry N. Levy, manager, was attached to the page in the Guardian Book No. 5, containing the original bond. . . . Reference is made to the original record for the exact terms of the 'Assumption of liability certificate.'

"After the guardian bond was signed by Fannie E. Vann, . . . Harry N. Levy, agent and attorney in fact of the National Surety Company, and now manager of the National Surety Corporation, had knowledge and notice that Fannie E. Vann, local agent of the surety company, had individually signed the guardian bond as surety until the guardian bond signed by the National Surety Company was returned properly executed.

"When the 'Assumption of liability certificate' was signed by the National Surety Corporation, the said corporation, through its local

agent and Harry N. Levy, manager, had knowledge and notice that the clerk of the Superior Court had made the entry on the margin of the record as set out in Finding Number Four, purporting to relieve Fannie E. Vann as surety from further liability on the bond executed by her and dated 28 January, 1931.

"The National Surety Corporation, having voluntarily become surety on the guardian bond, . . . had notice of the facts appearing on the records in the office of the clerk of the Superior Court of Sampson County, and which would have been disclosed upon proper examination of the same."

Supplemental findings by the court below: "That the guardian did not receive any amount prior to the entry upon the guardianship records in the clerk's office undertaking to cancel the bond signed by Fannie E. Vann and all receipts were subsequent to the date of the filing of the bond by the National Surety Company, the first receipt being on 10 March, 1931. . . . The bond signed by Fannie E. Vann was signed for the temporary purpose, as found by the referee, and the bond of the National Surety Company when filed was not cumulative, but in substitution of the Fannie E. Vann bond, and she was thereupon discharged from further liability."

In the judgment is the following: "From the findings of facts by the referee, as modified and supplemented by the foregoing findings by the court and conclusions of law, the court is of the opinion that the plaintiff is entitled to recover judgment according to the above findings of facts. and conclusions of law. It is thereupon considered, ordered, and adjudged that the plaintiff State of North Carolina, on behalf of William Charles Beaman and William Charles Beaman, individually, do recover for the use of William Charles Beaman from the defendants Mordecai Vann, guardian, the National Surety Corporation, on account of and for the full amount of said assumption certificate, to wit: The sum of $5,000, to be discharged upon the payment into court of the sum of $3,252.43, with interest thereon from 3 January, 1934, at six per cent per annum, together with the costs of this action to be taxed by the clerk."

The National Surety Corporation excepted and assigned error as follows:

"(1) For that his Honor held that the bond signed by Fannie E. Vann was signed for a temporary purpose, and that the bond of the National Surety Company, when filed, was not cumulative, but in substitution of the Fannie E. Vann bond, and she was thereupon discharged from further liability, and this error constitutes the defendant's First Exception.

"(2) For that the court held the National Surety Corporation liable for the payment of the sum of thirty-two hundred fifty-two and 43/100

($3,252.43) dollars, with interest from 3 January, 1934, and did not hold that Fannie E. Vann was jointly liable with it for said amount. This is the Second Exception."

Varser, McIntyre & Henry for Fannie E. Vann.
Graham & Grady and Shepherd & Shepherd for National Surety Corporation.

CLARKSON, J. For the determination of this controversy, we think that the only question involved on this appeal is whether Fannie E. Vann is jointly liable with the National Surety Corporation and contribution arises in this case between said corporation and Fannie E. Vann. We think not, under the facts and circumstances of this case.

The National Surety Corporation cites the cases of *Jones v. Hays*, 38 N. C., 502; *Comrs. of Brunswick v. Inman*, 203 N. C., 542; and *Thornton v. Barbour*, 204 N. C., 583. We think those cases have no application to the facts in the present action.

In *Roebuck v. Carson*, 196 N. C., 672 (674), citing authorities, it is said: "Parol evidence is admissible to show that the contract was delivered upon condition precedent, or that the obligation was not to be assumed at all except upon certain contingencies." *Insurance Co. v. Morehead*, 209 N. C., 174. For a decision of this controversy we do not base our opinion on these authorities, as the bond was an official one.

On the facts in this case, the plaintiffs are not contending that Fannie E. Vann is liable on the purported bond signed by her, but this is a controversy between the National Surety Corporation and Fannie E. Vann. The National Surety Corporation claiming from Fannie E. Vann contribution—one-half of what it has to pay for the default of the guardian.

The facts are to the effect that Fannie E. Vann was the local agent of the National Surety Company, and signed the guardian bond for $5,000, conditionally, on 22 January, 1931. On 28 January, 1931, the National Surety Company filed a $5,000 bond as surety for the guardian, with the knowledge that "Fannie E. Vann is hereby released from said bond—this 28 January, 1931." It received the premium on the $5,000 bond and became liable for the amount on default of the guardian, and does not on this appeal deny its liability. The guardian did not receive any funds until 10 March, 1931—long after the record discloses Fannie E. Vann was relieved from the bond, with the understanding when the corporate bond was filed. Thereafter, when the National Surety Company became insolvent and was taken over by the National Surety Corporation, and assumed the liability of the National Surety Company on the bond, all these facts were known to it: That Fannie E. Vann

had signed the bond temporarily and on condition, and the release as to her on the bond and the substitution of the National Surety Company. It goes without saying that no court of equity would allow a recovery by the surety corporation against Fannie E. Vann, under the facts here disclosed—it would be inequitable and unconscionable. The National Surety Corporation, successor to the National Surety Company, alone received the premium for its liability and alone is answerable for the default of the guardian, in accordance with its contract.

For the reasons given, the judgment of the court below is

Affirmed.

MRS. ESSIE ECKARD, WIDOW AND ADMINISTRATRIX OF LAWRENCE E. ECKARD, DECEASED, v. METROPOLITAN LIFE INSURANCE COMPANY.

(Filed 20 May, 1936.)

1. Insurance E b—

Statutory provisions in force at the time of the issuance of a policy of insurance become a part thereof as though expressly incorporated therein, and the statutory provisions will prevail over conflicting provisions of the policy.

2. Insurance I b—

By force of C. S., 6460, a policy of life insurance issued without a medical examination may not be avoided for misrepresentations by insured in his application for the policy unless such misrepresentations were fraudulently made.

3. Same—Policy issued without medical examination may not be avoided for ill health of insured in absence of procurement of policy by fraud.

Where the jury finds from the evidence that insured in a policy of life insurance issued without medical examination under C. S., 6460, was suffering with certain diseases stipulated in the policy as grounds for avoidance, but that insured did not procure the policy by false and fraudulent statements, insurer may not avoid liability under the policy, the provisions of the policy in conflict with the statute being unavailing to insurer.

APPEAL by plaintiff from *Pless, J.*, at November Term, 1935, of CATAWBA. Error and remanded.

This is an action to recover on a policy of life insurance.

On 28 August, 1933, the defendant issued a policy of insurance on the life of Lawrence E. Eckard, a citizen of this State, residing in Catawba County. The policy was issued in this State. The amount of the insurance as stated in the policy is $624.00. The insured died on 7 February, 1934. At the date of his death the policy was in full force and effect, according to its terms. The premium on the policy was pay-

able weekly. The total amount paid as premiums on the policy was $15.60. The plaintiff, who is the widow and administratrix of Lawrence E. Eckard, is the beneficiary named in the policy.

The policy was issued on the application of the insured, which is in writing and is dated 3 August, 1933. In response to questions contained in the application, the insured stated that he had never had any disease of the heart or kidneys; that he had never been under treatment in any clinic, dispensary, hospital, or asylum; that at the date of the application he was in sound health, and had no physical or mental defects or any infirmity of any kind; that he had no disease of the eyes or impairment of sight; and that he had not been under the care of any physician within three years prior to the date of the application. The insured further stated in his application that the statements therein were made by him to induce the defendant to issue the policy applied for, and that in consideration of the issuance of the policy he agreed, on behalf of himself and of any other person who might have a claim under the policy or an interest therein, that the statements contained in the application were true, and that any misrepresentation should render the policy void, and that the policy should not be binding on the defendant unless at its date the insured was alive and in sound health.

The policy was issued by the defendant without a previous medical examination of the insured. It contains the following provisions:

"If (1) the insured is not alive or is not in sound health on the date hereof; or if (2) before the date hereof, the insured has been rejected for insurance by this or by any other company, order or association, or has, within two years before the date hereof, been attended by a physician for any serious disease or complaint or, before said date, has had any pulmonary disease, or chronic bronchitis, or cancer, or disease of the heart, liver or kidneys, unless such rejection, medical attention or previous disease is specifically recited in the 'Space for Endorsements' on page 4 in a waiver signed by the secretary; or if (3) any policy on the life of the insured hereunder has been previously issued by this company and is in force at the date hereof, unless the number of such policy has been endorsed by the company in the 'Space for Endorsements' on page 4 hereof (it being expressly agreed that the Company shall not, in the absence of such endorsement, be assumed or held to know or to have known of the existence of such prior policy, and that the issuance of this policy shall not be deemed a waiver of such last mentioned condition), then in any such case, the Company may declare this policy void and the liability of the Company in the case of any such declaration or in the case of any claim under this policy, shall be limited to the return of premiums paid on the policy, except in case of fraud, in which case all premiums will be forfeited to the Company."

The issues arising on the pleadings and submitted to the jury were answered as follows:

"1. Was the insured, Lawrence E. Eckard, in sound health on 28 August, 1933, the date of the policy sued on in this action? Answer: 'No.'

"2. Had the insured, Lawrence E. Eckard, within two years before the said 28 August, 1933, been treated by a physician for a serious disease or complaint? Answer: 'No.'

"3. Had the insured, Lawrence E. Eckard, before the said 28 August, 1933, had any disease of the heart or kidneys? Answer: 'Yes.'

"4. Had the insured, Lawrence E. Eckard, before the said 28 August, 1933, had nephritis, a disease of the kidneys? Answer: 'Yes.'

"5. Had the insured, Lawrence E. Eckard, before the said 28 August, 1933, had arterio sclerosis, or hardening of the arteries? Answer: 'Yes.'

"6. Did the insured, Lawrence E. Eckard, procure the policy upon his life, sued on in this action, by false and fraudulent statements, as alleged in the answer? Answer: 'No.'"

On the verdict returned by the jury, the plaintiff tendered a judgment that plaintiff recover of the defendant the sum of $624.00, with interest from 7 February, 1934, and the costs of the action, and excepted to the refusal of the court to sign the judgment tendered by her.

From judgment that plaintiff recover of the defendant the sum of $15.60, with interest and costs, the plaintiff appealed to the Supreme Court, assigning as error the refusal of the court to sign the judgment tendered by the plaintiff, and the signing of the judgment appearing in the record.

Theodore F. Cummings and R. H. Shuford for plaintiff.
P. W. Garland and W. C. Feimster for defendant.

CONNOR, J. The policy of life insurance sued on in this action was issued by the defendant, a life insurance company doing business in this State, without a previous medical examination of the insured. The issuance of the policy was authorized by C. S., 6460, as amended prior to its issuance. See N. C. Code of 1935, sec. 6460. *Holbrook v. Ins. Co.,* 196 N. C., 333, 145 S. E., 609. The statute was in force at the date of the issuance of the policy, and is therefore a part of the policy as much so as if its provisions were expressly incorporated in the policy. The rights and liabilities of the parties to this action are determined by the provisions of the policy (*Gilmore v. Ins. Co.,* 199 N. C., 632, 155 S. E., 566), provided such provisions are not in conflict with the provisions of the statute (*Headen v. Ins. Co.,* 206 N. C., 270, 172 S. E., 349).

In that case, the statute and not the policy controls. In *Headen v. Ins. Co., supra,* it is said by *Stacy, C. J.:*

"The provisions of this statute being in force at the time of the execution of the policy, entered into and became a part of the convention of the parties as much so as if they had been expressly incorporated in its terms. *Bateman v. Sterrett,* 201 N. C., 59, 159 S. E., 14; *Trust Co. v. Hudson,* 200 N. C., 688, 158 S. E., 244; *House v. Parker,* 181 N. C., 40, 106 S. E., 136; *Mfg. Co. v. Holladay,* 178 N. C., 417, 100 S. E., 567. Therefore, the defendant may not now declare the policy in suit void, pursuant to the stipulation of the contract, as this is in direct conflict with the statute."

The statute which was in force at the date of the issuance of the policy in the instant case is as follows:

"Sec. 6460. Medical Examination Required. No life insurance company organized under the laws of or doing business in this State shall enter into any contract of insurance in any twelve months period in an amount in excess of five thousand dollars ($5,000.00) upon any one life within this State without having previously made or caused to be made a prescribed medical examination of the insured by a registered medical practitioner; and provided further, that where there has been no medical examination, the policy shall not be rendered void nor shall payment be resisted on account of any misrepresentation as to the physical condition of the applicant, except in cases of fraud; and provided further, that this section shall not apply to contracts of insurance issued under the group plan."

Where a policy of life insurance has been issued in this State, without a previous medical examination of the insured, as authorized by the statute, by reason of its provisions, representations made by the insured in his application for the policy, although false in fact, do not invalidate the policy or affect the liability of the company under the policy, where such representations were not made fraudulently.

The provisions in the policy of insurance sued on in this action are in conflict with the provisions of the statute and are not available to the defendant as a defense to plaintiff's recovery in this action of the amount of the policy. See *Potts v. Ins. Co.,* 206 N. C., 257, 174 S. E., 123.

There was error in the refusal of the judge to sign the judgment tendered by the plaintiff at the trial of this action.

The action is remanded to the Superior Court of Catawba County that judgment may there be signed in accordance with this opinion.

Error and remanded.

MRS. ROSA MANGUM v. SOUTHERN RAILWAY COMPANY AND NORTH CAROLINA RAILROAD COMPANY (ORIGINAL PARTIES DEFENDANT), AND L. R. POWELL, JR., AND HENRY W. ANDERSON, RECEIVERS OF THE SEABOARD AIR LINE RAILWAY COMPANY (ADDITIONAL PARTIES DEFENDANT).

(Filed 20 May, 1936.)

1. Parties B d—

Defendants in an action to recover for negligent injury are entitled, under N. C. Code, 618, to have other defendants joined with them upon filing a cross action against such other defendants, alleging that such defendants were joint tort-feasors with them in causing the injury.

2. Removal of Causes C b—Parties joined on cross action of original defendants as joint tort-feasors held not entitled to removal.

Plaintiff sued two railroad companies, alleging that her injuries were caused by their joint negligence. The original defendants filed answer denying the allegations of negligence and proximate cause, and filed a cross action against another railroad company, alleging that if defendants were negligent such other railroad company was guilty of negligence which concurred in producing the injury and that it was a joint tort-feasor with them in causing the injury, and that they were entitled to contribution from it. The other railroad company was joined as a party defendant upon the cross action, and moved for removal of the cause against it to the Federal Court on the ground of diverse citizenship, and that plaintiff's action against it was separable. *Held:* The allegations of the cross action are determinative of whether a separate or joint action was alleged, and the action against the original defendants not being removable, the motion to remove was properly denied.

APPEAL by defendant receivers of Seaboard Air Line Railway Company, from *Phillips, J.*, at February Term, 1936, of RICHMOND. Affirmed.

This is an action for actionable negligence brought by plaintiff against the Southern Railway Company and the North Carolina Railroad Company as joint tort-feasors, alleging damage. The defendants denied negligence and as a further answer and cross action alleged in detail that L. R. Powell, Jr., and Henry W. Anderson, receivers of the Seaboard Air Line Railway Company, were negligent in the operation of its train, and further allege: "That even if these defendants were guilty of negligence in any of the particulars alleged in the complaint, which is hereby expressly denied, and even if such alleged negligence was a proximate cause of the plaintiff's injury, which is also denied, the above described negligence of the receivers of the Seaboard Air Line Railway Company was also a proximate cause of the plaintiff's injury, operating jointly and concurrently to produce said injury, and if these defendants are at all responsible to the plaintiff for her injury, which is hereby

expressly denied, the said receivers of the Seaboard Air Line Railway Company are jointly and concurrently liable with these defendants, both to the plaintiff and to these defendants, and these defendants have a right to have said liability of said receivers determined and enforced in this action, under and by virtue of the terms and provisions of section 618 of the Consolidated Statutes of North Carolina."

Defendants' prayer is as follows: "Wherefore, these defendants pray: (1) That the said L. R. Powell, Jr., and Henry W. Anderson, receivers of the Seaboard Air Line Railway Company, be made parties to this action; and that summons be issued and served upon them directing them to answer the cross action of these defendants above set forth. (2) That the rights and liabilities of these defendants and the said receivers of the Seaboard Air Line Railway Company, as between themselves, be determined and enforced. (3) That the plaintiff recover nothing of these defendants in this action; and that judgment herein be entered in favor of these defendants. (4) For such other and further relief to which these defendants may be entitled in the premises."

Judge McElroy, at the September Term, 1935, made the following order:

"Upon reading and considering said answer and cross action, it is hereby considered, ordered, and decreed as follows:

"1. That the said L. R. Powell, Jr., and Henry W. Anderson, receivers of the Seaboard Air Line Railway Company, be and they are hereby made parties defendant to this action.

"2. That the clerk of this court be and he is hereby authorized and directed to issue a summons herein against said parties defendant mentioned in the preceding paragraph herein.

"3. That the sheriff of Richmond County be and he hereby is authorized and directed to serve upon said parties defendant the summons mentioned in the preceding paragraph hereof, by delivering a copy thereof, together with a copy of the verified answer and cross action herein filed by the original defendants herein.

"4. That the said L. R. Powell, Jr., and Henry W. Anderson, receivers of the Seaboard Air Line Railway Company, be commanded, by the terms of the summons hereinbefore referred to, to appear and answer, within 30 days from the service of said summons, the answer and cross action heretofore filed herein by the Southern Railway Company and the North Carolina Railroad Company."

Summons dated 7 September, 1935, upon L. R. Powell, Jr., and Henry W. Anderson, showing service 10 September, 1935, appears in the record.

The receivers petitioned for removal to the United States District Court, and set forth their reasons, in part, as follows: "Your petitioners

further allege that they are entitled to remove this cause to the United States District Court for the Middle District of North Carolina, Rockingham Division, said division including the county of Richmond, in which said action is brought, and that your petitioners are not indispensable necessary parties to the maintenance of this action; and that whatever cause of action is set out in the answer of the said defendants Southern Railway Company and North Carolina Railroad Company, the same is separable from the issues raised between the plaintiff Rosa Mangum and the defendants L. R. Powell, Jr., and Henry W. Anderson, receivers of the Seaboard Air Line Railway Company, and the North Carolina Railroad Company, and that a separable controversy exists, and that on account of the diversity of citizenship between the plaintiff and your petitioners, this cause of action is removable to said United States District Court."

The clerk of the Superior Court refused to remove the action and on appeal the court below approved and confirmed the order of the clerk. The receivers excepted and assigned error, and appealed to the Supreme Court.

Douglass & Douglass, Walter R. Jones, and R. L. McMillan for plaintiff.

F. W. Bynum and Varser, McIntyre & Henry for defendants.

CLARKSON, J. N. C. Code, 1935 (Michie), sec. 618, in part, is as follows: "In all cases in the courts of this State wherein judgment has been or may hereafter be rendered against two or more persons or corporations, who are jointly and severally liable for its payment either as joint obligors or joint tort-feasors, and the same has not been paid by all the judgment debtors by each paying his proportionate part thereof, one of the judgment debtors shall pay the judgment creditor, either before or after execution has been issued, the amount due on said judgment, and shall, at the time of paying the same, demand that said judgment be transferred to a trustee for his benefit, it shall be the duty of the judgment creditor or his attorney to transfer without recourse such judgment to a trustee for the benefit of the judgment debtor paying the same; and a transfer of such judgment as herein contemplated shall have the effect of preserving the lien of the judgment and of keeping the same in full force as against any judgment debtor who does not pay his proportionate part thereof to the extent of his liability thereunder in law and in equity, *and in the event the judgment was obtained in the action arising out of a joint tort, and only one, or not all of the joint tort-feasors, were made parties defendant, those tort-feasors made parties defendant, and against whom judgment was obtained, may, in an action*

therefor, enforce contribution from the other joint tort-feasors; or at any time before judgment is obtained, the joint tort-feasors made parties defendant may, upon motion, have the other joint tort-feasors made parties defendant." (Italics ours.) See *Gaffney v. Casualty Co.*, 209 N. C., 515.

In accordance with this section, the defendants Southern Railway Company and North Carolina Railroad Company (*original parties*) prayed that the receivers of Seaboard Air Line Railway Company, residents of Virginia, be made parties defendant, and allege that they are not guilty of negligence; but further allege, in substance, that if they are guilty of negligence they are liable only as joint tort-feasors with the receivers. We think that this procedure is permissible under the section, *supra*. The plaintiff, from her allegations in the complaint against the original defendants, cannot be affected by this procedure of the original defendants under the statute bringing in the receivers as joint tort-feasors. The original defendants were not entitled to removal.

The question as to the nature of the controversy, and whether there is separable controversy, is determined by the complaint. The plaintiff is entitled to have her cause of action considered as stated in the complaint.

In *Powers v. Chesapeake & Ohio Railway*, 169 U. S., 92 (97), speaking to the subject, it is said: "A separate defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his suit to final decision in his own way. The cause of action is the subject matter of the controversy, and that is, for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings." *Trust Co. v. R. R.*, 209 N. C., 304; *Howell v. R. R.*, 209 N. C., 589.

The judgment of the court below is

Affirmed.

STATE v. COLUMBUS WEBBER.

(Filed 20 May, 1936.)

1. Automobiles G b—Evidence of culpable negligence in driving held sufficient to overrule nonsuit in this prosecution for manslaughter.

Evidence that defendant was driving his car at a speed of from 50 to 55 miles per hour, on or near the center of the highway, when he collided with another car, resulting in the death of the driver thereof, *is held* sufficient to overrule defendant's motion to nonsuit in a prosecution for manslaughter, although defendant introduces evidence in sharp conflict; but an instruction that the driving on the highway at such speed was negligence *per se* is error entitling defendant to a new trial.

2. Automobiles C c—

The driving of an automobile upon a highway at a speed in excess of forty-five miles per hour is not negligence *per se* or as a matter of law, but only *prima facie* evidence that the speed is unlawful under the provisions of ch. 311, sec. 2, Public Laws of 1935.

APPEAL by defendant from *Sink, J.*, at February Special Term, 1936, of GUILFORD. New trial.

This is a criminal action, in which the defendant was tried on an indictment charging him with manslaughter.

The evidence at the trial showed that at or about 12:30 o'clock on the night of 14 September, 1935, there was a collision on a State highway in Guilford County, about 3 miles from the city of High Point in the direction of the city of Winston-Salem, between an automobile driven by the defendant Columbus Webber and an automobile driven by the deceased, Gorrell Burge; and that as the result of said collision, Gorrell Burge suffered personal injuries from which he died at a hospital in the city of High Point within a few days after said collision.

The evidence for the State tended to show that at the time of the collision the defendant was driving his automobile at a speed of from 50 to 55 miles per hour, on or near the center of the highway, and that the deceased was driving his automobile at a speed of from 30 to 35 miles per hour on his right side of the highway. The evidence for the State tended to show further that the defendant at the time of the collision was driving his automobile in a reckless and careless manner.

The evidence for the defendant tended to show that at the time of the collision he was driving his automobile at a speed of from 15 to 20 miles per hour, and that he was driving on his right side of the highway. The evidence for the defendant tended to show further that immediately before the collision the deceased, who was driving in the rear of another automobile, turned to his left, and was passing the other automobile when the collision occurred.

At the close of all the evidence the defendant moved that the action be dismissed by judgment as of nonsuit. The motion was denied, and the defendant duly excepted.

Among other things, the court charged the jury as follows:

"Now, gentlemen of the jury, as I told you at the outset, the burden is on the State to satisfy you beyond a reasonable doubt of the defendant's guilt. There is no burden on the defendant to show that he is not guilty. He may, though, show affirmatively, if he can, and he contends in this instance that all the evidence shows that he is not guilty, or that at least all the evidence should cause you to have remaining in your minds a reasonable doubt of his guilt, and that therefore you should acquit him.

"The State says, to the contrary, that when you have analyzed the testimony in its entirety you should find that the deceased, Gorrell Burge, came to his death as the proximate result of the culpable negligence of the defendant.

"Now, what is culpable negligence? Negligence is failure to perform some legal duty that one owes to his fellow man, or that is imposed upon one by law. The driving on the left-hand side of a highway by a driver of an automobile, when the driver's side of the road is not obstructed, when the whole road is open, is negligence *per se*. That is a violation of law. Driving at 50 to 55 miles per hour is a violation of law. Such driving is negligence *per se*. If the defendant was driving his automobile at the time of the collision at a speed of from 50 to 55 miles per hour, or was driving on the left side of the highway, he was violating the law. In either case he was negligent as a matter of law.

"The law says that either is sufficient to sustain a recovery in a civil action, but it says that for a conviction in a criminal case there must be more than causal negligence, there must be more than the negligence that is required for a recovery in a civil action. The negligence must be culpable.

"Culpable negligence is wanton, willful, heedless disregard of the rights of others, and when negligence has added to it wanton and heedless disregard, recklessness, then it rises to the degree of what we call in law culpable or criminal negligence."

The defendant in apt time duly excepted to so much of the charge as instructs the jury that "If the defendant was driving his automobile at the time of the collision at a speed of 50 to 55 miles per hour, or was driving on the left side of the highway, he was violating the law. In either case, he was negligent as a matter of law."

The jury returned a verdict that defendant is guilty of involuntary manslaughter.

From judgment that he be confined in the State's Prison for a term of not less than fifteen months or more than three years, the defendant appealed to the Supreme Court, assigning errors in the trial.

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

Walser & Wright, Hastings & Booe, and Peyton B. Abbott for defendant.

CONNOR, J. On his appeal to this Court, the defendant contends that there was error in the refusal of the trial court to allow his motion at the close of all the evidence for judgment as of nonsuit. C. S., 4643. This contention cannot be sustained. The evidence for the State, although

sharply contradicted by the evidence for the defendant, was sufficient to support a verdict that the defendant is guilty as charged in the indictment, and for that reason was properly submitted to the jury. *S. v. Everhardt,* 203 N. C., 610, 166 S. E., 738.

The defendant further contends that there was error in the instruction of the trial court to the jury that "If the defendant was driving his automobile at the time of the collision at a speed of from 50 to 55 miles per hour, or was driving on the left side of the highway, he was violating the law. In either case, he was negligent as a matter of law." This contention must be sustained. *S. v. Spencer,* 209 N. C., 827, decided 8 April, 1936.

It is evident that the learned judge who presided at the trial of this action was inadvertent to the change in the law resulting from the enactment of sec. 2, ch. 311, Public Laws of North Carolina, 1935, which provides that driving an automobile on a highway or public road in this State at a speed in excess of 45 miles per hour, under conditions as shown by all the evidence in the instant case, "shall be *prima facie* evidence that the speed is not reasonable or prudent, and is unlawful." By reason of this statute, driving an automobile on a highway or public road in this State, since its enactment, at a speed in excess of forty-five miles per hour is not negligence *per se* or as a matter of law, as was the case prior to its enactment.

For this error, the defendant is entitled to a new trial. It is ordered.

New trial.

CHARLOTTE NATIONAL BANK v. MUTUAL BENEFIT LIFE INSURANCE COMPANY AND JOE R. KLUTZ, ADMINISTRATOR OF JOHN D. HEATH, DECEASED.

(Filed 20 May, 1936.)

1. Limitation of Actions B a—Assignee's right of action for proceeds of life policy assigned accrues upon death of assignor.

Insured assigned a policy of insurance on his life as collateral security for his note executed to plaintiff bank. More than ten years elapsed after maturity of the note without payment of interest or principal. Thereafter, insured assignor died and the bank instituted this action less than one year after his death to recover the proceeds of the policy against insurer, which action was resisted by the administrator of insured assignor. *Held:* The bank assignee's right of action on the policy of insurance accrued upon the death of insured assignor, and the action having been instituted within one year thereof, was not barred by the statute of limitations.

2. Limitation of Actions A a—

The statute of limitations bars the remedy upon the lapse of the prescribed time, but does not extinguish the right, and the creditor may proceed to collect on collateral security assigned by the debtor even after action upon the principal debt is barred.

APPEAL by defendant Joe R. Klutz, administrator, from *Alley, J.*, at October Term, 1935, of MECKLENBURG. No error.

This is an action to recover on a policy of life insurance.

The action was begun by the Charlotte National Bank, as plaintiff, against the Mutual Benefit Life Insurance Company, as defendant, on ...... January, 1934. After the action was begun, and while it was pending, Joe R. Klutz, administrator of John D. Heath, deceased, on his own motion, was made a party defendant, and in defense of plaintiff's recovery set up in his answer the three-year and the ten-year statutes of limitations.

The facts shown by the evidence at the trial are as follows:

On 30 June, 1898, the defendant Mutual Benefit Life Insurance Company issued a policy of insurance on the life of John D. Heath, by which it promised to pay to his estate, at his death, the sum of $5,000. The insured, John D. Heath, paid all the premiums on said policy until 7 February, 1903, when he transferred and assigned said policy, subject to the lien of the company for a loan made to him, to the plaintiff Charlotte National Bank, as security for his note for $1,500, payable to said bank. All premiums due on the policy after it had been transferred and assigned to the plaintiff, together with the interest on the indebtedness of the insured to the company, were paid by the plaintiff.

On 24 January, 1916, as evidence of the amount of his indebtedness to the plaintiff, then due, the insured, John D. Heath, executed and delivered to the plaintiff his note in words and figures as follows:

"$4,560.30. CHARLOTTE, N. C., Jan'y. 24, 1916.

"One day after date, for value received, the undersigned promises to pay to the Charlotte National Bank, or order, at its banking house in the city of Charlotte, N. C., four thousand five hundred sixty and 30/100 Dollars ($4,560.30), having deposited with said bank as collateral security for the payment of this note, as well as for the payment of all other obligations or liabilities, direct or contingent, of the undersigned to said bank, due or to become due, whether now existing or hereafter arising or acquired by said bank, the following property, viz.:

"Policy No. 260817, for $5,000.00, in Mutual Benefit Life Ins. Co., of Newark, N. J., and thirty shares stock Dry-Heath-Miller Co.

. . . .

"All parties to this instrument hereby waive demand, protest, and notice of its dishonor, and agree that the time of payment of any of the obligations or liabilities herein referred to may be extended from time to time without notice to any of them, and without thereby releasing any of the rights of the said bank.

(Signed) JOHN D. HEATH."

No payment was made on said note by the maker, John D. Heath, who died on 3 November, 1933. The amount due on said note at the date of his death was $9,424.64. The net amount due on the policy at the death of the insured was $4,707.91. By consent, this amount was paid by the defendant Mutual Benefit Life Insurance Company into the office of the clerk of the Superior Court of Mecklenburg County, and is held by said clerk, subject to the judgment in this action.

At the close of all the evidence the defendant Joe R. Klutz, administrator, moved that the action be dismissed by judgment as of nonsuit. The motion was denied, and defendant excepted.

The 1st, 2d, 3d, 4th, and 5th issues submitted to the jury were answered by consent as follows:

"1. Was the policy of insurance set out in the pleadings assigned as collateral security by John D. Heath to the Charlotte National Bank, to secure the payment of the indebtedness of the said Heath to the said bank, the last renewal of said indebtedness being evidenced by the note dated 24 January, 1916, for $4,560.30? Answer: 'Yes.'

"2. Was any payment made on said note by John D. Heath between 24 January, 1916, the date of said note, and 3 November, 1933, the date of his death? Answer: 'No.'

"3. What was the amount of said indebtedness as evidenced by said note at the death of John D. Heath on 3 November, 1933? Answer: '$9,424.64.'

"4. What was the net amount payable under said policy at the death of John D. Heath, and paid into court? Answer: '$4,707.91.'

"5. Is the plaintiff's note barred by the statute of limitations, as alleged in the answer? Answer: 'Yes.'"

The 6th and 7th issues submitted to the jury were answered in accordance with peremptory instructions of the court as follows:

"6. Is the plaintiff's claim to the proceeds of the insurance policy set out in the pleadings barred by the three-year statute of limitations, as alleged in the answer? Answer: 'No.'

"7. Is the plaintiff's claim to the proceeds of the insurance policy set out in the pleadings barred by the ten-year statute of limitations, as alleged in the answer? Answer: 'No.'"

The defendant Joe R. Klutz, administrator, in apt time duly excepted to the peremptory instructions of the court to the jury, with respect to the 6th and 7th issues.

From judgment that plaintiff recover of the defendant Mutual Benefit Life Insurance Company the sum of $4,707.91, and the costs of the action, and directing the clerk to pay said sum now in his hands to the plaintiff, the defendant Joe R. Klutz, administrator, appealed to the Supreme Court, assigning errors based on his exceptions noted during the trial.

Pharr & Bell for plaintiff.
Lee Smith and R. L. Smith & Son for defendants.

CONNOR, J. The defendant on his appeal to this Court contends that all the evidence at the trial of this action shows that the action was barred by the three-year and also by the ten-year statutes of limitation, and that it was therefore error for the trial court to refuse to allow his motion at the close of all the evidence for judgment as of nonsuit, and to instruct the jury peremptorily to answer the 6th and 7th issues "No." These contentions cannot be sustained.

This is an action to recover on a policy of insurance issued by the defendant Mutual Benefit Life Insurance Company on the life of John D. Heath. The cause of action alleged in the complaint, and sustained by the evidence at the trial, accrued at the death of the insured, John D. Heath. He died on 3 November, 1933. This action was begun on ...... January, 1934, and is therefore not barred by either the three-year or the ten-year statutes of limitation.

This is not an action to recover of the defendant Joe R. Klutz, administrator of John D. Heath, deceased, on the note which was executed by his intestate on 24 January, 1916, and which was due one day after its date. It is not contended by the defendant that the note has been paid or otherwise discharged. It is conceded that an action on the note would be barred by the three-year statute of limitations. There is no presumption, however, that the note has been paid or discharged. The statute of limitations, if pleaded by the defendant in an action to recover on the note, would bar a recovery by the plaintiff, but it does not affect the right of the plaintiff in this action, as assignee of the policy, to recover the proceeds of the policy, and to apply the same to the payment of its note. See *Capehart v. Dettrick,* 91 N. C., 344, which is a conclusive authority in support of the refusal of the trial court to allow defendant's motion at the close of all the evidence for judgment as of nonsuit, and in support of its peremptory instructions to the jury with respect to the 6th and 7th issues. In that case it is

said that there is a clear distinction between the loss of a particular remedy and the extinguishment of a right. This Court quotes with approval the following remark of Lord Eldon in *Spears v. Hartley*, 3 Esp., 31: "I am clearly of opinion that though the statute of limitations has run against a demand, if the creditor obtains possession of goods on which he has a lien for a general balance, he may hold them for that demand by virtue of his lien." In the instant case, the plaintiff had possession as assignee of the policy, which had been duly assigned to it by the insured, and is therefore entitled not only to recover of the insurer the proceeds of the policy, but also to hold such proceeds as against the personal representative of the insured.

The judgment is affirmed.

No error.

STATE v. AGAMEMNON KOUTRO.

(Filed 20 May, 1936.)

1. Homicide E a—Charge of the court on the question of quantum of force permitted to be used in self-defense held without error.

The charge of the court in this prosecution for homicide to the effect that defendant would be guilty of manslaughter if he killed his assailant by the use of more force than was reasonably necessary to repel the assault *is held* without error, and defendant's contention that the court should have further instructed the jury that defendant could use such force as reasonably appeared to him to be necessary under the circumstances, is untenable, it appearing that the court later fully instructed the jury on the right to kill in self-defense upon real or apparent necessity, and it not being required that this principle should be coupled in the charge with the statement of the *quantum* of force permitted in self-defense.

2. Same—Charge on the principle that person provoking assault may not plead self-defense unless he had withdrawn from combat held correct.

The charge of the court in this prosecution for manslaughter to the effect that if the defendant provoked the assault in which he killed his assailant, the law would not permit him to successfully plead self-defense, even though the killing was necessary to protect himself from death or great bodily harm, unless defendant, prior to the infliction of the fatal injuries, withdrew from the combat and gave notice of his withdrawal to his adversary by word or deed, *is held* without error upon defendant's contention that it withdrew from the jury's consideration the plea of self-defense, it being apparent from the charge read contextually as a whole that the portion objected to was predicated upon defendant being the person who had provoked the fight, or willingly engaged therein, and the prior portions of the charge fully presenting defendant's plea of self-defense upon the other phases of the evidence.

APPEAL from *Hill, Special Judge,* at September Term, 1935, of GASTON. No error.

This was a criminal action wherein the defendant was placed on trial for murder in the second degree or manslaughter as the facts might warrant. The defendant admitted that he killed the deceased with a deadly weapon and assumed the burden of satisfying the jury of matters and things in mitigation and justification.

The jury returned a verdict of guilty of manslaughter, and from judgment of imprisonment the defendant appealed, assigning errors.

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

Ernest R. Warren for defendant, appellant.

SCHENCK, J. The defendant states that he abandons all assignments of error except those numbered 3 and 4, both of which are to portions of the charge.

Assignment No. 3 assails that portion of the charge in parentheses, which, with its connecting clause, reads: ". . . if you find from the evidence in the case that the prisoner slew the deceased, not with malice (but in defending himself, and that he used excessive force—more force than was reasonably necessary under the circumstances, to protect himself from great bodily harm, then the court instructs you it would be your duty to return a verdict of manslaughter)."

This charge is in accord with *S. v. Robinson,* 188 N. C., 784, wherein it is said: "One is permitted to kill in self-defense (*S. v. Johnson,* 166 N. C., 392); but, in the exercise of this right of self-defense, more force must not be used than is reasonably necessary under the circumstances, and if excessive force or unnecessary violence be used, the defendant would be guilty of manslaughter. *S. v. Garrett,* 60 N. C., 148."

The defendant in his brief concedes that the assailed portion of the charge "is correct as far as it goes," but that "the court should have instructed the jury that the defendant may fight in self-defense, and that he may do so when it is not actually necessary if he believes it to be necessary and has a reasonable ground for the belief; but whether his ground is reasonable is a matter for the jury and not the prisoner." We see no essential reason why the subject of the justification of fighting or killing in self-defense by actual necessity or apparent necessity should be coupled with the subject of the *quantum* of force permitted in self-defense. But, however that may be, the court did not fail to instruct the jury upon the subject of the right to fight or kill in self-defense when there was either an actual necessity or apparent necessity for so fighting or killing. The court charged the jury as follows: "There is

another principle of law. Ordinarily, the law does not permit one to repel simple assault. In illustration of that, where one person strikes another with an open hand and commits a simple assault upon him or strikes him with his fist and there is no great difference in the size of the parties, then the law would not permit that other person to take out a knife or any deadly weapon and assault his aggressor. That is in keeping with when one is not permitted to attack in simple assault. That principle does not apply where from a fierceness of heart and difference in the size of the parties, the character of the parties, or other surrounding circumstances, the person assaulted has reasonable grounds to believe he is about to suffer death or great bodily harm. The jury and not the prisoner are the judges of the reasonableness of the apprehensions, and that the jurors are to judge the reasonableness of such apprehension from the facts and circumstances as they existed at the time of the difficulty and not as they may appear to the jury now in a cool moment of reflection or in a moment of cool reflection."

The third assignment cannot be held for reversible error.

Assignment No. 4 assails that portion of the charge in parentheses, which, with its connecting clauses, reads: "Gentlemen, there is another principle of law that the court overlooked calling your attention to. Ordinarily, the law will not permit a person to provoke or bring about a difficulty and engage willingly in a fight and then, after he has done so, take the life of his adversary and then plead self-defense. The reason the law won't permit the person to plead self-defense is on the ground that the necessity for the killing was brought about by the wrongful and unlawful acts of the defendant. The law will not permit a man to provoke a difficulty or bring it on and then take the life of his adversary unless the person who does provoke such difficulty quits the combat and retreats as far as he can with safety. (If he brings about a difficulty by wrongful and unlawful conduct, curse words, or otherwise brings about the difficulty and then quits the combat and leaves his adversary and retreats as far as he can, and then he is hurt and it is necessary for him to take the life of his adversary, then, under these circumstances, the law gives him the right to do it; but if he entered the fight and then quit the combat and takes the life of his adversary even though it shall be actually necessary for him to do so to protect his own life from death or great bodily harm, then he would not be permitted to plead self-defense in this instance)."

The defendant says in his brief that "the foregoing portion of the judge's charge virtually withdrew from the jury the defendant's plea of self-defense which he had heretofore submitted." We do not perceive how this instruction withdrew the defendant's plea of self-defense. It did nothing more than to tell the jury, in effect, that the law does not

permit one who provokes or brings about a difficulty, or who willingly engages in a fight, to successfully plead self-defense if he kills his adversary, although in the course of the fight he was about to suffer great bodily injury or death, unless he shows that before he slew his adversary he had in good faith withdrawn from the fight and had given to his adversary notice, by word or action, of his withdrawal.

That part of the charge above quoted, including the portion assailed, was given somewhat as an addenda to the charge as a whole, and it is clear that it was all predicated upon the accused being a person who provoked or brought about the difficulty, or who willingly engaged in the fight, and, when read in this light, is in accord with the decisions of this Court. *S. v. Medlin*, 126 N. C., 1127; *S. v. Garland*, 138 N. C., 675; *S. v. Kennedy*, 169 N. C., 326.

The fourth assignment cannot be held for reversible error.

The evidence in this case, as interpreted in the record, is quite meager, and leaves us without a clear picture of the facts surrounding the homicide. However, it can be gleaned that there was a fierce fight between the deceased and the defendant, in which the deceased, though without a weapon, knocked the defendant down three times, before receiving a fatal wound from a knife in the hand of the defendant. The record of the defendant's testimony is that "The defendant tried to keep the deceased off him by waving the knife in the air. . . . The deceased advanced on the defendant and ran into and against the knife in the hand of the defendant." Perhaps it was this remarkable, if not incredible, explanation of how the fatal wound was inflicted that prevented the jury from accepting the defendant's version of how the homicide occurred.

On the record we find

No error.

JOHNSIE GREEN, BY HER NEXT FRIEND, DOROTHY S. GREEN, v. CHARLES R. GREEN.

(Filed 20 May, 1936.)

1. Parent and Child B a—

Where the parents of a minor child have been divorced and the custody of the child awarded the mother, the minor child, by a next friend, may sue the father for support.

2. Parent and Child A b: Divorce F b—

The liability of a father for the support of his minor child is not terminated by a divorce from the child's mother, even though the custody of the child is awarded its mother.

3. Parent and Child B a: Divorce F a—

A minor child of divorced parents is not relegated to a motion in the divorce action to force her father to provide for her support, but may maintain an independent action therefor, the child not being a party to the divorce action.

4. Parent and Child B a—

A child of divorced parents is not entitled to an allowance of counsel fees and suit money *pendente lite* in her action against her father to force him to provide for her support, the statutes, C. S., 1666, 1667, applying only to actions instituted by the wife, and such right not existing at common law.

APPEAL by plaintiff from *Rousseau, J.,* at March Term, 1936, of GUILFORD.

This was an action instituted by Johnsie Green, an infant of six years, against Charles R. Green, her father, for support and maintenance, and also for counsel fees *pendente lite.* The action was begun in the municipal court of the city of High Point.

Plaintiff alleged that the defendant, her father, had abandoned her and failed and refused to support her; that she has no means of support and has been dependent upon charity; that the defendant is able to pay for her support, and that she is unable to pay counsel for bringing and prosecuting this action, and she asks that defendant be required to provide for her support, and to pay a reasonable amount for counsel fees.

Defendant, answering, denied that he was the father of the plaintiff; alleged that he was married to her mother, Dorothy S. Green, in 1922, and that he obtained an absolute divorce from her in 1934, in the Superior Court of Forsyth County, and denied he was under any obligation to support the plaintiff, or to pay her counsel fees.

The judge of the municipal court held that as a matter of law he could not allow plaintiff counsel fees or support pending the trial, and further sustained the motion of the defendant to dismiss the action on the ground that the Superior Court of Forsyth County, in which the divorce action between Chas. R. Green and Dorothy S. Green was tried, had exclusive jurisdiction to determine the maintenance of the plaintiff Johnsie Green.

Upon appeal to the Superior Court of Guilford County the ruling of the municipal court was sustained and the action dismissed. From judgment of the Superior Court, plaintiff appealed to this Court.

Walser & Wright for plaintiff.
W. T. Wilson for defendant.

DEVIN, J. Plaintiff's appeal challenges the correctness of the ruling of the court below upon two points:

1. Can an infant maintain an action against her father for support?
2. And, if so, may she have an allowance for counsel fees?

The first question must be answered "Yes" and the second "No."

1. It is held in *Lynn Sanders and J. D. Sanders, by Their Next Friend, W. J. Pratt, v. R. M. Sanders,* 167 N. C., 319: "There can be no controversy that the father is under a legal as well as a moral duty to support his infant children (*Walker v. Crowder,* 37 N. C., 487), and, if he has the ability to do so, whether they have property or not. *Hagler v. McCombs,* 66 N. C., 345. There is a natural obligation to support even illegitimate children which the law not only recognizes, but enforces. *Burton v. Belvin,* 142 N. C., 153; *Kimborough v. Davis,* 16 N. C., 74."

The liability of the father primarily to support the children remains as well after as before divorce, and even when the custody of the children has been awarded to the mother. 14 Cyc., 812, 9 A. & E. (2d Ed.), 871.

It was held in *Small v. Morrison,* 185 N. C., 577, that an unemancipated child could not sue the father for a tort (there the alleged negligent operation of an automobile). Recovery was denied in that case upon the sound principle of the necessity of preserving the peace and privacy of the home and maintaining harmony in the domestic relations and family life. The ground upon which the right of action for tort by a child against a parent has been generally denied has been that, the family being the social unit, such actions would tend to undermine the influence of the home and were inconsistent with the family relation while it existed. *Wick v. Wick,* 192 Wis., 260; 52 A. L. R., 1113.

But, as pointed out in the well considered case of *Small v. Morrison, supra,* a distinction is made where the family relation had already been dissolved or disturbed and its harmony rudely shattered by the action of the father, quoting from *Hewlett v. George,* 68 Miss., 703, and *Roller v. Roller,* 37 Wash., 242.

Here it is alleged that defendant had obtained a divorce from plaintiff's mother, had abandoned the plaintiff to the precarious support of charity, and denied her paternity. There was no family life to be preserved.

The right of an illegitimate child to maintain an action against his father was upheld in *Hyatt v. McCoy,* 195 N. C., 762.

Nor was plaintiff Johnsie Green relegated to a motion in the cause in the case of "Charles R. Green *v.* Dorothy Green" in the Superior Court of Forsyth County. That remedy would have been exclusive had the mother, Dorothy Green, brought a proceeding against the defendant for an allowance to her for the support of the child. *In re Blake,* 184 N. C., 278; *In re Albertson,* 207 N. C., 553. But here the suit is by the child in her own right against the father to enforce the performance of his statutory obligation to support his child. She was not a party to the

action in Forsyth County, nor could the issues raised by the pleadings in this action be properly determined there.

2. Upon the second question presented, there is no statute or principle of law recognized by this Court whereby plaintiff can require the defendant to pay counsel fees or maintenance *pendente lite,* in an action of this kind.

C. S., 1666 and 1667, specifically refer to actions for divorce or for alimony. These sections confer a right only on the wife. While the principle is recognized that, under the common law, based on rulings and precedents of the ecclesiastical law of England, which still prevails to some extent as the basis for our State jurisprudence, the wife may have awarded to her in proper cases, independent of the statute, an allowance for counsel fees and suit money *pendente lite* (*Medlin v. Medlin,* 175 N. C., 529; *Allen v. Allen,* 180 N. C., 465-67), this rule does not apply to an action by the child against her father. Neither by statute nor by the common law is she entitled to such an allowance.

It follows, therefore, that the ruling of the court below denying allowance to plaintiff for counsel fees and support pending the action was proper, and that the judgment dismissing the action must be

Reversed.

E. McA. CURRIE ET AL. v. SOUTHERN MANUFACTURERS CLUB, INCORPORATED.

(Filed 20 May, 1936.)

Taxation D b—Where personal property is sold prior to levy for taxes, claim for taxes is not preferred claim against proceeds of sale.

The receiver of a corporation sold personal property of the corporation, comprising its sold assets, under orders of the court, and deposited the proceeds of sale to his credit as receiver. The city and county in which the corporation was located levied executions on the funds on deposit, claiming that they, respectively, were entitled to preferred claims against the funds for personal property taxes for several years prior to the appointment of the receiver. *Held:* Since a lien for personal property taxes does not attach until levy thereon, C. S., 7986, and no lien for taxes was created prior to the sale of the property free from tax liens by the receiver, the city and county have no lien on the proceeds of sale of the property and are not entitled to a preferred claim against the funds.

APPEAL by Nathan Sharpe, receiver, from *Harding, J.,* at Chambers in the city of Charlotte, N. C., on 13 March, 1936. Reversed.

The above entitled action was heard on the petition of Nathan Sharpe, receiver of the defendant, for instructions by the court with respect

to the payment of the claims of the city of Charlotte, and of Mecklenburg County for taxes which were levied on the property of the defendant prior to the appointment of the receiver, and which have not been paid by the defendant or by the receiver.

At the hearing it was agreed that the facts with respect to the claims of the city of Charlotte and of Mecklenburg County are as follows:

1. On 28 June, 1934, Nathan Sharpe was appointed by the judge of the Superior Court of Mecklenburg County, by an order made in this action, temporary receiver of the defendant, and thereafter, on 12 July, 1934, the said appointment was made permanent by the said judge.

2. The only property owned by the defendant at the date of the appointment of the receiver consisted of furniture, fixtures, and equipment, which were used by the defendant in the maintenance and operation of a social club in the city of Charlotte, Mecklenburg County, North Carolina. Upon his appointment as receiver of the defendant, Nathan Sharpe, pursuant to orders of the court, took into his possession all the property of the defendant, and thereafter, on ...... December, 1935, sold said property. The proceeds of said sale, less sums paid out by the receiver under orders of the court for expenses incurred by him, now amounting to the sum of $2,372.41, are on deposit with the Commercial National Bank of Charlotte, to the credit of Nathan Sharpe, receiver.

3. The defendant duly listed its property for taxation by the city of Charlotte for each year prior to the appointment of the receiver, and has paid all taxes levied on said property by the city of Charlotte, except the taxes levied for the years 1930, 1931, 1932, 1933, and 1934. The taxes for these years, amounting to the aggregate sum of $551.73, without interest or penalties, were not paid by the defendant prior to the appointment of the receiver, and have not been paid by the receiver since his appointment. The tax collector of the city of Charlotte had not levied on the property of the defendant for said taxes prior to the appointment of the receiver, nor did he levy on said property after it came into the possession of the receiver, and prior to its sale by the receiver, pursuant to orders of the court.

4. The defendant duly listed its property for taxation by Mecklenburg County for each year prior to the appointment of the receiver, and has paid all taxes levied on said property by Mecklenburg County, except the taxes levied for the years 1931, 1932, 1933, and 1934. The taxes for these years, amounting to the aggregate sum of $163.77, without interest or penalties, were not paid by the defendant prior to the appointment of the receiver, and have not been paid by the receiver since his appointment. The sheriff of Mecklenburg County had not levied on the property of the defendant prior to the appointment of the receiver, nor did

he levy on said property after it came into the possession of the receiver, and prior to its sale by the receiver, pursuant to orders of the court.

5. On 23 January, 1936, the tax collector of the city of Charlotte and the sheriff of Mecklenburg County caused executions in their hands, respectively, for the taxes due and unpaid by the defendant, to be served, simultaneously, on Nathan Sharpe, receiver, and the Commercial National Bank of Charlotte.

On these facts, the city of Charlotte and Mecklenburg County contended that each has a preferred claim against the defendant, and that each is entitled to the payment of its claim by the receiver out of the money in his hands in priority over other claims against the defendant.

On the other hand, Nathan Sharpe, receiver, contended that neither the city of Charlotte nor Mecklenburg County has a preferred claim against the defendant, and that each is entitled to the payment of its claim only pro rata with other claims.

The court was of opinion that on the facts agreed the city of Charlotte and Mecklenburg County, each, has a preferred claim against the defendant, and is entitled to the payment of its claim by the receiver out of the money in his hands in priority over other claims against the defendant.

From the order in accordance with the opinion of the court, Nathan Sharpe, receiver, with the permission of the court, appealed to the Supreme Court, assigning error in the order.

John D. Shaw and F. A. McCleneghan for the receiver.
Scarborough & Boyd for city of Charlotte.
J. Clyde Stancill and Henry C. Fisher for Mecklenburg County.

CONNOR, J. When the property of the defendant in this action came into the possession of the receiver appointed by the court, neither the city of Charlotte nor Mecklenburg County had a lien on said property for the taxes which had been theretofore levied against the defendant, and which were then unpaid. No levy had been made on said property for said taxes by the tax collector of the city of Charlotte or by the sheriff of Mecklenburg County. It is provided by statute that "taxes shall not be a lien upon personal property but from the levy thereon." C. S., 7986. *Coltrane v. Donnell*, 203 N. C., 515, 166 S. E., 377; *Carstarphen v. Plymouth*, 186 N. C., 90, 118 S. E., 905. The title to defendant's property vested in the receiver, under the orders of the court, free and clear of any lien for taxes then due to the city of Charlotte or to Mecklenburg County.

Neither the tax collector of the city nor the sheriff of the county levied upon said property for the unpaid taxes after the same came into

the possession of the receiver, and before its sale by the receiver, under the orders of the court, as each was authorized to do by statute. C. S., 1220; C. S., 8003. When the property was sold, under the orders of the court, the purchaser acquired title to same free and clear of any lien for the taxes due by the defendant at the date of the appointment of the receiver. See *Carstarphen v. Plymouth, supra.*

As neither the city of Charlotte nor Mecklenburg County had a lien on the property at the time it was sold by the receiver, they have no lien on the proceeds of the sale now in the possession of the defendant. The service of executions on the receiver and on the bank in which the proceeds of the sale were deposited to the credit of the receiver were ineffectual for the purpose of giving the claims of the city and of the county priority over other claims against the defendant. See *Shelby v. Tiddy,* 118 N. C., 792, 24 S. E., 521; *Alexander v. Farrow,* 151 N. C., 320, 66 S. E., 209.

There is error in the order in this cause directing the receiver to pay the taxes levied against the defendant prior to his appointment as preferential claims. The order is therefore

Reversed.

J. J. CROW v. F. M. MORGAN.

(Filed 20 May, 1936.)

1. **Homestead and Personal Property Exemptions A e—**

A debtor may have his homestead exemption allotted in lands owned by him but mortgaged to a third person, but in ascertaining the value thereof the mortgage debt should be disregarded, and the land appraised as though the debtor owned the unencumbered fee. N. C. Constitution, Art. X, sec. 2.

2. **Homestead and Personal Property Exemptions C a—**

The right to the personal property exemption exists by virtue of the Constitution and attaches prior to the allotment or appraisal.

3. **Homestead and Personal Property Exemptions C b—**

In the allotment of the personal property exemption, the creditor as well as the debtor is entitled to have the procedure conform to the constitutional provisions and the statutes enacted pursuant thereto. N. C. Code, 737, 751.

APPEAL by plaintiff from *Phillips, J.,* at February Term, 1936, of UNION. Reversed.

The plaintiff obtained a judgment against the defendant, which was duly docketed in the office of the clerk of the Superior Court for said

county, on 28 August, 1935, for the sum of $145.00, with interest from 1 October, 1933, and costs. This was a lien on defendant's real property. N. C. Code, 1935 (Michie), sec. 614. On 24 September, 1935, the clerk of the Superior Court of Union County duly issued an execution against the defendant, which was placed in the hands of the sheriff of Union County, N. C., and plaintiff paid the fee for laying off the homestead and personal property exemptions of defendant. The record discloses the return of appraisers. The return, in part, is as follows: "We have viewed and appraised the homestead of the said F. M. Morgan and the dwellings and buildings thereon, owned and occupied by said F. M. Morgan as a homestead, and valued the same at less than $1,000; and the tract bounded as follows: Equity in 45-acre tract in Lanes Creek Township, bounded on the north by Gulledge lands, on the east by G. B. Walters, on the south by First Carolinas Joint Stock Land Bank, and on the west by First Carolinas Joint Stock Land Bank—equity in this property of about $200. Two tracts containing 435 acres in Anson County, bounded on the north by E. Collins, on the east by E. Collins, on the south by N. C. Joint Stock Land Bank, and on the west by N. Barbara—equity of about $500.00 is valued at $900.00, and is exempt from sale under execution according to law."

As to the personal property is the following: "We find all of the above property mortgaged beyond any equity the said F. M. Morgan could have in same, which we declare to be a fair valuation, and the said articles are exempt from sale under execution in the said action. . . . There being no excess upon which levy could be made to satisfy this execution, it is returned *nulla bona*. This 5 November, 1935. J. W. Spoon, sheriff of Union County."

The plaintiff, in compliance with the statute, gave notice and excepted to the return. N. C. Code, 1935 (Michie), sec. 740.

In the record is the following: "It was agreed by the parties that no jury was required, and his Honor proceeded to hear and determine the motion upon the papers in the cause, which constitute the case on appeal."

The judgment of the court below is as follows: "This matter coming on to be heard before the undersigned judge, at the term above named, upon exceptions filed to the return and of the appraisers and allotment of homestead and personal property exemption, after full hearing, the court finds as a fact that the plaintiff judgment creditor has not sustained and cannot in any wise sustain any injury for any act or thing done or omitted by the appraisers and/or the sheriff, and: It is considered, ordered, adjudged, and decreed that the exceptions be and the same are hereby overruled, and that the report and allotment of homestead and exemptions is approved. Let the plaintiff and the surety on his

undertaking pay the costs of this proceeding. Done at the term above named. F. Donald Phillips, Judge presiding."

Plaintiff made numerous exceptions and assignments of error, and appealed to the Supreme Court.

R. B. Redwine for plaintiff.
No counsel for defendant.

CLARKSON, J. (1) We think the homestead exemption was not properly laid off. Constitution of N. C., Art. X, sec. 2, is as follows: "Every homestead, and the dwellings and buildings used therewith, not exceeding in value one thousand dollars, to be selected by the owner thereof, or in lieu thereof, at the option of the owner, any lot in a city, town, or village, with the dwelling and buildings used thereon, owned and occupied by any resident of this State, and not exceeding the value of one thousand dollars, shall be exempt from sale under execution or other final process obtained on any debt. But no property shall be exempt from sale for taxes, or for payment of obligations contracted for the purchase of said premises." A mortgagor of lands is entitled to his homestead exemptions as against the lien of a judgment creditor.

In *Chemical Corp. v. Stuart,* 200 N. C., 490 (492-3), is the following: "In enforcing a judgment lien, should prior recorded mortgages and other encumbrances be taken into consideration in arriving at the value of a homestead, or should the homestead be allotted subject to and burdened with prior encumbrances as though they did not exist? We think the homestead should be allotted subject to and burdened with prior encumbrances as though they did not exist. This has been long the practice and procedure in this jurisdiction." The matter is also thoroughly discussed in *Cheek v. Walden,* 195 N. C., 752. *Farris v. Hendricks,* 196 N. C., 439.

The homestead exemption was not laid off in accordance with the Constitution and statutes on the subject. See *Cheek v. Walden, supra; Duplin County v. Harrell,* 195 N. C., 445; *Bank v. Robinson,* 201 N. C., 796.

(2) We think the personal property was not properly levied on. Article X, section 1, of the Const. of N. C. is as follows: "The personal property of any resident of this State, to the value of five hundred dollars, to be selected by such resident, shall be and is hereby exempted from sale under execution or other final process of any court, issued for the collection of any debt."

The right to the personal property exemption exists not by virtue of the allotment, but by virtue of the Constitution, which confers it and

attaches the protection to the debtor, before the allotment or appraisal. *Lockhart v. Bear,* 117 N. C., 298.

In laying off the personal property exemption of a debtor, the property upon which there is no mortgage lien must be first exempted. *Cowan v. Phillips,* 122 N. C., 72. N. C. Code, 1935 (Michie), sec. 737, "Personal property appraised on demand."

A debtor may legally demand his personal property exemption at any time and to the last moment before the appropriation thereof by the court, and the order of court directing a payment of the money derived from the sale of such property is final process within the meaning of the Constitution giving the creditor such right until execution or other final process. *Befarrah v. Spell,* 178 N. C., 231.

The creditor, as well as the debtor, has the right to have the constitutional provisions before mentioned carried out, as written, and in compliance with the statutes on the subject. This was not done in the present case. The procedure is set forth under "Homestead and Exemptions," N. C. Code, 1935 (Michie), subch. 11. See the forms of "Appraisers' Return," sec. 751.

For the reasons given, the judgment of the court below is

Reversed.

CHARLES CUMMINGS, ADMINISTRATOR OF GLADYS LILLIAN JONES, v. A. W. DUNNING AND J. W. STANLEY.

(Filed 20 May, 1936.)

1. Pleadings D e—

Upon demurrer, the complaint is to be construed liberally in favor of the pleader with a view to substantial justice between the parties, C. S., 535, and the demurrer should be overruled unless the complaint is wholly insufficient, taking its allegations to be true, to state a cause of action.

2. Negligence A c—Complaint held to state cause of action for death of minor invitee drowned in defendants' artificial pond.

The complaint in this action for wrongful death alleged that defendants maintained an artificial pond, for pleasure and recreational purposes, adjacent to a road connecting two streets in the edge of a thickly settled city, that there was no obstruction between the pond and the road, that the pond was attractive to small children and was naturally hazardous, and that several children had been drowned therein to the knowledge of defendants, and that defendants had invited numerous small children, including members of intestate's family, to come upon the premises and play without warning them against the danger of the deep water, and that intestate, a child of tender years, went upon the premises and was drowned in the pond. *Held:* The complaint stated a cause of action for wrongful death and defendants' demurrer thereto should have been overruled.

3. Pleadings D e—

In ruling upon a demurrer to the complaint, its allegations alone will be considered, and taken as true, and whether the allegations can be sustained upon the trial is not presented for decision.

APPEAL by plaintiff from *Cranmer, J.*, at February Term, 1936, of NEW HANOVER. Reversed.

Action for damages for wrongful death of plaintiff's intestate, alleged to have been caused by the negligence of defendants in failing to properly safeguard a deep water hole or pond near the limits of the city of Wilmington.

Plaintiff alleged, substantially, in his complaint and amendment to complaint that defendants owned a large water hole or artificial pond or lake, adjoining the corporate limits of the city of Wilmington, which was maintained and used by defendants as a fish pond; that it was thirty or forty feet deep, and attractive to children; that there was no substantial fence about it nor warning against its use; that on the side near the road leading from Market to Princess Street there was no fence, and that plaintiff's intestate, a young girl, stated in the argument (without contradiction) to be eleven years of age, entered the premises and fell in or jumped in and was drowned. The following allegations appear in the amendment to the complaint:

"2. That these defendants had, on various occasions prior to the death of plaintiff's intestate, extended an invitation to numerous immature children, including members of the family of the deceased Gladys Lillian Jones, to come and bathe, swim, and play, and make use of the said artificial pond or lake hereinbefore referred to in the second paragraph of the complaint.

"3. That these defendants, on numerous occasions, were present at said artificial lake or pond and saw numerous immature children wading, bathing, and swimming and making use of said lake or pond as a playground, and had personal knowledge that said children had habitually frequented said lake or pond, and made no effort to prevent such use of said premises, but, to the contrary, permitted, encouraged, and invited the continuous use of said premises.

"4. That said artificial lake or pond was notoriously hazardous and dangerous, and on several occasions had been the cause of death by drowning of small children, which said hazardous character was well known to these defendants, having existed for a long period of time, but said hazardous character was unknown to plaintiff's intestate.

"5. That said artificial lake or pond did allure, entice, and attract numerous small children to use said pond or lake, including plaintiff's intestate.

"6. That these defendants, having full knowledge of the use of said lake or pond by immature children for the purpose hereinbefore alleged, could and should have anticipated and foreseen the dangers that did accompany the use of said lake or pond by said immature children, and these defendants utterly failed to properly guard or protect said children from the dangerous conditions and the maintenance of said pond or lake under these dangerous conditions, and the conduct of these defendants in allowing, permitting, and inviting the use of the same by immature children, including the plaintiff's intestate, constituted gross negligence on the part of these defendants, and was the proximate cause of the death of plaintiff's intestate."

The defendants' demurrer *ore tenus* to the complaint and amendment to the complaint was sustained, and from judgment dismissing the action plaintiff appealed.

John D. Bellamy & Sons and Rodgers & Rodgers for plaintiff.
Carr, James & LeGrand for defendants.

DEVIN, J. Demurrer *ore tenus* to the complaint as amended having been sustained, it is necessary to examine the allegations therein set forth to determine whether in any view a cause of action has been stated.

As was said in *Ramsey v. Furniture Co.,* 209 N. C., 165: "On a demurrer the statute (C. S., 535), requires that we construe the complaint liberally with a view to substantial justice between the parties. The demurrer admits the truth of all the material facts alleged, and every intendment is adopted in behalf of the pleader. A complaint cannot be overthrown by a demurrer unless it be wholly insufficient. If in any portion of it, or to an extent it presents facts sufficient to constitute a cause of action, the pleading will stand. It must be fatally defective before it will be rejected as insufficient. *S. v. Trust Co.,* 192 N. C., 246; *Lee v. Produce Co.,* 197 N. C., 714."

The principles of law applicable to the facts here alleged have been fully set forth in an able and elaborate opinion by *Mr. Justice Schenck* in *Brannon v. Sprinkle,* 207 N. C., 398, and need not be here restated. In that case, and in the cases cited in support of the conclusion there reached, the courts were dealing with children who were trespassers rather than invitees, and to whom the dangerous conditions were attractive.

But in the instant case it is alleged the defendants maintained for pleasure and recreational purposes a lake or pond thirty or forty feet deep, with no enclosure around it on the side adjacent to a road connecting two streets "in the edge of a thickly settled city"; that the pond was naturally hazardous and had been the cause on several occasions of

the drowning of children to the knowledge of the defendants; that defendants had invited numerous immature children, including members of the family of plaintiff's intestate, to come upon the premises and make use of said lake, and without any warning against the use of so deep a lake, permitted, encouraged, and invited the continuous use of the premises by immature children.

It is proper to say that in their answer the defendants deny these allegations and allege that the pond was protected by a fence and locked gate, and that plaintiff's intestate was forbidden to enter. But we are considering only the allegations in the plaintiff's complaint. We are not dealing with questions of evidence or proof. Whether plaintiff can sustain his allegations on the trial is another matter.

There was error in sustaining the demurrer.

Reversed.

STATE v. J. S. WILLIAMS.

(Filed 20 May, 1936.)

Indictment B b—Indictment charging several separate offenses under statute with disjunctive "or" held void for uncertainty.

Defendant was indicted under ch. 477, Public Laws of 1935, making it unlawful to manufacture, possess, have under control, sell, prescribe, administer, dispense, or compound any of certain narcotic drugs. The indictment followed the words of the statute and charged defendant in one count with the commission of the several acts forbidden, the several offenses being charged by the use of the disjunctive "or." *Held:* It is impossible to ascertain from the indictment which of the several separate offenses defendant was charged with committing, the indictment failing to charge the commission of each of them, since the disjunctive "or" is used, and defendant's motion to quash the indictment for uncertainty should have been allowed.

APPEAL from *Pless, J.*, at September Term, 1935, of GUILFORD. Reversed.

Prior to the reading of and the plea to the bill of indictment, and prior to the impaneling of the jury, the defendant moved to quash the bill of indictment, and, upon the motion being denied, reserved exception.

The bill of indictment is as follows:

"The Jurors for the State, upon their oath, present: That J. S. Williams, late of the County of Guilford, on the 16th day of June, in the year of our Lord, one thousand nine hundred and thirty-five, with force and arms, at and in the county aforesaid, unlawfully, willfully, and

feloniously did possess, manufacture, have under his control, sell, prescribe, administer, *or* dispense a narcotic drug, to wit: Cannabis, against the form of the statute in such case made and provided, against the peace and dignity of the State."

The verdict rendered was "Guilty as alleged in the bill of indictment."

From judgment of imprisonment the defendant appealed, assigning errors.

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

Frazier & Frazier and Yarborough & Yarborough for defendant, appellant.

SCHENCK, J. The bill of indictment was drawn to charge a violation of chapter 477 of the Public Laws of 1935, the two first sections of which are as follows: "Section 1. That the following words and phrases as used in this act shall have the following meanings unless the context otherwise requires: . . . (o) 'Narcotic Drugs' means coca leaves, opium, cannabis, and every substance not chemically distinguishable from them. . . . Sec. 2. It shall be unlawful for any person to manufacture, possess, have under his control, sell, prescribe, administer, dispense, *or* compound any narcotic drug, except as authorized in this act."

We are of the opinion, and so hold, that his Honor erred in denying the motion of the defendant to quash the bill of indictment upon the ground that it charged in one count several separate and distinct offenses in the disjunctive and was thereby rendered void for uncertainty. It cannot be determined from a reading of the bill whether it was meant to charge the defendant with possessing cannabis, or with manufacturing cannabis, or with having under his control cannabis, or with selling cannabis, or with prescribing cannabis, or with administering cannabis, or with dispensing cannabis. If it should be said that the purpose was to charge all of the offenses just enumerated, the answer is that the bill does not make such a blanket charge—the conjunction "and" instead of the disjunctive "or" was required to make such a charge. The expediency for such holding is clearly demonstrated by the result of the trial of this case, wherein the verdict was "guilty as alleged in the bill of indictment." If this verdict be interpreted as finding the defendant guilty of *some* of the charges in the bill, then it is void for uncertainty, since it does not indicate upon which of the charges the jury found the defendant guilty, and if the verdict be interpreted as finding the defendant guilty of *all* the charges in the bill, then the defendant would stand

convicted of at least some offenses of which there was no evidence. One might well have in his possession a narcotic without having manufactured it, and, likewise, one might have under his control a narcotic and not sell it or prescribe it.

If an indictment follows the language of the statute, it is usually sufficient and proper, "but the object of all indictments is to inform the person with what he is charged, as well as to enable him to make his defense, as to protect him from another prosecution from the same criminal act. It should therefore be reasonably specific and certain in all its material averments. . . . It is not always sufficient to pursue the words of the statute." *S. v. Hill,* 79 N. C., 656.

"The general rule is well settled that an indictment or information must not charge a party disjunctively or alternatively in such manner as to leave it uncertain what is relied on as the accusation against him. Two offenses cannot be alleged alternatively in the same count. As a general rule, where a statute specifies several means or ways in which an offense may be committed in the alternative, it is bad pleading to allege such means or ways in the alternative." 31 Corpus Juris, pp. 663-664. "Where a statute makes it an offense to do this or that or the other, mentioning several things disjunctively, the whole may be charged conjunctively, and the defendant may be found guilty of either one, and it is generally held to be fatal to charge disjunctively in the words of the statute." 14 R. C. L., par. 33, p. 188. "The rule is that whenever 'or' would leave the averment uncertain as to which of two or more things is meant, it is inadmissible; then 'and' may be employed in its stead if it makes the called-for sense." Bishop's New Criminal Procedure (2d Ed.), Vol. 2, par. 585, p. 462.

"As a general rule, it is sufficient in framing an indictment upon a statute to use the very words of the statute; but this rule is not without exception, for where a statute, in enumerating offenses, charging intent, etc., uses the disjunctive *or,* it is common to insert the conjunctive *and* in its stead in the bill of indictment, for alternative or disjunctive allegations make the bill bad for uncertainty. . . . It is common to insert several counts in order to meet the different views which may be presented by the evidence, but alternative allegations in the same count make it bad for uncertainty." *S. v. Harper,* 64 N. C., 129.

Reversed.

STATE v. CHARLES R. GREEN.

(Filed 20 May, 1936.)

Parent and Child A a: Husband and Wife G c—Husband living under same roof with wife is conclusively presumed to be father of children.

Where the husband and wife are living together under the same roof during the period when a child is begotten, the husband is conclusively presumed to be the father of the child when he is not impotent, and in a prosecution of the husband for abandonment and nonsupport of the child, evidence tending to establish the illegitimacy of the child under such circumstances is incompetent.

APPEAL by defendant from *Sink, J.*, at December Term, 1935, of GUILFORD.

The defendant was charged with the abandonment and nonsupport of his minor child, Johnsie Green, aged six years. The sole defense interposed by the defendant was that he was not the father of this child. Evidence was offered tending to show that the defendant and his wife, Dorothy S. Green, were married in 1922, and lived together in the same house until October, 1932, when they separated. They were divorced in 1934. Three children older than Johnsie were born of the marriage. Johnsie was born in 1930. Another child, a boy now dead, was born since the birth of Johnsie, the paternity of the last child being admitted by the defendant. The wife testified that the defendant was the father of Johnsie.

The defendant offered to testify that marital relations between himself and his wife ceased during the period between 15 February, 1929, and the last of April, 1929, though they were living in the same house. Upon objection, this testimony was excluded, as was also testimony from a number of witnesses as to misconduct on the part of defendant's wife with a man named Bullard during the spring of 1929. Defendant also offered evidence of a witness that defendant's wife had said that defendant was not the father of the child Johnsie. Numerous exceptions were taken to the rulings of the court in excluding this testimony.

There was a verdict of guilty. From judgment thereon that defendant pay the costs and ten dollars per month for the use and benefit of the child Johnsie, defendant appealed.

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

W. T. Wilson for defendant.

DEVIN, J. Though the record shows one hundred and ninety-six assignments of error in the trial below, only one determinative question is presented for decision.

When a child is born in wedlock, the husband and wife living in the same house, is legitimacy conclusively presumed?

Upon authority and reason, the question must be answered in the affirmative.

The ancient rule of the common law that if the husband was within the four seas no proof of nonaccess was admissible (*S. v. Pettaway,* 10 N. C., 623) has been modified in this State only to the extent that the presumption of legitimacy may be rebutted by evidence tending to show the husband could not have had access or was impotent. *S. v. McDowell,* 101 N. C., 734; I Wharton Criminal Evidence, 119.

Illegitimacy is an issue of fact resting upon proof of the impotency or nonaccess of the husband. *S. v. Liles,* 134 N. C., 735.

In *Woodward v. Blue,* 107 N. C., 407, *Clark, C. J.,* quotes the following: "If a husband have access, and others at the same time are carrying on a criminal intimacy with his wife, a child born under such circumstances is legitimate in the eye of the law;" though a different rule would apply "if husband and wife were living separate and the wife is notoriously living in open adultery." 10 L. R. A., 662.

In *Ewell v. Ewell,* 163 N. C., 233, it is said: "Nothing is allowed to impugn the legitimacy of a child short of proof by facts showing it to be impossible that the husband could have been its father."

Here it is uncontroverted that the husband and wife were living under the same roof during the period when the child Johnsie was begotten; that they continued to live together for more than two years thereafter, during which time there was born another child of which defendant admits he was the father. The law will not permit defendant now to assert the illegitimacy of the child Johnsie by the proffered evidence of nonaccess. The legitimacy is conclusively presumed.

It follows, therefore, that the evidence of the defendant on this point was incompetent, as was also other evidence tending to establish illegitimacy of the child under these circumstances.

We have examined the other exceptions which the diligence of counsel has presented for our consideration, and decide that none of them can be sustained. The judge's charge to the jury was in accord with the principles laid down in the decided cases.

In the trial we find

No error.

FRANCES W. HAGEDORN v. HEYMAN HAGEDORN ET AL.

(Filed 20 May, 1936.)

Judgments F b—Order held void as being alternative or conditional.

Plaintiff instituted this action to reach assets of the individual defendant to enforce an order for maintenance and support theretofore obtained by plaintiff against the individual defendant under C. S., 1667, alleging that the individual defendant had transferred his assets to a domestic corporation with intent to defraud plaintiff and other creditors. The corporate defendant filed answer, verified by the individual defendant, and plaintiff obtained an order under C. S., 900, that the individual defendant, as president and secretary of the corporate defendant, appear and be adversely examined, and upon his failure to appear, it was ordered, after notice, that the answer be stricken out as authorized by C. S., 903, with the proviso that if the individual defendant did appear by a specified time for adverse examination, the order striking out the answer should be rescinded. *Held:* The effectiveness of the order that the answer should be stricken out was made dependent upon the individual defendant's failure to appear within the time specified, and such order is void as being alternative or conditional. The order being void, the question of whether, upon the facts alleged and found by the court, the court had the power to order the individual defendant, who had moved to another State, to appear and to strike out the answer upon his failure to do so is not presented for decision.

APPEAL by defendant Forsyth Equipment Company from *Pless, J.*, at December Term, 1935, of GUILFORD.

Civil action pending in the Superior Court of Guilford County.

In September, 1935, plaintiff brought suit in the Superior Court of Guilford County against her husband, Heyman Hagedorn, for maintenance and support under C. S., 1667, and obtained an order requiring her said husband to provide $300 per month, and counsel fees, which order has not been obeyed.

The present action was instituted to reach assets belonging to the said Heyman Hagedorn, it being alleged that a certain bank account and other properties belonging to Heyman Hagedorn have been transferred to the Forsyth Equipment Company, a North Carolina corporation of which Heyman Hagedorn is president and treasurer, with intent to defraud the plaintiff and other creditors.

Heyman Hagedorn, being out of the State, was not served with summons. He verifies the answer of the corporate defendant, as treasurer, and says in the verification that he "is familiar with its business." In paragraph two of said answer it is averred "upon information and belief" that for the last eight years the "defendant Heyman Hagedorn" has resided in Pennsylvania and New York for business reasons.

Desiring to procure evidence for the trial, plaintiff obtained an order requiring Heyman Hagedorn, president and treasurer of the Forsyth Equipment Company, to appear before the clerk on 14 December, 1935, and be adversely examined under C. S., 900. Said officer failed to appear; whereupon, after notice, it was ordered, as authorized by C. S., 903, that the defendant's answer be stricken out, with the proviso that the same should not become effective until 20 January, 1936, "and if the defendant Heyman Hagedorn, as treasurer of Forsyth Equipment Company, shall appear before the clerk on Saturday, 18 January, for the purpose of said examination, then the order striking out the pleadings of the defendant shall be and the same is hereby rescinded; otherwise, it shall remain in full force and effect."

From this order the corporate defendant Forsyth Equipment Company appeals, assigning errors.

Herbert S. Falk and Max J. Kane for plaintiff.
Sapp & Sapp for defendant Equipment Company.

STACY, C. J. We are precluded from deciding the questions debated on brief and argument, *i.e.,* the power of the court to order Heyman Hagedorn, individually or as treasurer of the corporate defendant, to appear for examination under C. S., 900, and to strike out the answer under authority of C. S., 903, for failure to comply, because of the alternative condition attached to the order, which renders it void. *Myers v. Barnhardt,* 202 N. C., 49, 161 S. E., 715; *Flinchum v. Doughton,* 200 N. C., 770, 158 S. E., 486; *Lloyd v. Lbr. Co.,* 167 N. C., 97, 83 S. E., 248; *Strickland v. Cox,* 102 N. C., 411, 9 S. E., 414.

In McIntosh on N. C. Practice and Procedure, page 731, it is said: "A conditional judgment is one whose force depends upon the performance or nonperformance of certain acts to be done in the future by one of the parties, as where a judgment was given for plaintiff, to be stricken out if the defendant filed a bond within a certain time, and this was held to be void," citing as authority for the position *Strickland v. Cox, supra.* This definition was quoted with approval in *Killian v. Chair Co.,* 202 N. C., 23, 161 S. E., 546.

In the instant case, the effectiveness of the order striking out the answer, from which the defendant appeals, was made dependent upon the failure of Heyman Hagedorn, treasurer of the corporate defendant, to appear for examination, prior to the commencement date of the order. This rendered it alternative or conditional. *S. v. Perkins,* 82 N. C., 682; *Dunn v. Barnes,* 73 N. C., 273.

While Heyman Hagedorn was not served with summons, it is observed he verified the answer of the corporate defendant and speaks of himself

therein as the "defendant Heyman Hagedorn." It is also alleged, and found as a fact by the court below, that the Forsyth Equipment Company is but a corporate cloak used by Heyman Hagedorn to avoid service of process in this jurisdiction and to defraud the plaintiff of her support. Whether these considerations are sufficient to make him amenable to the orders of the court is a matter for further consideration in the Superior Court. *Harrell v. Welstead,* 206 N. C., 817, 175 S. E., 283; *Abbitt v. Gregory,* 196 N. C., 9, 144 S. E., 297; *Johnson v. Mills Co.,* 196 N. C., 93, 144 S. E., 534.

Error.

STATE v. JOHN E. ELLIS.

(Filed 20 May, 1936.)

1. Intoxicating Liquor G d—

Evidence establishing defendant's possession of more than a gallon of intoxicating liquor, without other incriminating evidence, is insufficient to support a directed verdict of guilty of possession of intoxicating liquor for the purpose of sale under the provisions of C. S., 3379.

2. Criminal Law I j—Establishment of prima facie case against defendant will not alone support directed verdict of guilty.

Evidence establishing certain facts made *prima facie* evidence of guilt under a statute is not sufficient to support a directed verdict against defendant in a prosecution for violating the statute in the absence of adminicular evidence so aiding the *prima facie* case that all the evidence, if believed, points unerringly to defendant's guilt, since, as against the *prima facie* case, the presumption of innocence stands with defendant, rendering the question of defendant's guilt beyond a reasonable doubt under the *prima facie* case a question for the jury.

3. Appeal and Error A e—

The constitutionality of a statute will not be determined on appeal, even when properly presented, when there is also presented some other ground upon which the appeal can be decided.

APPEAL by defendant from *Williams, J.,* at November Term, 1935, of NEW HANOVER.

Criminal prosecution, tried upon warrant charging the defendant with unlawfully "having in his possession, for the purpose of sale, a quantity of intoxicating liquor," etc., in violation of the New Hanover County Alcoholic Beverage Control Act, ch. 418, sec. 21, Public Laws 1935.

The record discloses that on 11 October, 1935, the defendant was arrested in the city of Wilmington and had in his Ford coupe at the time 12½ quarts of whiskey. There were two packages in the front of the

car; two packages in the back under the seat, and one pint in a paper sack. When the officers informed the defendant they had a search warrant for his car, he said, "You need not read it; you have got me." He also asked the officers who reported him. The defendant was alone in his car.

The defendant offered no evidence, and contended that under ch. 418, Public Laws 1935, which exempts New Hanover County from the provisions of the Turlington Act, 3 C. S., 3411 (a), *et seq.*, the possession of said liquor was not unlawful.

The court instructed the jury as follows:

"The court charges you if you find the facts to be as the evidence tends to show and beyond a reasonable doubt, if you believe the evidence, you will return in this case a verdict of guilty." Exception.

Verdict: Guilty.

Judgment: Two years upon the roads.

Defendant appeals, assigning errors.

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

W. F. Jones for defendant.

STACY, C. J. Conceding that C. S., 3379, is still in force in New Hanover County and applicable to all persons, firms, associations, and corporations, other than the New Hanover County Alcoholic Beverage Control Board, it is made unlawful by said section for any person to have or to keep in his possession, for the purpose of sale, any spirituous liquors, and proof of the possession of more than a gallon of such liquors, at any one time, constitutes "*prima facie* evidence of the violation of this section."

In the case of *S. v. Russell,* 164 N. C., 482, 80 S. E., 66, the trial court instructed the jury, under chs. 819 and 992, Public Laws 1907, making the possession of more than 2½ gallons of intoxicating liquors in Mecklenburg County *prima facie* evidence of its possession for the purpose of sale, as follows: "The statutory presumption in this case, to the effect that keeping or having on hand or under one's control more than 2½ gallons of intoxicating liquor shall be *prima facie* evidence of an intent to sell same contrary to law is not binding upon the jury, though the defendant does not see fit to introduce any testimony or to go on the stand as a witness for himself. The jury is still at liberty to acquit the defendant, if they find his guilt is not proved beyond a reasonable doubt." This instruction was approved and commended for its accuracy and precision, citing in support *S. v. Wilkerson,* 164 N. C., 431, 79 S. E., 888, and *S. v. Barrett,* 138 N. C., 630, 50 S. E., 506.

It is also held for law in this jurisdiction that the trial court may not direct a verdict for the prosecution in a criminal action, when there is no admission or presumption calling for explanation or reply on the part of the defendant. *S. v. Singleton,* 183 N. C., 738, 110 S. E., 846; *S. v. Hill,* 141 N. C., 769, 53 S. E., 311; *S. v. Riley,* 113 N. C., 648, 18 S. E., 168.

A *prima facie* showing carries the issue to the jury and is sufficient to warrant, but does not compel, a conviction. *S. v. Russell, supra; S. v. Wilkerson, supra; S. v. Barrett, supra; Speas v. Bank,* 188 N. C., 524, 125 S. E., 398. It is only when the *prima facie* case of the statute is adminiculated by circumstances which point unerringly to the defendant's guilt, and perforce require his conviction, if believed, that a peremptory instruction is permissible. 5 Wigmore on Evidence, sec. 2495. It was on this theory that the instructions were upheld in *S. v. Langley,* 209 N. C., 178, and *S. v. Rose,* 200 N. C., 342, 156 S. E., 916.

As against the *prima facie* case, there comes to the aid of the defendant the common-law "presumption of innocence," which goes with him throughout the trial and stands until overcome by proof or an adverse verdict. *S. v. Herring,* 201 N. C., 543, 160 S. E., 891; *S. v. Boswell,* 194 N. C., 260, 139 S. E., 374. It is only in rare instances that a verdict may be directed for the prosecution in a criminal case. *S. v. Riley, supra.*

The defendant challenges the constitutionality of the act, ch. 418, sec. 21, Public Laws 1935, under which he was charged and convicted, but it is not after the manner of appellate courts to pass upon constitutional questions, even when properly presented, if there be also present some other ground upon which the case can be decided. *In re Parker,* 209 N. C., 693.

For error in directing the verdict, a new trial must be awarded. It is so ordered.

New trial.

STATE v. LACEY TATE.

(Filed 20 May, 1936.)

1. Intoxicating Liquor G c—

The possession of more than one gallon of intoxicating liquor is *prima facie* evidence of possession for the purpose of sale, C. S., 3379, and is sufficient to take the case to the jury on the issue.

2. Intoxicating Liquor G e—

C. S., 3379, making the possession of intoxicating liquor by individuals for the purpose of sale unlawful, is not repealed as to New Hanover County by ch. 418, Public Laws of 1935.

3. Same: Intoxicating Liquor B a—

The provisions of 3 C. S., 3411 (j), making the possession of intoxicating liquor lawful in certain instances, is repealed in New Hanover County by ch. 418, Public Laws of 1935.

4. Criminal Law L e—

A slight inaccuracy in the charge of the court which, when taken with the charge as a whole, is neither misleading nor prejudicial, will not entitle defendant to a new trial.

CLARKSON, J., concurs in result.

APPEAL by defendant from *Williams, J.*, at November Term, 1935, of NEW HANOVER.

Criminal prosecution, tried upon warrant charging the defendant with unlawfully "having in his possession, for the purpose of sale, 1½ gallons of untax-paid whiskey," etc., in violation of the New Hanover County Alcoholic Beverage Control Act, ch. 418, sec. 21, Public Laws 1935.

The record discloses that on 18 October, 1935, two police officers, with search warrant, went to the home of the defendant in New Hanover County and found there three half-gallons of liquor.

The defendant testified that he did not have the liquor for sale, but solely for the purpose of giving his wife a surprise party, and he introduced four witnesses who testified they had been invited to the party.

Verdict: Guilty.

Judgment: Ten months on the roads.

Defendant appeals, assigning errors.

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

R. M. Kermon for defendant.

STACY, C. J. Under C. S., 3379, which is not in conflict with the New Hanover County Alcoholic Beverage Control Act, ch. 418, Public Laws 1935, and therefore not repealed thereby (*S. v. Langley,* 209 N. C., 178), the possession of more than a gallon of spirituous liquor is *prima facie* evidence of its possession for the purpose of sale. *S. v. Hammond,* 188 N. C., 602, 125 S. E., 402; *S. v. Bush,* 177 N. C., 551, 98 S. E., 281. Hence, the evidence was sufficient to carry the case to the jury and to warrant a conviction. *S. v. Ellis, ante,* 166.

The defendant contends that under the Turlington Act, 3 C. S., 3411 (j), the possession of the liquor in question was lawful. *S. v. Dowell,* 195 N. C., 523, 143 S. E., 133. This statute was expressly rendered inapplicable to New Hanover County by ch. 418, Public Laws 1935.

There was a slight inaccurate statement by the Judge in his charge, but taken as a whole, the *lapsus linguæ* was neither misleading nor prejudicial. The verdict and judgment will be upheld.

No error.

CLARKSON, J., concurs in result.

STATE v. JOHN E. ELLIS.

(Filed 20 May, 1936.)

Constitutional Law F d: Criminal Law L f—

Upon defendant's appeal from judgment and sentence by the court after defendant had entered a conditional plea of guilty under ch. 23, Public Laws of 1933, the case will be remanded in order that a jury may pass upon defendant's guilt or innocence in accordance with defendant's constitutional right.

APPEAL by defendant from *Williams, J.*, at November Term, 1935, of NEW HANOVER.

Criminal prosecution, tried upon warrant charging the defendant with violations of the prohibition law.

From a conviction in the recorder's court of New Hanover County and sentence of sixty days on the roads, the defendant appealed to the Superior Court, where he tendered a "conditional plea of guilty" under ch. 23, Public Laws 1933, which was accepted by the solicitor.

Upon hearing the evidence, without the intervention of a jury, the court adjudged the defendant "guilty" and sentenced him to two years on the roads.

Defendant appeals, assigning errors.

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

W. F. Jones for defendant.

STACY, C. J. It is conceded in the State's brief a new trial must be awarded under authority of *S. v. Camby,* 209 N. C., 50, to the end that a jury may pass upon the guilt or innocence of the accused, as is his constitutional right. It is so ordered. *S. v. Hill,* 209 N. C., 53.

New trial.

COUNTY OF MECKLENBURG AND THE BOARD OF COUNTY COMMISSIONERS FOR MECKLENBURG COUNTY v. PIEDMONT FIRE INSURANCE COMPANY, A CORPORATION.

(Filed 20 May, 1936.)

1. **Taxation B d—City school bonds held by insurance company in the county held exempt from taxation by the county.**

Plaintiff county sought to list for *ad valorem* taxation as solvent credits certain bonds issued by a municipality of another county and owned by a domestic insurance company having its principal place of business in the county. *Held:* The bonds were issued by the municipality as an administrative agency of the State to provide schoolhouses and equipment necessary to the constitutional school term, N. C. Constitution, Art. I, sec. 27, Art. IX, sec. 1, and were for a public purpose, and the statute exempting such bonds from taxation, N. C. Code, 7971 (19), in effect at the time the bonds were issued, is constitutional and valid, the Legislature having been given authority by Art. V, sec. 5, to provide for such exemption from *ad valorem* taxation, Art. V, sec. 3, Art. VII, sec. 9, since the bonds, although the property of a private corporation, were issued for a necessary public purpose and purchased in reliance upon the statutory provision exempting them from taxation, and stand upon the same footing as the school buildings erected with the proceeds of the bonds.

2. **Statutes A e—**

A statute will not be declared unconstitutional unless it is plainly and clearly so, and any doubt will be resolved in favor of constitutionality.

DEVIN, J., concurring in result.

APPEAL by plaintiffs from *Shaw, Emergency Judge,* 2 December, 1935, Extra Term Superior Court of MECKLENBURG. Affirmed.

The following is the agreed statement of facts:

"1. The Piedmont Fire Insurance Company is and was at all times hereinafter mentioned a corporation, duly chartered, 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 Charlotte, county of Mecklenburg, State of North Carolina.

"2. That Mecklenburg County is a political subdivision of the State of North Carolina, and a body corporate. That B. J. Hunter, H. W. Harkey, A. D. Cashion, R. F. Dunn, and A. H. Wearn are the duly elected, qualified, and acting members of the board of commissioners of said county, and as such have the power and authority to assess *ad valorem* taxation of property located in said county lawfully subject to taxation.

"3. That on the tax return date in 1935, the Piedmont Fire Insurance Company owned and held certain bonds issued by the city of Winston-

Salem on 13 May, 1929, for amounts aggregating $107,285, the said bonds being hereinafter referred to.

"4. That at the time the aforesaid bonds were issued by the city of Winston-Salem, at the present time and at all times herein mentioned, the city of Winston-Salem was one of the municipalities of the State of North Carolina, located in Forsyth County.

"5. That the bonds herein referred to were issued pursuant to an ordinance duly adopted by the board of aldermen of the city of Winston-Salem, on 20 January, 1928, calling a special election for the purpose of voting upon an ordinance authorizing the issuance of bonds for $2,500,000 for school purposes; that the election was duly held on 6 March, 1928; that the said ordinance was duly approved; that the said bonds were thereafter issued pursuant to the Municipal Finance Act of the State of North Carolina 'for the purpose of acquiring, constructing, reconstructing, and enlarging public school buildings'; that the records as required by section 4, chapter 214 of the Public Laws of North Carolina for the year 1927, were duly filed in connection with the issuance of the said bonds; that the Private Laws of the State of North Carolina for the year 1927, chapter 232, as amended, were duly complied with; and that the proceeds from the sale of the above bonds were issued to purchase land and erect two junior high schools, to enlargement and equipment of five school buildings, to erect one new elementary school and one Negro high school, and to provide for the extension of school grounds in the city of Winston-Salem, North Carolina, a photostatic copy of one of the said bonds, marked 'Exhibit A,' being hereto attached and made a part hereof, all of the bonds that were owned by the Piedmont Fire Insurance Company, as first above mentioned, being similar in all respects to the bond the copy of which is attached, except as to the amounts and maturities of the same.

"6. That the Piedmont Fire Insurance Company did not list the above mentioned bonds owned by it in the year 1935 for *ad valorem* taxes in Mecklenburg County; that thereafter the county of Mecklenburg, through its duly elected and qualified board of commissioners, listed the said bonds and assessed the same for taxation against the Piedmont Fire Insurance Company, notwithstanding the objection made at the time by the Piedmont Fire Insurance Company; that thereupon the Piedmont Fire Insurance Company gave notice of appeal, filed the necessary bond, all as required by law and in accordance with the statutes pertaining thereto, and appealed from the listing and assessment made by the county of Mecklenburg, acting through its duly elected board of commissioners in connection with the said bonds to the Superior Court of Mecklenburg County, North Carolina.

"7. It is stipulated and agreed by and between the parties to this action that all legal formalities have been complied with and that this case is properly before the court for adjudication.

"CONTENTION OF THE PARTIES.

"The Piedmont Fire Insurance Company contends that the aforesaid bonds are not subject to *ad valorem* taxes in Mecklenburg County, North Carolina, and contends that the same are exempt from such taxation by law, and more particularly by section 7971 (19) of the Consolidated Statutes of North Carolina, which provides: 'The following personal property . . . shall be exempted from taxation: Bonds of this State, . . . and bonds of political subdivisions of this State. . . .' Mecklenburg County contends that the above mentioned bonds are subject to the aforesaid *ad valorem* taxes.

"Henry E. Fisher and J. Clyde Stancill, Attorneys for county of Mecklenburg and Board of Mecklenburg County Commissioners.

"Guthrie, Pierce & Blakeney, Attorneys for Piedmont Fire Insurance Company."

Copy of bond omitted—Jurat by litigants.

The judgment of the court below is as follows: "This cause coming on to be heard before his Honor, Thomas J. Shaw, at the 2 December, 1935, Extra Term of the Superior Court of Mecklenburg County, upon the statement of facts agreed to by the parties, a jury trial having been expressly waived; and, after duly considering the matters in controversy, the court is of opinion that the school bonds issued by the city of Winston-Salem, owned by the Piedmont Fire Insurance Company on the tax return date in 1935, and referred to in the agreed statement of facts are exempt from *ad valorem* taxation and cannot lawfully be taxed by the county of Mecklenburg, and that the said Piedmont Fire Insurance Company is not liable for such taxes on said bonds. The court is not holding that all municipal bonds are necessarily exempt from taxation. However, the Constitution of North Carolina imposes upon the State the duty to provide for the education of the children of the State, and in the present case the State did not so provide, but it empowered the city of Winston-Salem, one of its governmental agencies to do so; if the State had issued its own bonds for this purpose, they would be exempt from taxation, and since the city of Winston-Salem, as a governmental agency of the State, issued the bonds for the aforesaid purpose, the court is of the opinion that they are exempt from taxation either by the State or by any other governmental agency of the State. It is therefore ordered, adjudged, and decreed that the aforesaid bonds are exempt from *ad valorem* taxation by the county of Mecklenburg, and that the same

cannot be lawfully assessed for taxation by Mecklenburg County, and that the listing of the aforesaid bonds and the assessment made upon the same by the board of Mecklenburg County Commissioners for taxes for the year 1935 be and the same hereby are declared to be null and void, and that such listing and assessment be and hereby are vacated and set aside. It is further ordered that the costs of this action be taxed against Mecklenburg County. This 13 December, 1935. Thomas J. Shaw, Judge presiding."

The plaintiffs excepted and assigned error to the judgment as signed, and appealed to the Supreme Court.

J. Clyde Stancill and Henry E. Fisher for plaintiffs.
Guthrie, Pierce & Blakeney for defendant.

CLARKSON, J. The question involved: Are the bonds issued by the city of Winston-Salem, a municipality, liable for *ad valorem* taxation in Mecklenburg County when owned and held on the tax return day by the Piedmont Fire Insurance Company, a North Carolina corporation, with its principal office and place of business in Mecklenburg County, North Carolina, when the proceeds from the sale of said bonds were used to purchase land and to erect school buildings on the same, and for other public school purposes in the municipality issuing the said bonds? We think not, under the facts and circumstances of this case.

Constitution of North Carolina, Art. V, sec. 3, in part, is as follows: "Laws shall be passed taxing, by a uniform rule, all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise; and, also, all real and personal property, according to its true value in money."

Article VII, section 7, declares: "No county, city, town, or other municipal corporation shall contract any debt, pledge its faith, or loan its credit, nor shall any tax be levied or collected by any officers of the same except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein."

Article VII, sec. 9, provides: "All taxes levied by any county, city, town, or township shall be uniform and *ad valorem* upon all property in the same, except property exempted by this Constitution."

The bonds in controversy were issued in accordance with the Constitution and legislative sanction given the city of Winston-Salem, a municipal corporation. In the agreed statement of facts is the following: "The proceeds from the sale of the above bonds were issued to purchase land and erect two junior high schools, to enlargement and equipment of five school buildings, to erect one new elementary school and one Negro high school, and to provide for the extension of school grounds in the city of Winston-Salem, North Carolina."

N. C. Code, 1935 (Michie), sec. 7971 (19), in part, is as follows: "The following personal property, and no other, shall be exempted from taxation: (1) Bonds of this State, of the United States, Federal farm loan bonds, joint stock land bank bonds, *and bonds of political subdivisions of this State, hereafter issued,*" etc. (Italics ours.)

This same provision has been included in the statutes of the State for many years. The particular bonds under consideration were issued by the city of Winston-Salem on 15 May, 1929. This same exemption was provided for in section 306 of chapter 344 of the Public Laws of 1929, ratified on 19 March, 1929. It was section 306 of chapter 428 of the Public Laws of 1931. It was section 306 of chapter 204 of the Public Laws of 1933. Public Laws 1935, ch. 371 (p. 431), sec. 2, *Property Exempt,* in part: "The following property shall be exempt from taxation under this article: (2) Property passing to or for the use of the State of North Carolina, or to or for the use of municipal corporations within the State or other political subdivisions thereof, for exclusively public purposes," etc. The General Assembly has followed a uniform practice of expressly exempting an *ad valorem* tax to be placed upon the bonds of the State of North Carolina and of "the political subdivisions of this State."

The city of Winston-Salem, being a political subdivision of this State, under express and clear language of the General Assembly, these bonds for school purposes were exempt from an *ad valorem* tax. The municipality of Winston-Salem, a political subdivision of the State, issued them and the defendant purchased them as exempt from taxation. To now tax them would, at least, savor of bad faith; but, if the exemption was unconstitutional, this could be done, as the Constitution was in existence when the bonds were issued. We cannot see how the exemption impinges the Constitution.

Const. of N. C., Art. I, sec. 27, declares: "The people have the right to the privilege of education, and it is the duty of the State to guard and maintain that right."

Art. IX, sec. 1: "Religion, morality, and knowledge being necessary to good government, and the happiness of mankind, schools and the means of education shall forever be encouraged. Sec. 2: The General Assembly, at its first session under this Constitution, shall provide by taxation and otherwise for a general and uniform system of public schools, wherein tuition shall be free of charge to all children of the State between the ages of six and twenty-one years. And the children of the white race and the children of the colored race shall be taught in separate public schools; but there shall be no discrimination in favor of, or to the prejudice of, either race. Sec. 3. Each county of the State shall be divided into a convenient number of districts, in which one or

more public schools shall be maintained at least six months in every year; and if the commissioners of any county shall fail to comply with the aforesaid requirements of this section, they shall be liable to indictment."

The General Assembly of 1899 made the first appropriation of $100,000 for State schools. In 1931 (Public Laws 1931, ch. 430), under the McLean Bill—a compromise measure—all the schools were taken over by the State to be maintained for six months each year, and an appropriation of $16,500,000 each year was made. About $12,500,000 from the general fund and 15c. *ad valorem* tax on land. The General Assembly of 1933 increased the school term to eight months (ch. 562, Public Laws 1933), took the tax off of land and substituted a 3c. sales tax to aid the schools. There was also an appropriation, known as the Tax Reduction Fund, of $1,500,000 for each year. In 1935 the State appropriation was $20,031,000 for the first year and $20,000,000 for the second year (Public Laws 1935, ch. 455), with a 3c. sales tax and no tax on land.

In *Julian v. Ward,* 198 N. C., 480 (482), citing authorities, it is said: "Under these and other pertinent sections of the Constitution, it has been held in this jurisdiction that these provisions are mandatory. It is the duty of the State to provide a general and uniform State system of public schools of at least six months in every year wherein tuition shall be free of charge to all the children of the State between the ages of six and twenty-one. It is a necessary expense and a vote of the people is not required to make effective these and other constitutional provisions in relation to the public school system of the State. Under the mandatory provision in relation to the public school system of the State, the financing of the public school system of the State is in the discretion of the General Assembly by appropriate legislation, either by State appropriation or through the county acting as an administrative agency of the State."

The Constitution of North Carolina, Art. V, sec. 5, *supra,* is unmistakable in its language: "Property belonging to the State or to a municipal corporation shall be exempt from taxation."

Before the schools were taken over by the State, under the Constitution, the municipal corporations were agencies of the State—"Political subdivisions of this State." Under the Constitution these schools in Winston-Salem are not subject to *ad valorem* tax, nor the bonds issued under legislative authority to build them subject to *ad valorem* tax.

When a State steps down from her sovereignty and goes into business enterprises to compete with individuals, then the above principle does not apply. *Board of Finance Control of Buncombe Co. v. Henderson Co.,* 208 N. C., 569, Anno. 101 A. L. R., 783; *Benson v. Johnston Co.,* 209 N. C., 751.

In *Webb v. Port Comm.*, 205 N. C., 663 (674-5), it is said: "The provision in the act by which the Port Commission was created that its property and the bonds that may be issued and sold as authorized by the act shall be exempt from taxation by the State, or any of its political subdivisions, is valid. The General Assembly has the power to so provide, for the reason that the property of the Port Commission will be held, and the bonds will be issued solely for public purposes. Whatever doubt there may be as to the validity of this provision, by reason of section 3 of Article V of the Constitution of this State, must be, under well settled principles of constitutional construction, resolved in favor of its validity." *Hinton v. State Treasurer*, 193 N. C., 496.

The cases cited by plaintiffs are not applicable to the facts in the present action—they do not apply to bonds for "public purposes," such as these school bonds, but private and such as *quasi*-public corporations, as drainage bonds. In our research, we can find no authority in this State that "school bonds" like the present, issued under legislative authority by a municipality for building schools for free education of the children of the State, as contemplated by the Constitution, has ever been taxed. Perhaps these great schools in the cities and counties of the State would never have been built if the bonds were taxable. There are now 914 high schools and 4,505 elementary schools in our State. In the high schools 156,593 and in the elementary schools 736,055 pupils are enrolled.

Defendant bought these "school bonds" under an act of the General Assembly which exempted them from taxation. They were purchased by the defendant with this understanding. The Constitution of the State, if not in direct language, certainly by implication, allows them to be exempted, as the money was for a public purpose, to wit, schools. To now tax them would destroy confidence and would be a semblance of unfair dealing, and entail loss by defendant and all who purchased these tax-free "school bonds," under legislative sanction. To say the least, it would impair the credit of the State, as no one would put confidence in a State which would enact a statute to exempt such school bonds from taxation, and purchased tax-free, and thereafter allow them to be taxed. Such type of dealing would be reprehensible in an individual, and the legal and moral aspect would apply to an agency of the State—the bonds of political subdivisions of this State. By taxing defendant corporation, the effect is to tax, no doubt, widows, guardians, and other fiduciaries who purchased these tax-free bonds under legislative sanction and who have done so no doubt to live off of the interest on the bonds, or to provide support for minors.

In *Hinton v. State Treasurer, supra,* at p. 499 (quoting from *Sutton v. Phillips,* 116 N. C., at p. 504), it is declared: " 'While the courts have the power, and it is their duty in proper cases, to declare an act of the

Legislature unconstitutional, it is a well recognized principle that the courts will not declare that this coördinate branch of the government has exceeded the powers vested in it unless it is plainly and clearly the case. *If there is any reasonable doubt, it will be resolved in favor of the lawful exercise of their powers by the representatives of the people.* (Italics ours.) . . . (p. 505) It cannot be said that this act is plainly and clearly unconstitutional. The doubt, if any, must be resolved in favor of the General Assembly.' "

For the reasons given, the judgment of the court below is

Affirmed.

DEVIN, J., concurs in the result reached by the Court that school bonds of the city of Winston-Salem in the hands of an investor residing in Mecklenburg County may not be locally assessed for taxation, but regards the citation of *Benson v. Johnston County,* 209 N. C., 751, as unnecessary to this conclusion. In that case it was held that certain real property belonging to a municipal corporation was not exempt from taxation. Here, upon a different ground a different result is reached.

The writer, in his dissent in the *Benson case, supra,* expressed his view that the positive and unmistakable language of the Constitution, Art. V, sec. 5, which declares that "property belonging to the State or to a municipal corporation shall be exempt from taxation," may not be amended or qualified by judicial construction.

STATE v. RALPH DILLS AND LUTHER E. OSBORNE.

(Filed 20 May, 1936.)

1. Criminal Law F a—Plea of former jeopardy may be determined by trial jury under general plea of not guilty.

Defendants entered a plea of former acquittal and refused to plead to the indictment until the plea of former acquittal had been determined. The trial court entered a general plea of not guilty and submitted the question of former acquittal to the trial jury. *Held:* The trial court has discretionary power to have the same jury pass upon the question of former jeopardy under a general plea of not guilty, and defendants' exceptions cannot be sustained, the matter being solely one of procedure, and the trial court's discretionary determination thereof not being reviewable.

2. Criminal Law F d—Charges held for different offenses against different persons and plea of former jeopardy was bad.

Under a special verdict the jury found that defendants had been tried for the murder of a certain person in an attempt to commit robbery, and had been acquitted, N. C. Code, 4614, and that the present indictment

charged defendants with robbery with firearms from the companion of the person they were formerly charged with killing, N. C. Code, 4267 (a), the two offenses having been committed at the same time, and evidence of guilt of one of the offenses being substantially the same as the evidence of guilt of the other. *Held:* The special verdict supports the court's determination of the plea of former acquittal against defendants, the charges being for separate offenses committed against different persons. *S. v. Clemmons*, 207 N. C., 276, cited and distinguished.

APPEAL by defendants from *Pless, J.*, and a jury, at Regular December Term, 1935, of GUILFORD. No error.

This is a case in which the defendants Ralph Dills and Luther E. Osborne were tried in the Superior Court of Guilford County at the December Criminal Term, 1935, on a charge of robbery with firearms. At a prior term in the same county they had been tried upon the charge of murder in the first degree, the State contending that they killed William Davis while in an effort to perpetrate a robbery. Of this charge they were acquitted. This case was tried before his Honor, J. Will Pless, Jr., judge presiding.

Upon the calling of the case for trial the defendants, and each of them, through their counsel, entered a plea of former jeopardy and refused to plead to the bill of indictment until the plea of former jeopardy was determined. Thereupon, the court held that the plea constituted a refusal to plead to the bill of indictment and, therefore, was a plea of "Not guilty."

The court further held that under the general plea of "Not guilty" interposed by the court, the defendants, and each of them, are entitled to submit such evidence as may be pertinent upon the question of former jeopardy as well as to the charges contained in the above indictment.

To this ruling of the court the defendants excepted, and this is the defendants' *first exception.*

After a conference between the solicitor for the State, counsel for the defendants, and his Honor, the following proceedings were held:

"Upon the issue of former jeopardy submitted to the jury, the jury finds the following facts and returns same as its special verdict:

"That the defendants were indicted by the grand jury of Guilford County for the murder of William Davis on 13 October, 1934, and were tried upon the bill of indictment, which said bill of indictment is incorporated as part of this special verdict by reference and made a part of this special verdict by reference and made a part hereof. (See copy of same attached here.) That said trial took place in the Superior Court of Guilford County, in October, 1935, at which time the jury rendered a verdict of 'Not guilty.'

"That at the said trial the State offered evidence tending to show that the defendants were together on the night of 13 October, 1934, and

that in the attempted robbery of William Davis and his father, Ed Davis, killed the former with a pistol or some other deadly weapon, by striking the said William Davis over the head with the pistol or some other deadly weapon, causing his death from the said blow; and that at the said time and place the defendants assaulted Ed Davis, by striking him several blows with a shotgun, and took from the person of Ed Davis the sum of three hundred and ninety-one ($391.00) dollars in money, and from the person of William Davis the sum of six ($6.00) dollars in money.

"That in the said trial Ed Davis appeared as a witness for the State, and testified that a man looking exactly like the defendant Luther E. Osborne, and a man looking exactly like the defendant Ralph Dills, were the two persons who had robbed him and had robbed and killed his son.

"That Hon. F. Donald Phillips, judge presiding, charged the jury in effect that if they found that the defendants were at the scene of the alleged robbery and killing, as a result of an agreement or conspiracy theretofore made, or if they found that either of the defendants killed William Davis in the attempted robbery and the other was present, aiding and abetting, that they would render a verdict of 'Guilty of murder in the first degree'; and, otherwise, they would render a verdict of 'Not guilty.'

"That the said jury, after considering the evidence of the said Ed Davis, and of other witnesses tending to corroborate him, and upon the charge of the court, as above outlined, rendered a verdict of 'Not guilty.'

"That following the trial and acquittal of the defendants Luther E. Osborne and Ralph Dills, as above set forth, the court ordered the defendants Ralph Dills and Luther E. Osborne held to be dealt with on a charge of robbery with firearms under the statute as to Ed Davis, the same being section 4267 of Consolidated Statutes of North Carolina. That in obedience to said order said defendants were so held, and the solicitor for the State, subsequent thereto, prepared a bill of indictment charging said defendants with the crime of robbery with firearms. That the grand jury returned a true bill upon said charge, which said bill is hereto referred to and is part of the record in this case, and made a part hereto (copy of said bill is attached hereto) the same as if specifically set out herein.

"That at the regular term of Superior Court of Guilford County for the trial of criminal cases, held on 16 December, 1935, said case was set for trial on Wednesday, 18 December. That said case was called for trial upon the bill of indictment referred to. That upon being called upon to plead, the defendants, and each of them, through their counsel, entered a plea of former jeopardy, and refused to plead to the bill of indictment in other terms until that plea be disposed of. That the court

declined to have said plea determined first, and again requested the defendants to plead to the bill of indictment in the light of said holding, which the defendants refused to do. Thereupon, the court held that the said plea was tantamount to a general plea of 'Not guilty,' and that under the holding of the court the defendants were entitled to contest the question of their guilt upon the merits of the case, and also to offer such testimony as may be competent upon their plea of former jeopardy. To said rulings the defendants in apt time excepted. Thereupon, the jury was selected, sworn, and impaneled, and the following evidence offered, to wit:

"The State offered evidence tending to show that on the night of 13 October, 1934, as William Davis was driving homeward, accompanied by his father, Ed Davis, and at a point approximately five miles south of Greensboro the car was forced towards the ditch and made to stop by the occupants of a Ford roadster.

"That, after being stopped, one of the men in the Ford car, and whose face was partially concealed with a handkerchief or other means, drew a shotgun upon the said Ed Davis, and at the same time another occupant of the Ford car came to the scene carrying a pistol; that both Ed Davis and William Davis were stricken by the two men above referred to and were robbed, the said Ed Davis being robbed of approximately $391.00 and the said William Davis of $6.00.

"That in the perpetration of said robbery, Ed Davis received a blow on the head requiring sixteen stitches, and that the said William Davis received a blow at the back of his head which later caused his death. That Ed Davis identified the defendant Luther E. Osborne as being the man with the shotgun at the scene of said robbery and the person who actually took his pocketbooks containing his money from his pockets as he was lying on the ground after being stricken. That he further stated that the defendant Ralph Dills looked exactly like the man carrying the pistol and who accompanied and assisted the man he identified as Osborne in the said robbery and murder.

"The foregoing testimony was used by the State in the trial of the case against the defendants Luther E. Osborne and Ralph Dills, in which they were charged with the murder of William Davis on the night of 13 October, 1934, it being at the same time and place referred to in the testimony of the witness in this case, with other testimony of like character; which said evidence the defendants in this case introduced to sustain their plea of former jeopardy.

"That the bill of indictment upon which the defendants were tried for murder did not charge an assault or attempted robbery upon the person of Ed Davis, nor did it otherwise refer to him except that his name was listed as a State's witness. That said bill of indictment was a valid bill

of indictment, that the defendants were tried before a competent jury, duly impaneled and sworn to make true deliverance of the case in a court of competent jurisdiction, and the defendants were acquitted. That judgment was entered on the verdict of acquittal, which judgment still remains in full force and effect and has not been reversed or made void.

"We find the foregoing facts, and if on such facts the court is of the opinion that the defendants have heretofore been placed in jeopardy on the charge contained in the bill of indictment, then we, the jury, answer the issue submitted to us 'Yes'; and if the court be of the opinion that the defendants have not heretofore been placed in former jeopardy, then we answer the said issue 'No.' "

The following issue was submitted to the jury: "Have the defendants Ralph Dills and Luther E. Osborne heretofore been placed in jeopardy on the charge contained in the bill of indictment?"

Upon the return of the jury it pronounced that it had arrived at a verdict, and that upon the general plea of guilt or innocence, it found that the defendants were guilty as charged in the bill of indictment. Upon the plea of former jeopardy the jury returned as its answer the facts as set out in the special verdict.

Upon the facts being found by the jury as set out in the special verdict, the court gave as its opinion, and so held, that the defendants had not heretofore been placed in jeopardy on the charge contained in the bill of indictment, and thereupon, under the authority contained in the special verdict, answered the issue "No."

To the ruling of the court that the facts found by the jury as incorporated in the special verdict did not sustain the plea of former jeopardy, the defendants in apt time objected and excepted, the defendants contending as a matter of law that the issue should be answered "Yes" and the defendants found "Not guilty" and discharged, and this is the defendants' *second exception.*

Thereupon the court pronounced judgment upon the verdict sentencing each defendant to twenty (20) years in the State's Prison, to be worked under the supervision of the State Highway and Public Works Commission. To the judgment each defendant excepted, and this is defendants' *third exception.*

"STATE OF NORTH CAROLINA—GUILFORD COUNTY.

Superior Court, October Term, 1934.

"The jurors for the State upon their oath do present, That Ralph Dills, Luther E. Osborne, Paul Sams, Robert Smith, Reuben Varner, late of Guilford County, on 13 October, A.D. 1934, with force and arms, at and in the said county, feloniously, willfully, premeditatedly, and

deliberately, and of his malice aforethought, did kill and murder William Davis, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State.

H. L. KOONTZ, *Solicitor.*"

"STATE OF NORTH CAROLINA—GUILFORD COUNTY.
Superior Court, November Term, A.D. 1935.

"The jurors for the State upon their oath present, That Ralph Dills and Luther E. Osborne, late of the county of Guilford, on 13 October, in the year of our Lord one thousand nine hundred and thirty-four, with force and arms, at and in the county aforesaid, unlawfully, willfully, and feloniously having in possession or with the use or threatened use of certain firearms or other dangerous weapon, implement, or means, to wit: A shotgun, the life of Ed Davis was endangered or threatened, did unlawfully take or attempt to take the personal property, to wit: Good and lawful money of the value of $391.83, from Ed Davis or from the place of business, residence, or other place where the said Ed Davis was in attendance, against the form of the statute in such case made and provided against the peace and dignity of the State.

H. L. KOONTZ, *Solicitor.*"

The defendants made the following exceptions and assignments of error and appealed to the Supreme Court: "(1) To the ruling of the court that the question as to former jeopardy of the defendants should not be determined prior to, and in a separate inquiry, the determination of the question of general guilt or innocence of the defendants. (2) To the ruling of the court that the facts found by the jury as incorporated in the special verdict did not sustain a plea of former jeopardy, and answering the issue 'No.' (3) To the judgment of the court sentencing the defendants."

Attorney-General Seawell and Assistant Attorney-General McMullan for the State.
J. A. Myatt for defendant Ralph Dills.
Gold, McAnally & Gold for defendant Luther E. Osborne.

CLARKSON, J. The main contention of defendants is their plea of former jeopardy. The first bill of indictment upon which defendants were tried and acquitted was for the homicide of William Davis, on 13 October, 1934, and drawn in conformity with N. C. Code, 1935, sec. 4614. The second bill of indictment upon which defendants were tried and convicted was for the robbery with firearms from Ed Davis, and

drawn in conformity with N. C. Code, 1935 (Michie), sec. 4267 (a), which is as follows: "Any person or persons who, having in possession or with the use or threatened use of any firearms or other dangerous weapon, implement, or means, whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another or from any place of business, residence, or banking institution or any other place where there is a person or persons in attendance, at any time, either day or night, or who aids or abets any such person or persons in the commission of such crime, shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than five or not more than thirty years."

The two crimes are separate and distinct: (1) For the homicide of William Davis, (2) for robbery with firearms from Ed Davis, under the statute. There is no identity of offenses.

The defendants do not challenge the verdict of guilty under sec. 4267 (a), on which the defendants were convicted and sentenced, but rely for an acquittal on the ground of the plea of former jeopardy. The defendants further contend that the court below committed error in refusing to permit the defendants to have their plea of former jeopardy first determined and passed upon before requiring them to proceed with the trial of the action upon its merits. We do not think that the exceptions and assignments of error on either contention can be sustained.

In *S. v. Cale,* 150 N. C., 805 (807), we find: "According to the strict rules of criminal procedure, the pleas of 'not guilty' and 'former conviction' could not be entertained and determined before one and the same jury; and it is further recognized and established that, on a plea of former conviction, when material questions of fact are involved in the issue, as in the case of dispute as to the identity of the parties, the determination of such plea is for the jury. But, as shown in a learned opinion by the present *Chief Justice,* in *S. v. Ellsworth,* 131 N. C., 773, the plea of former conviction is not treated in many respects as one involving the substantial question of guilt or innocence of defendant, but as one approaching more nearly the determination of a civil issue, and by consent it may be entertained and determined at the same time with a plea of not guilty, and, when so agreed upon, may be heard and decided by the court. There was no error, therefore, in the method by which the case has been determined," citing authorities. *S. v. Ellis,* 200 N. C., 77 (80).

We see no prejudicial error in this record in determining the plea of former jeopardy under the plea of "Not guilty" before the same jury. The matter was one of procedure and, under our liberal practice, was in the sound discretion of the court below, and cannot be held as prejudicial error.

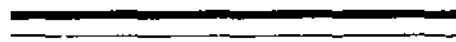
In Vol. 1 (12th Ed.), Wharton's Criminal Law, pp. 537-8, part of sec. 394, it is declared: "Same act may constitute two or more offenses which are distinct from each other. In such cases the accused may be separately prosecuted and punished for each, and a conviction or acquittal in a prosecution for the one will not constitute a bar to a trial for the other. Thus, where two or more are assaulted, robbed, or their goods stolen, or are shot or murdered by one and the same act and at the same time, conviction or acquittal on an indictment for offense against the one will be no bar to a trial on an indictment charging the offense against the other."

In Miller on Criminal Law (Handbook Series), p. 543, part sec. 187, it is said: "Where the same act constitutes distinct offenses, neither an acquittal nor a conviction for one offense will bar a subsequent prosecution for the other." *S. v. Nash,* 86 N. C., 650; *S. v. Gibson,* 170 N. C., 697 (700).

The defendants rely on *S. v. Bell,* 205 N. C., 225, and *S. v. Clemmons,* 207 N. C., 276, which we think distinguishable from the present action.

For the reasons given, we find in the judgment of the court below

No error.



MRS. FLORENCE TAYLOR v. MRS. BERTHA T. RIERSON, ADMINISTRATRIX OF W. P. RIERSON, AND ROBERT TAYLOR.

(Filed 20 May, 1936.)

1. Automobiles C f—

The mere fact of skidding is insufficient to establish negligence on the part of the driver of an automobile, but where the skidding is caused by the negligent operation of the car, the driver is liable for injuries resulting therefrom.

2. Trial D a—Discrepancies in testimony of witness will not warrant disregard of her testimony for plaintiff on motion to nonsuit.

Discrepancies in the testimony of a witness upon her examination in chief and upon cross-examination, and her testimony in a prior action, does not justify the disregard of her testimony favorable to plaintiff in passing upon defendant's motion to nonsuit, it being the province of the jury to determine at which time, if at all, her testimony was accurate.

3. Automobiles C f—Evidence held sufficient to show that skidding was caused by negligent operation of car.

The evidence favorable to plaintiff tended to show that defendant's intestate was driving his car at a speed of forty-five miles per hour along a wet street in heavy traffic in a thickly populated residential section of

a city when the car skidded fifty feet and careened to the left over the center of the street and hit another car going in the opposite direction, resulting in the injuries in suit. *Held:* The evidence was sufficient to be submitted to the jury on the question of whether the skidding of the car was caused by its negligent operation by defendant's intestate.

4. Negligence B b—Doctrine of last clear chance may arise only when plaintiff is guilty of contributory negligence.

The doctrine of last clear chance may arise only when plaintiff is guilty of contributory negligence, and one of defendants, sued as joint tort-feasor, may not resist recovery by plaintiff on the ground that the other defendant had the last clear chance to avoid the injury.

5. Automobiles C i—Held: Evidence failed to show intervening negligence, since driver's negligence was active and not passive.

Plaintiff's evidence tended to show that plaintiff was a gratuitous guest in a car driven by defendant's intestate, that intestate drove his car about forty-five miles per hour down a wet street in heavy traffic in a thickly populated residential district of a city, that the car skidded approximately fifty feet and careened to the left so that it was about seven feet over the center of the street when it collided with another car which was being driven by the other defendant in the opposite direction. Plaintiff's evidence also tended to show that the driver of the other car failed to keep a proper lookout, that he could have seen that intestate's car was out of control and could have avoided the collision by turning three feet further to his right, although he was to his right of the center of the street when the collision occurred. *Held:* Defendant administratrix' motions to nonsuit were properly denied, since there was no contention of contributory negligence on the part of plaintiff necessary to support the doctrine of last clear chance, and since the evidence discloses that intestate's negligence was active and not passive, rendering untenable the contention that defendant driver's negligence was the sole proximate cause of the injury.

6. Automobiles D b—

The "gross negligence" rule does not apply in this jurisdiction to actions by a gratuitous guest to recover from the driver for injuries sustained in a collision.

7. Automobiles C f—Evidence held sufficient to be submitted to jury on question of negligence in failing to keep proper lookout.

The evidence disclosed that the car in which plaintiff was riding as a guest skidded approximately fifty feet and careened to the left so that its left front wheel was about seven feet over the center of the street when it struck the car driven by defendant, that defendant was driving his car on the right side of the street at about twenty miles per hour, but that he could have seen that the car in which plaintiff was riding was out of control, and that he could have avoided the collision by turning three feet further to his right, there being about seventeen feet between his car and the right curb. *Held:* The evidence was sufficient to be submitted to the jury upon plaintiff's allegations that the driver of the car failed to keep a proper lookout, and was driving in a reckless manner in view of the conditions of the street and the surrounding circumstances.

8. Negligence D d—Instruction on question of proximate cause held sufficiently full in absence of request for special instructions.

Where, in an action by a guest against two defendants upon allegations that the collision causing her injuries resulted from the concurrent negligence of the drivers of the cars, the court correctly charges the law on the question of proximate cause, the objection of one defendant that the charge was not sufficiently full in view of his contention that the negligence of the other defendant was the sole proximate cause of the collision will not be sustained, it being required of defendant, if he wished more particular instructions, to have aptly tendered a request therefor. C. S., 565.

9. Appeal and Error F b—

An exception taken by one defendant to the charge of the court on an issue relating solely to the other defendant's liability and in no way affecting the interest of the excepting defendant, will not be considered.

10. Appeal and Error G c—

Assignments of error not discussed in appellant's brief are deemed abandoned. Rule of Practice in the Supreme Court, No. 28.

APPEAL by defendants from *Small, J.*, at July Special Term, 1935, of MECKLENBURG. No error.

This is a civil action to recover damages for personal injuries alleged to have been negligently inflicted.

The plaintiff alleged and offered evidence tending to prove that on 1 July, 1934, on West Trade Street, in the city of Charlotte, while she was riding as a guest in the automobile of the intestate of the defendant Rierson, the said intestate drove said automobile at an unlawful rate of speed and in a reckless and negligent manner on the left side of a street, causing it to skid and to collide with the automobile of the codefendant Taylor, resulting in serious and permanent injury to the plaintiff.

The plaintiff further alleged and offered evidence tending to prove that the defendant Taylor was operating his automobile on the occasion in question negligently, "with a disregard of the safety of this plaintiff, and without keeping a proper lookout for persons traveling upon said street," and thereby caused the collision wherein the plaintiff was injured.

The issues submitted to and answers made by the jury were as follows:

"1. Was the plaintiff injured by the negligence of W. P. Rierson, deceased, as alleged in the complaint? Answer: 'Yes.'

"2. Was the plaintiff injured by the negligence of the defendant Robert Taylor, as alleged in the complaint? Answer: 'Yes.'

"3. What amount of damages, if any, is the plaintiff entitled to recover? Answer: '$5,000.' "

From judgment based upon the verdict the defendants appealed, assigning errors.

Carswell & Ervin for plaintiff, appellee.

C. H. Gover, William T. Covington, Jr., and Hugh L. Lobdell for defendant Rierson, appellant.

J. Laurence Jones for defendant Taylor, appellant.

DEFENDANT RIERSON'S APPEAL.

SCHENCK, J. Assignments of Error Nos. 1, 2, and 3 are directed to the refusal of the court to allow motions for judgment as of nonsuit and for peremptory instruction for the defendant upon the first issue. To sustain these motions the appellant relies principally upon what is said in *Springs v. Doll,* 197 N. C., 240, where the following language from Huddy on Automobiles is quoted with approval: "The mere fact of the skidding of a car is not of itself such evidence of negligence as to render the owner liable for an injury in consequence thereof." In the same opinion it is stated: "In the case at bar it does not appear that there was any defect in the automobile, or that it was operated at an excessive rate of speed, or in any other negligent or careless manner. Therefore, the mere skidding of the automobile, causing it to run upon the embankment and turn over, is the sole basis of the claim of the plaintiff."

The result of the holdings in the cases that fall in the class of the *Springs case, supra,* is that the skidding of an automobile may occur without fault or negligence of the driver, and for that reason the mere skidding itself does not render the driver liable for an injury in consequence thereof, but if the skidding be caused by his negligence, then the driver is liable for resulting injuries.

In the case at bar the evidence tends to show that the collision of the two automobiles was caused by the skidding on the left of the center of the street of the automobile in which the plaintiff was riding as a guest, and that as a result thereof she was seriously injured. Therefore, we are called upon to decide if there was sufficient evidence to be submitted to the jury upon the question as to whether the skidding of the automobile driven by the defendant's intestate was proximately caused by his negligence.

The witness Pauline Berger, a passenger in the automobile that collided with the intestate's automobile, testified: "I saw the Rierson car before the collision. The Rierson car was running before the collision about forty-five miles an hour. I have an opinion satisfactory to myself as to how fast the car in which I was riding was running. My opinion is that the car was running about twenty or twenty-five miles an hour. The Rierson car was traveling down hill, and the car in which I was riding was going up hill, going east. The Rierson car was going in a westerly direction. The left side of the Rierson car hit the left front

of the Ford car. . . . In my opinion, the Rierson car at that time was traveling forty-five miles an hour. . . . I saw the Rierson car just a few minutes before the collision between our car and the Rierson car took place. I don't know how far our car moved between the time I saw the Rierson car and the time the collision took place."

Although the witness, Miss Berger, under cross-examination, was shown to have made statements on the trial of another cause, to which she was a party, not entirely in accord with the foregoing excerpt, and although her testimony on cross-examination was otherwise somewhat at variance with her testimony in chief, upon a motion to nonsuit, the court must consider the evidence in the light most favorable to the plaintiff, it being the function of the jury to determine at which time, if at all, her testimony was accurate.

When considered in the light of the fact that all of the evidence tended to show that the collision took place in a thickly populated residential section of the city of Charlotte, on a street heavy with traffic and wet from rain, we think the testimony of Miss Berger furnished sufficient evidence from which an inference could be reasonably drawn that the negligent, reckless driving, of the intestate proximately caused his automobile to skid, resulting in injury to his guest and in his own untimely death.

The appellant further argues, under her motion for judgment as of nonsuit, that even if the court should be of the opinion that there was evidence of negligence on the part of her intestate, that all of the evidence tends to show that the negligence of her codefendant, Robert Taylor, under the doctrine of "the last clear chance," was the sole proximate cause of the collision between the two automobiles, and, therefore, of the plaintiff's injuries. We apprehend that the doctrine of "the last clear chance" has no application here, since such doctrine presupposes negligence on the part of the plaintiff, that is, contributory negligence, and there was no issue of contributory negligence suggested in the trial of this cause. "The Supreme Court of the United States thus lays down the doctrine of contributory negligence as modified by that of the last clear chance: 'Although the defendant's negligence may have been the primary cause of the injury complained of, yet an action for such injury cannot be maintained if the proximate and immediate cause of the injury can be traced to the want of ordinary care and caution in the person injured, subject to this qualification, which has grown up in recent years: That the contributory negligence of the party injured will not defeat the action if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the injured party's negligence.' (*Grand Trunk R. R. Co. v. Ives,* 144 U. S., 408.) The doctrine really means, however, that

even though a person's own acts may have placed him in a position of peril, yet if another acts or omits to act with knowledge of the peril, and an injury results, the injured person is entitled to recover." 20 R. C. L., par. 114, p. 140. To like effect is *Redmon v. Southern Ry. Co.,* 195 N. C., 764, cited in appellant's brief, wherein it is said: "The last clear chance doctrine is the duty imposed by the humanity of the law upon a party to exercise ordinary care in avoiding injury to another who has negligently placed himself in a situation of danger. . . . The doctrine of last clear chance does not arise until it appears that the injured party has been guilty of contributory negligence." There is no evidence in the case at bar that the plaintiff's own acts or negligence placed her in a position of peril or danger, but, to the contrary, the evidence tends to show that if she were so placed, she was so placed by the negligence of the intestate, the driver of the automobile in which she was riding, which negligence is not imputed to her, a passenger.

The appellant also argues that the principle enunciated in *Baker v. R. R. Co.,* 205 N. C., 329, and *Haney v. Lincolnton,* 207 N. C., 282, is applicable to this case, that is, that if her intestate were guilty of any negligence, such negligence was inactive and was insulated as the proximate cause of the collision by the intervening negligence of her codefendant Taylor, the driver of the other automobile involved in the collision. We cannot agree that an automobile running down hill at the rate of forty-five miles per hour on the left-hand side of a wet street, in heavy traffic, in a thickly populated residential section of the city, can be said to be "inactive."

Assignments of Error Nos. 5, 6, and 7 are directed to the court's refusal to grant judgment as of nonsuit for the reason that there is no evidence that the defendant's intestate was guilty of willful and wanton negligence. The appellant frankly states in her brief that she is suggesting that this Court adopt for those riding in automobiles as gratuitous guests the "gross negligence rule" of certain other jurisdictions and overrule *Norfleet v. Hall,* 204 N. C., 573. The Court finds itself unwilling to act upon this suggestion.

Assignments of Error Nos. 4, 8, 9, 10, 11, and 12 are not set out in appellant's brief, and are therefore taken as abandoned by her. Rule 28, Rules of Practice in the Supreme Court, 200 N. C., 811 (831).

On defendant Rierson's appeal we find no error.

DEFENDANT TAYLOR'S APPEAL.

Assignments of Error Nos. 1, 2, and 3 are directed to the refusal of the court to allow motions for judgment as of nonsuit and for peremptory instruction for the defendant on the second issue.

The plaintiff's evidence (it will not be necessary to consider the defendant Rierson's evidence and the defendant Taylor introduced no evidence), viewed in the light most favorable to her, as it must be on a motion for judgment as of nonsuit, tends to show that the appellant Taylor was driving a Ford car in an easterly direction on the south side of West Trade Street in the city of Charlotte, and met a Graham-Paige car driven on the north side of said street in a westerly direction by the intestate Rierson, that the Rierson automobile departed from the line of traffic on the north side of the street and skidded for fifty feet down the street, passing seven feet to the south of the center thereof; that the street was straight, and the view of the appellant was unobstructed, and that the fact that the Rierson automobile was out of the control of the driver thereof was apparent; and withal, the appellant, having driven his automobile toward the center of the street to pass a truck parked at the south curb, continued to drive straight ahead into the skidding Rierson car, when he had 17 feet between him and the south curb in which to turn and avoid the collision—that by turning only three feet south (to his right) the appellant could have avoided the collision.

The witness, W. A. McCorkle, testified: "I saw this (Rierson) car in this helpless position move a whole distance of fifty feet, and I saw the Taylor car when it was something like fifty feet from the point where the collision took place. I don't remember seeing a thing between the Taylor car and the Rierson car. In my opinion, there was nothing to obstruct Taylor's view, nothing that I saw at the time or remember seeing could obstruct Taylor's view. During the time I observed this situation I observed nothing which could obstruct Taylor's view during a distance of at least one hundred feet before the collision took place. The Rierson car went on down the street, angling across and skidding. Taylor—when I took my eyes off the car—was going at the same rate of speed as he was when I first saw the car. He did not slow down at any time that I observed him. The collision took place very near the south rail of the south car track. At the time of the collision, the Rierson car was a distance of about three feet over the south rail. That left seventeen feet to the south curb, and if Taylor had turned three feet to the right, he would have missed the Rierson car. If Taylor had of turned his car and had been able to have brought the whole car three feet over he would have missed the Rierson car. When I saw him fifty feet back from the point where the collision occurred, he was going twenty to twenty-five miles an hour."

The witness Pauline Berger testified: "I say that the Taylor car passed the truck too fast and that Mr. Taylor, who was driving the car I was riding in, was not keeping a proper lookout, and I said that I didn't know where he was looking."

The testimony of the witnesses McCorkle and Berger was sufficient evidence to carry the case to the jury upon the allegations in the complaint that: "The defendant Robert Taylor negligently operated his automobile on the occasion in question in a careless manner without considering the conditions of the street and the surrounding circumstances, and with a disregard of the safety of this plaintiff, and without keeping a proper lookout for persons traveling upon said street."

Assignment of Error No. 4 is directed to the definition of proximate cause given in the charge as follows: "Proximate cause, gentlemen of the jury, as defined by Webster and others, is 'a cause which directly or with no intermediate agency, produces in effect a specific result. The proximate cause of a given result is that particular cause without which the result would not have happened.' The court's own definition, gentlemen of the jury, of proximate cause is the real cause, the efficient cause, the cause that actually produces the result or injury."

The appellant in his brief says that while "the definition of proximate cause given by the court might be passed over in some cases," since the appellant "in his answer set up the defense that the sole proximate cause of the plaintiff's injury was the negligence of the codefendant, the court . . . should have at least approached the definition set out in *Harton v. Telephone Co.,* 141 N. C., 455." In the light of the whole charge we think the definition given was sufficient. If the appellant desired instructions in the language of the *Harton case, supra,* or any more specific instructions, he should have requested them in the manner prescribed by C. S., 565.

Assignment of Error No. 6 is directed to that portion of the charge as follows: "If you find by the greater weight of the evidence that the collision between the Rierson, Graham-Paige, car and the Robert Taylor car was purely accidental and unavoidable, so far as the said W. P. Rierson was concerned, and occurred without fault or negligence on Rierson's part, you should answer the first issue 'No.'" This seems to be a correct statement of the law, but however this may be, it relates solely to the first issue and could in no way affect the interest of the appellant Taylor, whose contentions were presented under the second and third issues.

Assignments of Error 5, 7, 8, 9, 10, and 11 are not mentioned in appellant's brief, and are therefore deemed to be abandoned. Rule 28 of this Court, *supra.*

On the defendant Taylor's appeal, we find

No error.

MRS. KATHERINE E. H. SCHNIBBEN, EXECUTRIX OF CHARLES SCHNIBBEN, AND CITY OF WILMINGTON, v. BALLARD & BALLARD COMPANY, INC., AND CLARENCE GRADY.

(Filed 20 May, 1936.)

Pleadings D d—By filing answer, defendant waives right to demur except *for want of jurisdiction or failure of complaint to state cause.*

By filing answer to the complaint, defendants waive the right to demur thereto except for want of jurisdiction of the court over the person of defendant or for failure of the complaint to state a cause of action, and such waiver applies to an amended complaint when the amended complaint is substantially the same as the original complaint to which answer was filed. C. S., 511.

APPEAL by the defendants from *Williams, J.*, at October Term, 1935, of NEW HANOVER. Affirmed.

This was a civil action to recover damages for the alleged wrongful death of Charles Schnibben, instituted by his executrix, and joined in by his former employer, self-liability insurance carrier, against which claim under the Workmen's Compensation Act had been filed by his dependent widow. Complaint was filed by the plaintiffs. Answer was filed by the defendants. Complaint was amended by leave of the court so as to allege that since the institution of this action an award had been made by the Industrial Commission against the city, as employer, in favor of the widow of the deceased employee. Demurrer was filed to the complaint as amended. Demurrer was overruled. Defendants excepted and appealed to the Supreme Court.

Burney & McClelland and I. C. Wright for plaintiffs, appellees.
Bryan & Campbell for defendants, appellants.

PER CURIAM. The defendants filed answer to the complaint. By so doing they waived any right to demur to the complaint except upon the first and last grounds stated in C. S., 511, namely, that "the court has no jurisdiction of the person of the defendant or of the subject of the action," and "the complaint does not state facts sufficient to constitute a cause of action." *Ransom v. McClees,* 64 N. C., 17; *Finch v. Baskerville,* 85 N. C., 205; *Goldsboro v. Supply Co.,* 200 N. C., 405, and cases there cited; McIntosh's N. C. Prac. and Proc., pp. 457, 458. The rather elaborate demurrer filed is not based upon either of these grounds, and could not have been sustained had it been so based. True, the demurrer filed was to the amended complaint, but, in the language of the appel-

lant's brief, page 3, "the amended complaint is substantially the same as the original complaint." Certainly, the amendment adds nothing to the original complaint and takes nothing from it which nullifies the waiver of the right to demur caused by the filing of an answer.

Affirmed.

STATE OF NORTH CAROLINA, ON RELATION OF MARY MARTIN, WILLIE GIBSON, NANNIE GIBSON, ELIZABETH GIBSON, AND LEE GIBSON, v. H. R. McPHERSON, ADMINISTRATOR OF MITCHELL MARTIN, AND HARRY N. LEVEY, ANCILLARY RECEIVER FOR THE NATIONAL SURETY COMPANY.

(Filed 20 May, 1936.)

Executors and Administrators K c—

An executor and the surety on his bond may not be held liable for loss to the estate by reason of the failure of the bank in which the administrator had deposited funds of the estate in the absence of evidence that the administrator had actual or constructive knowledge that the bank was in an unsound condition.

APPEAL by the plaintiffs from *Sink, J.*, at October Term, 1935, of STOKES. Affirmed.

The plaintiffs are the mother and the children of a deceased sister of Mitchell Martin, deceased. The defendants are the administrator of Mitchell Martin, deceased, and the surety on his bond.

Mitchell Martin died when a soldier in the American Expeditionary Forces. The defendant McPherson qualified as administrator of Mitchell Martin on 27 January, 1930, and in the early part of June, 1930, collected from the United States Government the sum of $6,708.84, being a portion of the proceeds derived from a war risk insurance policy on the life of his intestate, and deposited said amount in his name as administrator in the Bank of Stokes County, at Walnut Cove, on 12 June, 1930. The Bank of Stokes County was closed by the Commissioner of Banks on 18 November, 1930, and is now in the course of liquidation. The Bank of Stokes County was insolvent on 18 November, 1930.

This action was commenced on 25 September, 1934, to recover of the administrator and the surety on his bond the amount of the loss which the plaintiffs, as next of kin and distributees of the estate of Mitchell Martin, have suffered on account of the failure of the said administrator to pay over to them the amount collected by him. It is alleged in the complaint that the loss was caused by the negligence of the defendant administrator in placing the money on deposit in the Bank of Stokes County and allowing it to remain there until the bank was closed.

The evidence tended to show that the money was on deposit therein for the four months and five days next preceding the closing of the Bank of Stokes County; that the administrator was cashier of the Farmer's Union Bank and Trust Company of Stokes County at the time of its merger with the Bank of Stokes County on 7 March, 1926, but had had no connection, other than that of a depositor, with the consolidated bank since that date; that the administrator married the sister of the wife of the cashier of the Bank of Stokes County; that there were some rumors in Walnut Cove, where the administrator lived, during June and July, 1930, that the Bank of Stokes County was in "bad shape," and some of the stockholders and depositors had said that they did not get any dividends and could not collect their deposits, but there was no evidence that the defendant administrator had any knowledge of such rumors, or heard such statements, or that the bank was insolvent at the time.

At the close of the evidence of the plaintiff, the defendants moved for judgment as of nonsuit, upon the ground that there was no evidence tending to show that the loss which the plaintiffs had suffered by reason of the deposit by the administrator of the funds of the estate of his intestate in the Bank of Stokes County was caused by his negligence. The motion was allowed, and the plaintiffs duly excepted.

From judgment dismissing the action, the plaintiffs appealed to the Supreme Court.

E. E. Risner and E. M. Whitman for plaintiffs, appellants.
S. Gilmer Sparger and Kenneth M. Brim for defendants, appellees.

PER CURIAM. There is no evidence tending to show that the defendant administrator was negligent in depositing and allowing to remain in the Bank of Stokes County funds belonging to the estate of his intestate. Prior to and during the time such funds were in the bank the administrator had no notice that the bank was unsound, or would probably be forced to close its doors because of insolvency. Rumors that the bank was in "bad shape," which he did not hear, and the fact that he was a brother-in-law of the cashier of the bank, considered with all the other attendant circumstances disclosed by the evidence, were not sufficient to put the administrator on notice that the bank was in an unsound condition prior to its closing, if such was the fact. Upon the authority of *Stroud v. Stroud,* 206 N. C., 668, this case is

Affirmed.

CITY OF LEXINGTON v. H. I. LOPP, MRS. ANNIE E. LOPP, AND MRS. E. J. ZIMMERMAN, MORTGAGEE, AND ROBY LOFTIN, MORTGAGEE.

(Filed 20 May, 1936.)

Municipal Corporations G c: Constitutional Law I b—

Street assessments made under charter provisions failing to provide notice and an opportunity to be heard to those assessed are void as violating due process of law, and may not be validated by curative acts of the Legislature. Art. XIV, sec. 1, of the Federal Constitution, Art. I, sec. 17, of the State Constitution.

APPEAL from *Hill, Special Judge,* at September Term, 1935, of DAVIDSON. Affirmed.

This is an action brought by plaintiff against the defendants H. I. Lopp and Mrs. Annie E. Lopp (certain mortgagees made parties) to recover $104.26 for the construction of a curb and gutter along East 6th Avenue and Salisbury Street, in the city of Lexington, N. C., by plaintiff.

The plaintiff alleges that the work was done and assessment was made by it, and prayed for judgment for the amount to be declared a lien on the Lopps' land, and same to be sold to pay the assessment.

The Lopps answer, in part: "That said improvements were not made at the request of a majority of the abutting property owners, and that the assessments attempted to be made and levied on said property for said improvements were not legally and properly made and are not valid or binding on these defendants."

The amended complaint sets up a certain curative act of 1933, and the amended answer alleges that plaintiff had not complied with the terms of the act and brought the suit in the time limit fixed in the act. The plaintiff made reply that the Act of 1933 was repealed by an act passed in 1935, validating suits not brought in time under the Act of 1933.

The court below rendered judgment against plaintiff, and it excepted, assigned error, and appealed to the Supreme Court.

P. V. Critcher and D. L. Pickard for plaintiff.
McCrary & DeLapp for defendants.

PER CURIAM. In the judgment of the court below is the following: "That the provisions of the charter of said municipality (Private Laws 1907, ch. 14, sec. 23) with reference to street improvements and assessments therefor, and the alleged assessments attempted to be made against the property of the defendants, were and are null and void, for that same not only violated the purpose and intent of the general statutes of North Carolina with reference to street assessments by a municipality, but were

and are in contravention of the Constitution, and lacked the essential element of 'due process of law' by failing to afford the landowner an opportunity to be heard concerning the legality, justice, and accuracy of the proposed assessment before same was finally made. That the aforesaid alleged curative statutes, relied upon by the plaintiff, are unconstitutional, null, and void in so far as same attempt to dispense with notice to the landowner, and opportunity to be heard, before final assessment."

The private statute on the subject made no sufficient provision as to notice and an opportunity to be heard. The purported curative statutes could not give life to a null and void assessment.

In *Lumber Co. v. Smith,* 146 N. C., 199 (204), we find: "Provision for notice is, therefore, part of the 'due process of law,' which it has been customary to provide for these summary proceedings; and it is not to be lightly assumed that constitutional provisions, carefully framed for the protection of property rights, were intended or could be construed to sanction legislation under which officers might secretly assess the citizen for any amount in their discretion without giving him an opportunity to contest the justice of the assessment," citing Cooley Taxation. *Markham v. Carver,* 188 N. C., 615; Const. of U. S., Art. XIV, sec. 1; Const. of N. C., Art. I, sec. 17.

From a careful examination of the record, we think the judgment of the court below correct.

The judgment of the court below is

Affirmed.

CITY OF WILMINGTON v. BOARD OF EDUCATION OF NEW HANOVER COUNTY.

(Filed 20 May, 1936.)

1. Appeal and Error J a—

An order making additional parties upon a proper amendment of the complaint is within the discretionary power of the trial court and is not reviewable.

2. Pleadings E c—

The trial court has discretionary power to allow plaintiff to amend his complaint when the amendment does not alter the cause alleged so as to render it a new or different cause of action. C. S., 547.

3. Pleadings D e—

Defendant's contention that the complaint, even upon the joinder of an additional party and the allowance of an amendment, would fail to state a cause of action against it, may not be presented by exception to the order allowing the amendment, the defendant's procedure being by demurrer to the complaint as amended.

APPEAL from *Parker, J.*, at March Term, 1936, of NEW HANOVER. Appeal dismissed.

This was a civil action, brought by the city of Wilmington to recover from the board of education of New Hanover County the sum of $1,199.43 for improvements made on its streets and sidewalks abutting on the property of the defendant used for a high school, to have said amount declared a lien on the said property, and to foreclose said lien by a sale to pay said debt.

The case came on for hearing and the defendant moved, on the pleadings, for judgment dismissing the action. Whereupon, the court, upon motion of the plaintiff, entered an order denying the motion of the defendant, and allowing the plaintiff to make the board of commissioners of New Hanover County a party defendant, and to amend its complaint so as to seek to determine the amount due by the board of education on the assessments made upon its property, and to pray that a writ of *mandamus* issue to collect the amount so ascertained.

To the foregoing order the defendant excepted, and appealed to the Supreme Court.

Wm. B. Campbell and George L. Peschau for plaintiff, appellee.
C. D. Hogue for defendant, appellant.

PER CURIAM. It very rarely happens that the making of additional parties proves prejudicial, and hence orders making such parties are discretionary with the trial court, and are not reviewable upon appeal. *Tillery v. Candler,* 118 N. C., 888; *Bernard v. Shemwell,* 139 N. C., 446; *Maggett v. Roberts,* 108 N. C., 174. By proper amendment new parties may be brought into a pending action. *Dobson v. Southern Ry. Co.,* 129 N. C., 289.

A judge of the Superior Court has within his sound discretion the statutory authority to permit the plaintiff to amend his complaint when thereby the ground for the alleged cause is not so substantially changed as to become a new or different cause of action. *Goins v. Sargent,* 196 N. C., 478; C. S., 547.

The appellant takes the position in its brief that should the additional party be made, and should the complaint be amended as allowed by his Honor's order, no cause of action would then be alleged against it. However this may be, the proper way in which to present that question is by demurrer to the complaint when amended, and not by exception to the order allowing such amendment.

The appeal is premature, and therefore is dismissed.

Appeal dismissed.

AGNES BROWN, ADMINISTRATRIX OF THE ESTATE OF A. O. BROWN, DECEASED, v. M. P. LIPE AND PAUL WHITENER.

(Filed 20 May, 1936.)

1. Death B b—

In an action for wrongful death it is error to allow the jury to consider the annuity tables set out in C. S., 1791, upon the question of damages.

2. Courts A c—

Where error has been committed in the county court in instructing the jury on the issue of damages, the Superior Court, on appeal, has the discretionary power to order a new trial of the case instead of restricting the new trial to the issue of damages.

APPEAL by plaintiff from *Rousseau, J.*, at February Term, 1936, of GUILFORD. Affirmed.

This was an action for wrongful death alleged to have been caused by the negligence of defendants in the operation of a motor vehicle.

The action was instituted in the municipal court of the city of High Point, and tried there upon the usual issues of negligence, contributory negligence, and damages. From judgment on the verdict on each issue in favor of the plaintiff, defendants appealed to the Superior Court of Guilford County, assigning errors. Upon the hearing on the appeal in the Superior Court, the defendants' assignments of error as to portions of the charge on the issue of damages were sustained, and the case remanded to the municipal court of High Point for a new trial.

From the judgment of the Superior Court awarding a new trial, plaintiff appealed to this Court.

Gold, McAnally & Gold for plaintiff.
James E. Gay, Jr., and Sapp & Sapp for defendants.

PER CURIAM. The charge of the judge of the municipal court as to the measure of damages in a case of wrongful death was erroneous under the rule laid down in *Poe v. R. R.*, 141 N. C., 525, wherein *Walker, J.*, clearly drew the distinction between income and annuity, and it was held for error to permit the jury to consider the annuity tables set out in C. S., 1791, as was done in the instant case. *Ward v. R. R.*, 161 N. C., 179; *Comer v. Winston-Salem*, 178 N. C., 383.

The plaintiff, however, contends that even if the charge of the trial court on the issue of damages was properly held to be erroneous, the new trial should have been restricted to that issue. While this course is frequently pursued by appellate courts, when the error is confined to

one issue, it has been repeatedly held and now firmly established with us that it is a matter of discretion. *Lumber Co. v. Branch,* 158 N. C., 251; *Huffman v. Ingold,* 181 N. C., 426; *Whedbee v. Ruffin,* 191 N. C., 257.

The judgment of the court below remanding the case to the municipal court of the city of High Point for a new trial is

Affirmed.

MARY LILLY EDWARDS WILLIAMS, BY HER NEXT FRIEND, E. D. WILLIAMS, v. MARY IDA STRAUSS.

(Filed 20 May, 1936.)

Landlord and Tenant B c: Negligence A c—In absence of agreement, landlord is not under duty to keep premises in repair.

In the absence of evidence that a landlord retained control of or agreed to keep in repair a balcony between two apartments owned by her and constructed for the use of both apartments, the landlord is not liable for injuries resulting to a member of the household of a tenant of one of the apartments, caused by disrepair of the balcony.

APPEAL by plaintiff from *Williams, J.,* at October Term, 1935, of NEW HANOVER. Affirmed.

This is an action to recover damages for personal injuries suffered by the plaintiff, a child five years of age, when she fell down a stairway extending from a balcony or platform in the rear of an apartment, in which she was living as a member of the family of her aunt, Mrs. Rosa Guthrie, to the ground.

The apartment is located on the second floor of a building owned by the defendant and at the time the plaintiff was injured, was occupied by her aunt as a tenant of the defendant. Plaintiff's fall down the stairway and her resulting injuries were caused by a defect in the floor of the balcony or platform, near the head of the stairway.

There are two apartments on the second floor of defendant's building. At the time the plaintiff was injured one was occupied by her aunt; the other was vacant. The balcony or platform at the rear of the building was constructed for use by tenants who should occupy both apartments.

There was no evidence at the trial of the action tending to show that the defendant, when she rented one of the apartments to plaintiff's aunt, retained control of the balcony or platform, or agreed to keep the same in good repair. Evidence offered by the plaintiff showed that defendant had declined to repair the floor of the balcony or platform when requested to do so by plaintiff's aunt.

At the close of the evidence for the plaintiff, defendant moved for judgment dismissing the action as of nonsuit. The motion was allowed and plaintiff excepted.

From judgment dismissing the action the plaintiff appealed to the Supreme Court, assigning as error the judgment.

Cleves M. Symmes for plaintiff.
Stevens & Burgwyn for defendant.

PER CURIAM. The judgment in this action is in accord with the law in this State as declared and applied by this Court in *Mortgage Co. v. Massie,* 209 N. C., 146; *Salter v. Gordon,* 200 N. C., 381, 157 S. E., 11; *Tucker v. Yarn Mill,* 194 N. C., 756, 140 S. E., 744; and *Fields v. Ogburn,* 178 N. C., 407, 100 S. E., 583. In the last cited case it is said: "In the absence of express stipulation on the subject, there is usually no obligation or assurance on the part of the landlord to his tenant that the premises will be kept in repair, or that the same are fit or suitable for the purposes for which they are rented."

No facts are shown by the evidence in the instant case which bring this case within any recognized exception to the general rule as to the liability of a landlord to a tenant for damages resulting from defects in the premises. The general rule is that the landlord is not liable for such damages. The judgment is

Affirmed.

JOHN M. STALLINGS, ADMINISTRATOR OF JOHN C. STALLINGS, v. BUCHAN TRANSPORT COMPANY.

and

O. D. STALLINGS, ADMINISTRATOR OF ARMED W. STALLINGS, v. BUCHAN TRANSPORT COMPANY.

(Filed 20 May, 1936.)

Automobiles C e—Stopping on highway for fraction of minute because of wrecked cars ahead on highway held not parking in violation of statute.

The evidence disclosed that the driver of a truck with a trailer stopped on the highway at night on the right-hand side, with lights burning, because two automobiles in front of him were interlocked in a wreck, that plaintiff, driving his car in the same direction, became blinded by lights of a car approaching from the opposite direction, drove about a hundred feet while so blinded, and did not see the parked truck until close upon it, when he turned to the left to pass it, saw another car coming toward

him so he could not pass, and turned back to the right and hit the back of the parked truck and trailer, that at the time of the collision the truck and trailer had been standing still only a fraction of a minute, and that it remained parked for about five minutes thereafter. *Held:* At the time of the collision the truck was not parked on the highway within the meaning of C. S., 2621 (66), and the length of time it remained still after the collision is immaterial to plaintiff's right to recover, and defendant's motion to nonsuit was properly granted.

APPEAL by the plaintiffs from *Parker, J.*, at November Term, 1935, of FRANKLIN. Affirmed.

W. L. Lumpkin and Thos. W. Ruffin for plaintiffs, appellants.
Douglass & Douglass for defendant, appellee.

PER CURIAM. The two cases were consolidated for the purpose of trial.

The picture presented by the record, when the evidence is interpreted most favorably to the plaintiffs, is that on the night of 24 November, 1934, about 8 o'clock, the driver of a truck and trailer of the defendant came upon two cars which had become interlocked in a collision on the highway. The driver stopped the truck on the right-hand side of the highway, within 25 or 30 feet of the two interlocked cars, which were surrounded by several people who were endeavoring to extricate them and clear the highway. Immediately upon stopping, or within a small fraction of a minute thereafter, a Chevrolet car driven by the intestate John C. Stallings and in which the intestate Armed W. Stallings was riding as a guest, ran into the rear of the defendant's trailer, causing the death of both intestates. The road for about 300 feet back of the trailer was practically straight and level. The driver of the Chevrolet was driving about 25 or 30 miles per hour and became blinded by the unusually bright lights of a Ford car coming from the opposite direction, and after being blinded continued to drive on at least 100 feet, to within 15 or 20 feet of the rear of the defendant's trailer, and then, upon first seeing the trailer, attempted to drive to the left around it, but was prevented from so doing by another car approaching from the opposite direction, and turned back to the right and ran into the rear of the trailer, which was properly lighted.

Upon the close of the evidence his Honor entered judgment as of nonsuit in each case, and in this action we see no error.

We do not agree with the appellants that there was sufficient evidence to carry the case to the jury upon the theory that the driver of the truck violated the provisions of C. S., 2621 (66), governing parking on the highway. As was said by this Court, "This word (park) is in general use, with reference to motor-driven vehicles, and means the permitting of

such vehicles to remain standing on a public highway or street, while not in use." *S. v. Carter,* 205 N. C., 761. ". . . . To 'park' means something more than a mere temporary or momentary stoppage on the road for a necessary purpose." 42 C. J., 613. The fact that the trailer, according to some of the evidence, remained still for four or five minutes after it had been struck by the Chevrolet does not alter the legal result. We do not apprehend that it was the intention of those who drafted the statute to make it a violation of law for a driver of a heavy truck and trailer to stop on his right-hand side of the highway before driving around or by two cars interlocked in a collision on the highway, and around which a number of people were working.

While this was indeed an unfortunate tragedy, resulting as it did in the death of two young men of high character and great promise, we concur in the conclusion of his Honor that the record fails to disclose that it was proximately caused by the negligence of the defendant.

Affirmed.

ROSE M. HEAD v. PRUDENTIAL INSURANCE COMPANY.

(Filed 20 May, 1936.)

Compromise and Settlement B b—Compromise agreement held to preclude recovery by plaintiff under facts of this case.

After the absence of insured for over seven years without being heard from, the beneficiary, who had kept the policy in force by paying premiums, agreed with insurer to accept the cash surrender value of the policy with the privilege of reopening the case in the event the beneficiary could ever prove insured died prior to the lapsing of the contract. *Held:* The compromise agreement precludes the beneficiary from reopening the case except upon proof of actual rather than presumptive death.

APPEAL by plaintiff from *Pless, J.,* at November Term, 1935, of GUILFORD.

Civil action to recover on $4,000 policy of insurance issued by defendant 30 December, 1910, on life of Frank M. Head, and made payable to plaintiff as beneficiary.

In 1915 the insured disappeared. The plaintiff paid the premiums until 30 December, 1923, when the policy lapsed, provided the insured was then living. Plaintiff insisted the insured was presumably dead and demanded payment of the policy. Defendant denied death of insured, but agreed to pay, in compromise settlement, the cash surrender value of the policy, $1,341.35, with privilege to plaintiff "of reopening the case in the event you can ever prove death occurred prior to the lapsing of the contract." This offer was accepted 30 April, 1925.

In 1934, the plaintiff attempted to reopen the matter and instituted this action, but offered only the presumptive evidence of death, which existed at the time of the compromise settlement.

From directed verdict and judgment for defendant, accordant with terms of compromise settlement, the plaintiff appeals, assigning errors.

C. C. Barnhardt and Frazier & Frazier for plaintiff.
Brown & Trotter and Smith, Wharton & Hudgins for defendant.

PER CURIAM. The trial court correctly interpreted the privilege, accorded plaintiff in the compromise settlement, to mean that the matter could be reopened upon actual, rather than presumptive, proof of death prior to 30 December, 1923. *Lewis v. Lewis,* 185 N. C., 5, 115 S. E., 885. Plaintiff's interpretation of the agreement would render the settlement meaningless.

No error.

L. L. KING, ADMINISTRATOR OF THE ESTATE OF JOE KING, DECEASED, v. MANETTA MILLS COMPANY AND JOHN M. CARROLL.

(Filed 20 May, 1936.)

Electricity A d—Evidence held to disclose contributory negligence in grasping wire thrown over uninsulated transmission wire.

Plaintiff's evidence disclosed that, while he and his intestate were attempting to erect a radio aerial, intestate caught hold of a wire which plaintiff had thrown across defendant's transmission wire, resulting in the death of intestate by electrocution, that the insulation on defendant's transmission wire, which was fifteen to eighteen feet above the ground, had become worn, that the insulation could be seen hanging from the wire, leaving the uninsulated wire plainly visible, and that intestate was an intelligent man and had lived in the vicinity a number of years. *Held:* The evidence discloses contributory negligence barring recovery as a matter of law.

APPEAL by plaintiff from *McElroy, J.,* at October Term, 1935, of UNION. Affirmed.

Action for wrongful death, alleged to have been caused by the negligence of the defendants in failing to properly safeguard electric power wires maintained by them along a road or street in the village where defendants' employees resided.

Plaintiff alleged and offered evidence tending to show that defendants owned and used lines of wires for the transmission of electric power for the operation of the mill machinery and for the lighting of the houses of their employees; that there were wires strung on poles along the road or street of the mill village where plaintiff and his intestate lived; that the

insulation on the power wires had worn off; that in places the insulating material hung down, exposing the bare power wire to view; that on the occasion alleged plaintiff and his intestate (brothers) were attempting to string a wire to be used as a radio aerial from an elevated water tank to the house where plaintiff and his intestate lived; that after attaching one end of the aerial to the tank fifty feet high, they carried the radio wire to the road or street, and plaintiff threw the coiled wire over and across the electric power line, and that when the intestate picked up the loose end of the aerial in his yard he received an electric shock from which he died. It was also in evidence that plaintiff's intestate was an intelligent man, twenty-nine years of age, and had resided there and worked in the mill some five or six years.

Defendants denied all allegations of negligence and pleaded the contributory negligence of plaintiff's intestate as a bar to plaintiff's recovery.

At the conclusion of plaintiff's evidence, motion for judgment of nonsuit was allowed, and plaintiff appealed.

A. A. Tarlton and A. M. Stack for plaintiff.
Sikes & Richardson and Vann & Milliken for defendants.

PER CURIAM. The duty devolving upon those who undertake to operate and maintain electric power lines is succinctly stated in *Helms v. Power Co.*, 192 N. C., 784, and cases cited, and in *Mitchell v. Electric Co.*, 129 N. C., 166, and *Ellis v. Power Co.*, 193 N. C., 357.

Whether the failure to maintain the proper insulation of electric power wires fifteen to eighteen feet from the ground would constitute actionable negligence and impose liability in damages to one who placed another wire across the power wire and was injured, and whether such result was foreseeable in the exercise of due care under the circumstances (*Hudson v. R. R.*, 176 N. C., 488), need not be here decided, as it is apparent that the condition of the insulation on the power wire and the use of the wire for the transmission of electric power were well known to plaintiff's intestate, who had lived and worked there five or six years and was an intelligent man. Under these circumstances, to attempt to pull a radio wire across and upon a live electric power wire, from which, at places, it was plainly observable that the insulation had worn or fallen, leaving the bare wire visible, would sufficiently indicate failure on the part of the plaintiff's intestate to exercise ordinary care and precaution for his own safety.

Upon this view of the case, we think the judgment of nonsuit was properly entered.

Affirmed.

STATE v. ODELL OAKLEY.

(Filed 15 June, 1936.)

1. **Burglary C d—Evidence held sufficient for jury on issue of defendant's guilt of burglary in the first degree.**

Evidence that the house of the prosecuting witness was broken into by twisting the knob off the locked door and forcing the door open, that the time was late at night, and that the prosecuting witness and his wife were asleep in the room entered, together with evidence that tracks in the freshly fallen snow were followed and led to defendant's room in another house in a distant part of the city, where defendant was apprehended, *is held* sufficient to be submitted to the jury on the question of defendant's guilt of burglary in the first degree. N. C. Code, 4232.

2. **Criminal Law I c—New trial is awarded in this case for inadvertent expression of opinion by trial court upon the evidence.**

In order to establish the identity of defendant as the perpetrator of the crime in this prosecution for burglary in the first degree, the State relied upon testimony that tracks at the scene of the crime were followed in the newly fallen snow to the room of defendant, where he was apprehended. The officer who followed the tracks did not measure them or compare them with defendant's shoes. While the officer was testifying regarding the tracks, the court asked the witness: "You tracked the defendant to whose house?" *Held:* Defendant is entitled to a new trial for the inadvertent expression of opinion by the court that the State had proven the tracks to be those of defendant, and the fact that the court immediately thereafter stated he did not mean to say "defendant," and asked the witness to whose house he followed "a set of tracks," does not cure the error, since the statement might have made a lasting impression on the jury to defendant's prejudice, and since the State's evidence was circumstantial and defendant was on trial for his life. The power of the court to withdraw incompetent evidence and instruct the jury not to consider it, distinguished. C. S., 564.

SCHENCK, J., concurs in result.

APPEAL from *Clement, J.*, and a jury, at January Term, 1936, of ROCKINGHAM. New trial.

The defendant was tried on the following bill of indictment:

"STATE OF NORTH CAROLINA—ROCKINGHAM COUNTY.
SUPERIOR COURT, JANUARY TERM, 1936.

"The jurors for the State upon their oath present, That Odell Oakley, late of the county of Rockingham, on 29 December, 1935, about the hour of 12 in the night of the same day, with force and arms, at and in the county aforesaid, the dwelling house of one B. F. Sprinkle, there situate, and then and there actually occupied by one B. F. Sprinkle,

feloniously and burglariously did break and enter, with intent, the goods and chattels of the said B. F. Sprinkle in the said dwelling house then and there being, then and there feloniously and burglariously to steal, take and carry away, against the peace and dignity of the State.

GWYN, *Solicitor.*"

The jury returned a verdict "That the said Odell Oakley is guilty of burglary in the first degree in manner and form as charged in the bill of indictment." Judgment of death was pronounced.

B. F. Sprinkle, a witness for the State, testified, in part: "I live in Reidsville, on Main Street, at the corner of Harrison Street. On 29 December, 1935, my house was broken into. There is a screen door and a locked door. The knob was twisted off of the inside door, which was locked. Then the door was forced open. The screen door opens on the outside and the other door opens from the inside. On the night of the 29th Mrs. Sprinkle and I were occupying the house alone. The breaking was done about 2 o'clock in the morning. I was sound asleep. Mrs. Sprinkle and I occupy twin beds. She sleeps with her head one way and I sleep with mine another. My head was next to the inside door, which comes out of the sun parlor into our bedroom. I was awakened by my wife's calling me. She said somebody was in our room and to get the gun. I heard him go out. When I awakened, it was snowing. It was snowing when the breaking occurred. In my opinion, when I woke up the snow was three inches deep. I called the police and Mr. Saunders and another gentleman came up there. I suppose it was fifteen or twenty minutes before Mr. Saunders came. He went right out and went on the track. No instrument was used in the breaking. The door was a little bit small for the frame and the lock didn't catch in too deep. The door knob was twisted off and the door shoved. The lock never did give, but the shove forced it open. The last thing Mrs. Sprinkle did before she went to bed was to lock that door. We went to bed at 9 or 10 o'clock and had been in bed four or five hours. I heard somebody go out of the door but I never did see who it was and don't know whether it was a man or woman. Nothing at all was taken. There were tracks on the doorstep, but I didn't measure them and I never went out of the house. The tracks on the steps looked like men's tracks. I pointed them out to Mr. Saunders."

Mrs. B. F. Sprinkle testified, in part: "When the noise woke me, I saw a man standing right inside the bedroom right at Mr. Sprinkle's head. I took a good look at him. He was apparently just standing up in the room. It was a man, had on a man's coat. It looked as if he were wearing a dark brown suit. I called Mr. Sprinkle three or four times before I could wake him and then he ran out the same door he

came in, through the sun parlor. Mr. Sprinkle called the police and Mr. Saunders came up. Mr. Saunders tracked the man. There was snow on the ground when I woke up. I saw Odell Oakley at the preliminary trial. That night I described to Mr. Saunders the man's appearance. Odell Oakley looks very much like the man I saw. In my opinion, he is the man. This breaking was Sunday morning. At the time I first saw Odell Oakley, I did not tell the officers that in my opinion he was the man. I only said he was a tall, slender boy. . . . At the preliminary trial I did not attempt to identify this boy as the man who was in my home."

J. T. Saunders testified, in part: "I am the officer who was on duty in the city of Reidsville the night of 29 December. It started snowing that night about 11 o'clock. By 2 o'clock the snow was about three inches deep. About 2 o'clock Mr. Sprinkle called me and another officer, Mr. Cobb, drove me up there. Mr. Cobb did not stay. I found a broken door, but didn't take time to examine it. Mr. and Mrs. Sprinkle pointed out to me tracks on the south side of the house on the step. Those tracks were a man's tracks and I followed them through town to Joe Martin's home, for about a mile and a half. I saw one other track on Lindsey Street going in the opposite direction. I saw the person who made that track. It was John Sommers, a white boy, and I spoke to him. Those two tracks did not get mixed up. They crossed, one man coming down on one side the street and the other the other, but they crossed and then they went on the opposite side the street. (The Court) They made by whom? Ans.: John Sommers and Odell Oakley. (Mr. Garrett) I object. (The Court) Well, you could not say. Don't consider, gentlemen, that he said the tracks made by Sommers and Oakley. You tracked the defendant to whose house? Ans.: Joe Martin's. (Mr. Garrett) You said the defendant. (The Court) I didn't mean to say the defendant; he followed a set of tracks to whose house? Ans.: Joe Martin's." To the foregoing questions and comments by his Honor the defendant objected, as being an expression of opinion. Exception. The witness continued: "When I got to Joe Martin's house there were no other tracks leading in to the house and there were no tracks leading away from the house. I saw no other tracks of any kind. This track went up in front of the house and went to the back and came back and up the front steps and right up the steps on the inside, leading into this room. I tracked the snow into the house. I followed the tracks right around the side of the house to the back and then he came back to the front, up the front steps on to the porch and went inside and up the stairway and into the first door after he got to the top of the stairway. . . . The tracks in the snow compared exactly with the defendant's shoes. There was no place where I followed those tracks

from Mr. Sprinkle's to the place where I found this man, where the tracks led off and away from any snow. I did not measure the tracks which I saw with this boy's shoes. I am just guessing. I did not ask for Joe Martin or try to arrest him. I didn't go there to arrest Joe Martin. I wanted to find the shoes that made that track. I do not know what kind of shoes Joe Martin wore. . . . I did not at any time measure Odell Oakley's tracks with those tracks in the snow. I trailed the man for a mile and a half, across streets, up streets with sidewalks and across and back across the street. I tracked him to five different homes, went on the porch of two of those homes and up to the windows of three and back out to the streets and down the streets. . . . All of these tracks were not exactly alike. The man didn't walk exactly straight and sometimes he would drag his feet a little. He walked sorter sideways. And when he walked sideways that threw some snow in the track."

The defendant denied that he was in the Sprinkle home, and said he left Allen Neal's barber shop about 11:00 o'clock and went to Joe Martin's home, where he was living. That he had been in bed about four hours when the officer came and woke him up. He was corroborated by Allen Neal and Jerome Bailey as to his leaving the shop about 11:30. On cross-examination he stated: "From 1924 to the present time they have had me in court ten or eleven times upon serious charges with terms ranging from three months to six years. They caught me every time I ever stole anything. During the last ten years I have visited from one city to the other." He told of the different offenses, where committed, and the time.

The defendant made many exceptions and assignments of error, and appealed to the Supreme Court. The only material ones will be considered in the opinion.

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

Claude S. Scurry, Joe W. Garrett, and Sharp & Sharp for defendant.

CLARKSON, J. At the close of the State's evidence, and at the close of all the evidence, the defendant made motions in the court below for judgment of nonsuit. N. C. Code, 1935 (Michie), sec. 4643. The court below overruled these motions, and in this we can see no error.

N. C. Code, *supra,* sec. 4232, is as follows: "There shall be two degrees in the crime of burglary as defined at the common law. If the crime be committed in a dwelling house, or in a room used as a sleeping apartment in any building, and any person is in the actual occupation of any part of said dwelling house or sleeping apartment at the time of the

commission of such crime, it shall be burglary in the first degree. If such crime be committed in a dwelling house or sleeping apartment not actually occupied by any one at the time of the commission of the crime, or if it be committed in any house within the curtilage of a dwelling house, or in any building not a dwelling house but in which is a room used as a sleeping apartment and not actually occupied as such at the time of the commission of the crime, it shall be burglary in the second degree."

Section 4233: "Any person convicted, according to due course of law, of the crime of burglary in the first degree shall suffer death, and any one so convicted of burglary in the second degree shall suffer imprisonment in the State's Prison for life, or for a term of years, in the discretion of the court."

The evidence in the present case is circumstantial, although sufficient to be submitted to a jury. We consider the only material exception and assignment of error which has merit: The officer never measured or compared any of the tracks he followed and never measured or compared the shoes of the defendant with the tracks he followed. During the testimony of the officer who followed tracks, he testified that the tracks he was following crossed tracks made by John Sommers. Then it was that the court asked the question set forth above and made the statement to which defendant excepted and assigned error. It will be noted that immediately after telling the witness he could not say who made the tracks that the judge himself said, "You tracked the defendant to whose house?" This was not a question asked by the solicitor.

In *S. v. Bryant,* 189 N. C., 112 (114), speaking to the subject, we find: " 'No judge, in giving a charge to the petit jury, either in a civil or a 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 state in a plain and correct manner the evidence given in the case, and declare and explain the law arising therein.' C. S., 564. In terms, this statute refers to the charge, but it has always been construed as including the expression of any opinion, or even an intimation by the judge, at any time during the trial, which is calculated to prejudice either of the parties. *Morris v. Kramer,* 182 N. C., 87, 91. And when once expressed, such opinion or intimation cannot be recalled. In the case last cited, the court said: 'When the damage is once done, it cannot be repaired, because, as we know, the baneful impression on the minds of the jury remains there still. . . . One word of untimely rebuke of his witness may so cripple a party as to leave him utterly helpless before the jury.' *Bank v. McArthur,* 168 N. C., 48; *S. v. Cook,* 162 N. C., 586; *S. v. Dick,* 60 N. C., 440. It is also held that the probable effect or influence upon the jury, and not the motive of the judge,

determines whether the party whose right to a fair trial has been impaired is entitled to a new trial." *S. v. Sullivan,* 193 N. C., 754.

The expression of the court below, "You tracked the defendant to whose house?" we think prejudicial, and especially so as the evidence of the State was circumstantial. Although inadvertently made by the learned and able judge, yet we think the expression, even when followed by "I didn't mean to say the defendant," would make a lasting impression on the jury, who alone were the triers of the facts. Then, again, the defendant was on trial for his life, and this *lapsus linguæ* may have determined his fate.

The principle above set forth does not apply to the power of the court to withdraw incompetent evidence and instruct the jury not to consider it. *S. v. Stewart,* 189 N. C., 340 (344).

For the reasons given, we think the defendant is entitled to a

New trial.

SCHENCK, J., *concurs in result.*

W. A. POWELL v. A. J. MAXWELL, COMMISSIONER OF REVENUE OF THE STATE OF NORTH CAROLINA.

(*Filed 15 June, 1936.*)

1. Taxation A h—

Art. I, sec. 10 (2), of the Federal Constitution, prohibiting a state from levying duties on imports or exports, relates solely to foreign commerce and has no reference to interstate commerce.

2. Same—Tax upon automobiles held excise or use tax, and not tax on interstate commerce, or an attempt to tax transaction outside of State.

The tax imposed by subsec. 13, sec. 404, ch. 371, Public Laws of 1935 (N. C. Code, 7880 [156]e, subsec. 13), upon the purchase price of automobiles payable before license may be issued by every person purchasing them and using them upon the highways of the State, when a State license is required for such use, *is held* not a tax upon interstate commerce in violation of Art. I, sec. 8 (3), of the Federal Constitution, since the tax is not imposed until after the purchase of the automobile and after it has come to rest within this State for use herein, and is levied without regard to where it was purchased, nor a tax upon transactions taking place beyond the confines of the State in violation of the Due Process clause of the Federal Constitution (14th Amendment), since the tax is neither an *ad valorem* nor a sales tax upon the purchase of automobiles, but an excise or use tax imposed upon the owners for the privilege of using them upon the highways of the State.

3. **Taxation A c—Tax upon every owner for privilege of using automobile upon highways of this State held not void as discriminatory.**

The tax levied upon every owner for the privilege of using an automobile upon the highways of this State when a State license is required for such use is not void as discriminatory in amount because of the provision of the statute that such tax need not be paid when the owner furnishes a certificate from a dealer in this State to the effect that the tax has been paid, and that such dealer will be responsible therefor to the Commissioner of Revenue, since the statute requires the same amount to be paid regardless of whether the car is purchased from a dealer within or outside the State, the tax in one instance being payable to the Commissioner of Revenue and in the other instance to the dealer in this State from whom the car is purchased. Art. I, sec. 8 (3), of the Federal Constitution, Art. V, sec. 3, of the Constitution of North Carolina.

4. **Taxation C c—**

The Commissioner of Revenue is given authority to construe administratively, in the first instance, all sections of the Revenue Act by sec. 507 thereof.

5. **Taxation A c—Difference in procedure for collection of tax held not to render it discriminatory under facts of this case.**

An excise tax, uniform in amount, regardless of whether the article used is purchased within the State or not, will not be held void as discriminatory because the procedure for its collection when the article used is purchased outside the State is different from that when it is purchased within the State, when it appears that the statute does not discriminate either in substance or in its operation in practical application.

APPEAL by the plaintiff from *Barnhill, J.*, at March Term, 1936, of WAKE. Affirmed.

From the allegations and admissions in the pleadings it appears that on 9 July, 1935, the plaintiff, who is a resident of Rockingham County, North Carolina, purchased a new Oldsmobile coupe from the Wyatt Chevrolet Corporation in Danville, Virginia, for a price in excess of $800.00; that the plaintiff purchased this automobile for use upon the streets and highways of the State of North Carolina, and after returning to his home with it, applied to the defendant, the Commissioner of Revenue, for a license and certificate of title for said automobile; that he tendered to the Commissioner all of the taxes and fees due under the laws of the State prior to the issuance of the license and certificate of title except the tax imposed by subsection 13, section 404, chapter 371, Public Laws 1935, N. C. Code of 1935 (Michie), 7880 (156)e, subsection 13; that the amount of the tax imposed by said subsection 13, being exacted by the Commissioner of Revenue, was paid by the plaintiff under protest, and within thirty days the plaintiff demanded in writing that the same be refunded; that the Commissioner declined to make refund of the tax paid, and this suit was thereupon instituted. In the

pleadings it also appears that the tax demanded of the plaintiff was limited to $10.00, and that the Commissioner of Revenue had administratively construed and applied subsection 13, section 404, chapter 371, Public Laws 1935, as subject to the same limitations of maximum tax upon any single article of merchandise as is fixed in subsection 12 of said section 404, namely, $10.00.

Liability for the tax was denied upon the ground that subsection 13 of section 404, chapter 371, Public Laws 1935, being a portion of the Revenue Act of 1935, was void for the reason that it was in violation of the provisions of the Federal and State Constitutions.

The court was of the opinion that said subsection 13 did not violate the provisions of either the Federal or State Constitution, and that the tax demanded and collected was lawful, and entered judgment denying the recovery sought by the plaintiff, from which he appealed, assigning errors.

J. M. Broughton, W. H. Yarborough, Jr., and Geo. D. Vick, Jr., for plaintiff, appellant.

Gholson & Gholson of counsel for plaintiff, appellant.

Attorney-General Seawell and Assistant Attorneys-General McMullan and Bruton for defendant, appellee.

SCHENCK, J. The portion of the act under consideration is subsection 13, section 404, Public Laws 1935, and reads as follows: "In addition to the taxes levied in this act or in any other law there is hereby levied and imposed upon every person, for the privilege of using the streets and highways of this State, a tax of three per cent of the sales price of any new or used motor vehicle purchased or acquired for use on the streets and highways of this State requiring registration thereof under section 2621 (6), Consolidated Statutes, which said amount shall be paid to the Commissioner of Revenue at the time of applying for registration of such motor vehicle, or certificate of title for same. No certificate of title or registration plate shall be issued for same unless and until said tax has been paid: *Provided, however,* if such person, so applying for registration and license plate for such motor vehicle, or certificate of title therefor, shall furnish to the Commissioner of Revenue a certificate from a licensed motor vehicle dealer in this State upon a form furnished by the Commissioner certifying that such person has paid the tax thereon levied in this act, the tax herein levied shall be remitted to such person to avoid in effect double taxation on said motor vehicle under this act. The term 'motor vehicle' as used in this section shall include trailers." N. C. Code of 1935 (Michie), 7880, (156)e, subsection 13.

The foregoing subsection 13 was administratively construed to be limited to a maximum tax of $10.00 upon any single article of merchandise as is fixed in the preceding subsection 12, which reads as follows: "The maximum tax that shall be imposed upon any single article of merchandise shall be ten dollars ($10), and as an additional means of enforcement of the payment of the tax herein levied the Department of Revenue shall not issue a license plate or a certificate of title for any new or used motor vehicle sold by any merchant or licensed dealer until the tax levied for the sale of same under this act has been paid, or a certificate duly signed by a licensed dealer is filed at the time the application for license plate or title is made for such motor vehicle; such certificate to be on such form as may be prescribed by the Commissioner of Revenue, and that such certificate shall show that the said licensed dealer has assumed the responsibility for the payment of the tax levied under this act and agrees to report and remit the tax in his next regular monthly sales tax report required to be filed under this act." N. C. Code of 1935 (Michie), 7880, (156)e, subsection 12.

The position taken that the portion of the act under consideration is in contravention of the provision of the Federal Constitution that "No state shall, without the consent of Congress, levy any imposts or duties on imports or exports, . . ." Art. I, sec. 10 (2), is untenable, since this provision relates to foreign commerce and has no reference to interstate commerce. *Woodruff v. Parham*, 8 Wall., 123, 19 L. Ed., 382; *Pittsburgh & S. Coal Co. v. Louisiana*, 156 U. S., 590, 30 L. Ed., 544.

The position taken that the portion of the act under consideration impinges the provision of the Federal Constitution that "The Congress shall have the power . . . to regulate commerce . . . among the several states, . . ." Art. I, sec. 8 (3), is likewise untenable, for the reason that the tax levied is not upon articles in interstate commerce, since it does not become operative until after the purchase of the automobile has been consummated and until after it has been brought into North Carolina—the tax becomes effective only when the automobile has come to rest within the State, and then without regard to where it was purchased, and is imposed as an excise or use tax. Excise tax upon the use of an article within the State, although the article may be of out-of-state origin, does not fall under the regulation of the commerce clause of the Federal Constitution. *Bowman v. Continental Oil Co.*, 256 U. S., 642, 65 L. Ed., 1139; *Hart Refineries v. Harmon*, 278 U. S., 499, 73 L. Ed., 475; *Nashville, C. & St. L. R. Co. v. Wallace*, 288 U. S., 249, 77 L. Ed., 730. In the last mentioned case, *Mr. Justice Stone* writes: "The gasoline, upon being unloaded and stored, ceased to be a subject of transportation in interstate commerce and lost its immunity as such from state taxation."

The position taken that the portion of the act under consideration is subversive to that clause of the 14th Amendment to the Federal Constitution reading, ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law," is also untenable, for the reason that the tax levied is an excise or use tax, levied and collected for the privilege of using the streets and highways in North Carolina, and not an attempt to tax transactions which take place beyond the confines of the State, over which North Carolina has no jurisdiction.

We are of the opinion, and so hold, that the tax levied by the portion of the act under consideration is neither an *ad valorem* tax nor a sales tax upon extraterritorial transactions, but is an excise or use tax, levied and collected for the privilege of operating automobiles upon the streets and highways of North Carolina. The authority to levy excise and use taxes in general is well settled in this State. *O'Berry, Treasurer, v. Mecklenburg County,* 198 N. C., 357; *Stedman, Treasurer, v. Winston-Salem,* 204 N. C., 203.

The appellants contend, however, that, conceding the Legislature was vested with the authority to levy and to provide for the collection of a general excise tax for the privilege of operating automobiles upon the streets and highways of the State, the insertion into the act of the proviso to the effect that when the person applying for registration of his motor vehicle "shall furnish . . . a certificate from a licensed motor vehicle dealer in this State . . . certifying that such person has paid the tax thereon levied in this act, the tax herein levied shall be remitted to such person to avoid, in effect, double taxation on said motor vehicle under this act," caused the act to contravene Art. I, sec. 8 (3), of the Constitution of the United States, vesting the power to regulate commerce among the several states in Congress, and Art. V, sec. 3, of the Constitution of North Carolina, providing that "Taxation shall be by uniform rule," in that it brings about a discrimination in favor of automobiles bought from North Carolina dealers and against automobiles bought outside of the State.

It must be conceded that if the tax levied discriminates against the plaintiff by reason of the fact that he purchased his automobile outside of the State, such a discrimination would be violative of the aforesaid regulatory and uniformity provisions of the Federal and State Constitutions. *Welton v. Missouri,* 91 U. S., 275, 23 L. Ed., 347. The plaintiff contends that the remission of the tax upon the furnishing of a certificate from a licensed motor vehicle dealer in this State to the effect that the sales tax had been paid, gives rise to a discrimination against him by reason of the fact that the tax is collected upon his automobile bought in Virginia and not collected (or is "remitted") upon automobiles bought in North Carolina. However, in this connection, it must

be observed that if the plaintiff, instead of purchasing his automobile in Virginia, had purchased it from a North Carolina dealer, under the provisions of the Revenue Act, he would have been required to pay to the dealer when he purchased his automobile exactly the same amount of tax as he, when he applied for the registration of his automobile bought in Virginia, was required to pay for the privilege of using the streets and highways of the State. The amount of tax exacted upon the North Carolina bought and the Virginia bought automobile is the same, namely, $10.00. There is no discrimination in so far as the amount of the tax is concerned.

While the appellant challenges the right of the Commissioner of Revenue to construe administratively subsection 13, section 404, Public Laws 1935, as subject to the same limitation of maximum tax upon any single article of merchandise as is fixed in subsection 12 of said section 404, namely, $10.00, the authority to construe all sections of the act imposing taxes is specifically given by section 507 thereof, wherein it is provided that "such decisions by the Commissioner of Revenue shall be *prima facie* correct, and a protection to the officers and taxpayers affected thereby"; and it is a well established rule of this Court that in passing upon the constitutionality of tax statutes the administrative construction and application of such statutes shall be regarded and considered. *Cannon v. Maxwell, Comr. of Revenue,* 205 N. C., 420, and cases there cited.

The plaintiff is relegated to the position that there is a discrimination in the manner in which the tax is levied and collected under the statute—his complaint being to the form rather than to the substance.

In *Gregg Dyeing Co. v. Query,* 286 U. S., 472, 76 L. Ed., 1232, involving the construction of a statute in many respects similar in principle to the act under consideration, *Chief Justice Hughes* writes: "In maintaining rights asserted under the Federal Constitution, the decision of this Court is not dependent upon the form of a taxing scheme, or upon the characterization of it by the state court. We regard the substance rather than the form, and the controlling test is found in the operation and effect of the statute as applied and enforced by the state."

Brogden, J., in *Stedman, Treas., v. Winston-Salem, supra,* says: "The judicial denomination of a tax as an excise tax or a property tax is a mere use of terms and the selection of certain letters from the alphabet. The ultimate test is the operation of the tax and its practical application to the commercial transactions of life."

When the substance of subsection 13 of section 404, chapter 371, Public Laws 1935, is regarded rather than its form, and its operation tested by its practical application, it is manifest that there is no discrimination in favor of the North Carolina bought automobile over the

Virginia bought automobile by the remission of the privilege or excise tax to the owners of the former, since the result is, as stated in the act itself, "to avoid, in effect, double taxation" on automobiles bought from North Carolina dealers and to make the tax on all new bought automobiles equal. There can be no discrimination when there is equality.

Affirmed.

VERONA F. CREWS v. R. A. CREWS, E. G. CREWS, TRUSTEE, AND A. A. CREWS.

(Filed 15 June, 1936.)

1. **Appeal and Error J c—**

   Where the parties have waived trial by jury and have agreed that the court may find the facts, the court's findings, when supported by competent evidence, are conclusive and not reviewable on appeal.

2. **Deeds and Conveyances D a—General description covering larger tract intended to be conveyed will prevail over specific description.**

   When the specific description by metes and bounds contained in a deed or deed of trust does not include land which it was the intention of the parties to the instrument to convey, but such land is included in and is covered by a general description, the general and not the specific description will control, and the grantee in the deed, or the trustee in the deed of trust, acquires title to the larger tract embraced in the general description.

3. **Reformation of Instruments A c—**

   Where it appears by clear, strong, and cogent proof that the draftsman, through inadvertence or mistake, failed to include in the description of the deed all the land intended by the parties to be embraced therein, equity will grant reformation of the deed to bring it into harmony with the true intention of the parties.

4. **Reformation of Instruments B a—Party to deed of trust may not become innocent purchaser under subsequent deed from trustor.**

   Where a wife joins her husband in the execution of a deed of trust on his lands, and a part of the tract intended to be embraced therein is omitted therefrom through error of the draftsman, upon the husband's subsequent conveyance to the wife of the tract erroneously omitted from the description in the deed of trust, she may not resist reformation of the deed of trust on the ground that she is an innocent purchaser under her deed from her husband.

APPEAL by plaintiff from *Cowper, Special Judge,* at October Term, 1935, of the Superior Court of Granville County. Affirmed.

This is a special proceeding for the partition of certain land described in the petition between the plaintiff Verona F. Crews, and the defendant R. A. Crews, as tenants in common.

The proceeding was begun before the clerk of the Superior Court of Granville County. After it was begun, and while it was pending before the said clerk, E. G. Crews, trustee, and A. A. Crews were made parties to the proceeding. They filed an answer to the petition, in which they denied that the plaintiff Verona F. Crews owns an undivided one-half interest in the land described in the petition. They alleged that the defendant R. A. Crews and the defendant A. A. Crews are the owners of said land, as tenants in common, each owning an undivided one-half interest in said land.

The proceeding was transferred by the clerk to the civil issue docket of the Superior Court of Granville County, for trial of the issue raised by the pleadings, and was heard at the October Term, 1935, of said court, when judgment was rendered as follows:

"This cause coming on to be heard before the undersigned judge presiding at the October Term, 1935, of the Superior Court of Granville County, and being heard upon an agreement of counsel representing the plaintiff and the defendants that the undersigned might find the facts and declare the law upon such facts; the undersigned, after hearing the evidence offered by the plaintiff and the defendants, finds the following facts:

"1. This cause was begun before the clerk of the Superior Court of Granville County by Verona F. Crews against R. A. Crews, for the partition of certain lands described in the petition filed therein; in due time, the defendants E. G. Crews, trustee, and A. A. Crews, on their own motion, were made parties to the proceeding and filed an answer to the petition in which they denied that the plaintiff is the owner as tenant in common of an undivided one-half interest in the land described in the petition. The proceeding was thereupon transferred by the clerk to the civil issue docket of the Superior Court of Granville County, for trial of the issue raised by the pleadings.

"2. The plaintiff claims an undivided one-half interest in the land described in the petition under a deed executed by W. W. Crews, dated 16 December, 1931, and duly recorded in the office of the register of deeds of Granville County.

"3. The defendant E. G. Crews, trustee, is the trustee named in a certain deed of trust executed by W. W. Crews and his wife, the plaintiff Verona F. Crews, dated 16 December, 1927, and duly recorded in the office of the register of deeds of Granville County. The land conveyed by said deed of trust is described by metes and bounds and as 'all of the land conveyed by W. S. Daniel and wife to W. W. Crews and R. A.

Crews by a deed duly recorded in the office of the register of deeds of Granville County, with the exception of 89½ acres heretofore conveyed by W. W. Crews and R. A. Crews and their wives to Mrs. Lucy Oakes.'

"4. The said deed of trust was foreclosed by said trustee on 24 April, 1934, and the deed from said trustee to the defendant A. A. Crews, the purchaser at the foreclosure sale, is dated 11 May, 1934.

"5. The description by metes and bounds in the aforesaid deed of trust from W. W. Crews and his wife, the plaintiff Verona F. Crews, to the defendant E. G. Crews, trustee, does not contain a description of or embrace a tract of land containing 212 acres, in which the said W. W. Crews at the time of the execution of the aforesaid deed of trust owned an undivided one-half interest.

"6. The concluding language in said description as follows, to wit: 'It being all of the land conveyed by W. S. Daniel and wife to W. W. Crews and R. A. Crews by a deed duly recorded in the office of the register of deeds of Granville County, with the exception of 89½ acres heretofore conveyed by W. W. Crews and R. A. Crews and their wives to Mrs. Lucy Oakes,' covers and embraces said 212 acres of land.

"7. The said R. A. Crews and W. W. Crews engaged B. S. Royster, Jr., a practicing attorney in Granville County, to prepare said deed of trust, and instructed said attorney to draw said deed of trust, so that it would convey to the said E. G. Crews, trustee, an undivided one-half interest in all of the lands acquired by said W. W. Crews and R. A. Crews from W. S. Daniel and wife, except a tract of land containing approximately 89 acres, which had been conveyed by them to Mrs. Lucy Oakes.

"8. By mistake or inadvertence of the draftsman, or by an honest and mutual mistake of the parties, the description by metes and bounds on the aforesaid deed of trust to E. G. Crews, trustee, did not cover and embrace said 212 acres of land.

"9. The evidence in regard to said mistake is clear, strong, cogent, and convincing.

"And upon the aforesaid facts the court concludes as a matter of law and adjudges:

"*First.* That the following language in the deed of trust from W. W. Crews and his wife, the plaintiff Verona F. Crews, to E. G. Crews, trustee, to wit: 'It being all of the land conveyed by W. S. Daniel and wife to W. W. Crews and R. A. Crews by a deed duly recorded in the office of the register of deeds of Granville County, with the exception of 89½ acres heretofore conveyed to W. W. Crews and R. A. Crews and their wives to Mrs. Lucy Oakes,' covers and embraces the aforesaid 212 acres of land, and that said deed of trust conveys the said 212 acres of land.

"*Second.* That A. A. Crews, the purchaser at the foreclosure sale made by the said E. G. Crews, trustee, became and was the purchaser of an undivided one-half interest in said 212 acres of land, and by virtue of his deed from said trustee he is now the owner of an undivided one-half interest in and to said 212 acres of land, and the defendant R. A. Crews is the owner of the other undivided one-half interest in and to said land.

"*Third.* That the description of the lands conveyed by the deed of trust from W. W. Crews and his wife, Verona F. Crews, to E. G. Crews, trustee, securing a note payable to R. A. Crews in the sum of $4,100, recorded in Book 196, at page 4, in the office of the register of deeds of Granville County, be and the same is hereby reformed so as to include in the description in said deed of trust all of the lands conveyed to W. W. Crews and R. A. Crews by W. S. Daniel and wife, Nancy G. Daniel, by deed dated 19 June, 1924, recorded in Book 83, at page 260, in the office of the register of deeds of Granville County, with the exception of the tract or parcel of land conveyed to Mrs. Lucy Oakes by W. W. Crews and R. A. Crews.

"*Fourth.* That the description of the land as set forth in and conveyed by the deed from E. G. Crews, trustee, to A. A. Crews, dated 11 May, 1934, and recorded in Book 96, at page 262, in the office of the register of deeds of Granville County, be and the same is hereby reformed and corrected so as to include in the description in said deed all of the land conveyed to W. W. Crews and R. A. Crews by W. S. Daniel and wife, Nancy G. Daniel, by deed dated 19 June, 1924, and recorded in Book 85, at page 260, in the office of the register of deeds of Granville County, and to include tracts Nos. 3, 4, and 5, as shown on the plat and survey of the W. S. Daniel lands as platted and surveyed by R. T. Gregory, surveyor, in October, 1916, and not to include tract No. 1, as shown on said plat.

"*Fifth.* That the plaintiff is liable for the costs of this action, and such costs are hereby taxed against the plaintiff."

From said judgment the plaintiff appealed to the Supreme Court, assigning as errors certain findings of fact, and certain conclusions of law made by the judge, and set out in the judgment.

M. C. Pearce and Irvin B. Watkins for plaintiff.
Parham & Taylor and B. S. Royster, Jr., for defendants.

CONNOR, J. Plaintiff's exceptions to certain findings of fact made by the judge at the hearing of this proceeding, and set out in the judgment, cannot be sustained. There was competent evidence at the hearing, sufficient in probative force to sustain each and all the findings of

fact. It is well settled that where, by agreement of the parties to a civil action or to a special proceeding, a trial by jury has been expressly waived, and the judge has heard the evidence and found the facts in controversy, and there was competent evidence sufficient in probative force to support his findings, they are conclusive and not reviewable on an appeal to this Court from a judgment in accordance with such findings. In the instant case, all the findings of fact are supported by competent evidence, which was properly heard and considered by the judge.

Nor can plaintiff's exceptions to the judgment, which is in accord with the findings of fact and conclusions of law made by the judge, be sustained. It is a well settled principle of law that when the specific description by metes and bounds contained in a deed does not include land which it was the intention of the parties to the deed to convey, but such land is included in and is covered by a general description, as in the instant case, the general and not the specific description will control. *Quelch v. Futch,* 172 N. C., 316, 90 S. E., 259. In the opinion in that case it is said: "The entire description in a deed should be considered in determining the identity of the land conveyed. Clauses inserted in a deed should be regarded as inserted for a purpose, and should be given a meaning that would aid the description."

There is no error in the judgment decreeing a reformation of the deed of trust and of the deed under which the defendant A. A. Crews claims in the instant case. In *Crawford v. Willoughby,* 192 N. C., 269, 134 S. E., 494, it is said: "The principle that a court of equity, or a court exercising equitable jurisdiction, will decree the reformation of a deed or written instrument, from which a stipulation of the parties, with respect to some material matter, has been omitted by the mistake or inadvertence of the draftsman, is well settled and frequently applied. *Strickland v. Shearon,* 191 N. C., 560. The equity for the reformation of a deed or written instrument extends to the inadvertence or mistake of the draftsman who writes the deed or instrument. If he fails to express the terms as agreed upon by the parties, the deed or instrument will be so corrected as to be brought into harmony with the true intention of the parties. *Sills v. Ford,* 171 N. C., 733."

The plaintiff in this case joined with her husband, W. W. Crews, in the execution of the deed of trust under which the defendant A. A. Crews claims. She was a party to the deed of trust, and is not in a position to assert that she is an innocent purchaser under the deed subsequently executed to her by her husband. The principle stated in the opinion in *Archer v. McClure,* 166 N. C., 140, 81 S. E., 1081, has no application in the instant case. The judgment is

Affirmed.

J. P. DALY AND HIS WIFE, JULIA R. DALY, v. S. D. PATE.

(Filed 15 June, 1936.)

1. Wills E d—Devisee held to take defeasible fee, which would become indefeasible if she should die leaving children her surviving.

A devise to testator's daughter and her heirs in fee simple absolute should she leave any child or children her surviving, but should she not leave any child or children her surviving, then the land to revert to the estate, to be equally divided among testator's nephews and nieces then living, *is held* to devise the defeasible fee to the daughter, which would become indefeasible upon her death if she should leave child or children her surviving, and in such event the daughter's deed would convey the indefeasible fee to her grantee, her children taking no interest under the devise.

2. Same—Heirs at law of testator held to have contingent interest, not affected by deed of devisee of defeasible fee and remaindermen.

The will in question devised the defeasible fee to testator's daughter, with contingent limitation over to testator's nephews and nieces living at her death in the event she should die without child or children her surviving. The nephews and nieces of testator subsequently executed a quitclaim deed to testator's daughter, and thereafter she executed a deed of trust on the lands, which was duly foreclosed and deed made to the purchaser. *Held:* The purchaser at the sale could not convey an indefeasible fee simple, since in the event the testator's daughter should die without child or children her surviving, and at the time of her death there should be no nephew or niece of testator then living, the heirs at law of testator would be entitled to the land, which interest would not be affected either by the quitclaim deed of the nephews and nieces, who would have acquired no interest in the land under such conditions, or by the deed of trust executed by testator's daughter, whose fee in the land would be defeated by the happening of the contingency.

STACY, C. J., dissents.

APPEAL by defendant from *Sinclair, J.*, at January Term, 1936, of WAYNE. Reversed.

This is a controversy without action, involving the title to the land described in the agreed statement of facts which was submitted to the court. C. S., 626.

By Item IV of his last will and testament, which was duly probated and recorded in the office of the clerk of the Superior Court of Wayne County, on or about 22 October, 1921, W. S. Newsome devised the land described in the agreed statement of facts to his daughter, Clyde Newsome, who subsequent to the execution of the said last will and testament intermarried with L. F. Davis.

Item IV of said last will and testament is as follows:

"Fourth. I give, devise and bequeath unto my daughter, Clyde Newsome, the following pieces, parcels or tracts of land,—one tract being that part of my home place lying in Greene County, and on the south side of Reedy Branch, containing one hundred and twenty-five acres, more or less. Also one other tract of land situated in Saulston Township, Wayne County, known as the Benton land, and containing two hundred and fifty acres, more or less.

"To have and to hold the said lands unto the said Clyde Newsome and her heirs in fee simple absolute should she leave any child or children surviving her, but should she not leave any child or children surviving her, then it is my will and desire that said lands shall revert to my estate and be equally divided as best it may be between my then living nephews and nieces."

The title to the land situated in Saulston Township, Wayne County, known as the Benton land, and containing two hundred and fifty acres, more or less, only is involved in this controversy.

On 19 December, 1925, all the nephews and nieces of W. S. Newsome, the testator, then living, executed a quitclaim deed by which they conveyed to Clyde Newsome Davis all their right, title, interest, and estate vested or contingent, and all their rights in remainder or in reversion, in and to the land described in the agreed statement of facts. This deed was duly recorded in the office of the register of deeds of Wayne County. At the date of the execution of said deed, all the brothers and sisters of W. S. Newsome, the testator, were dead. Clyde Newsome Davis was the only child of the testator, W. S. Newsome, and now has two living children.

On 10 February, 1928, Clyde Newsome Davis and her husband, L. F. Davis, executed a deed of trust by which they conveyed the land described in the agreed statement of facts to the First National Bank of Durham, trustee, to secure the payment of the sum of $4,800, the amount of their indebtedness to the North Carolina Joint Stock Land Bank of Durham. This deed of trust was duly recorded in the office of the register of deeds of Wayne County. Upon default in the payment of said indebtedness, the land described in the deed of trust was sold by the trustee under the power of sale contained therein, who thereafter conveyed said land to the North Carolina Joint Stock Land Bank, the purchaser at the sale by the trustee, by a deed dated 16 November, 1932. This deed was duly recorded in the office of the register of deeds of Wayne County.

On 1 November, 1933, the North Carolina Joint Stock Land Bank of Durham executed a deed by which it conveyed the land described in the agreed statement of facts to the plaintiff J. P. Daly. This deed was duly recorded in the office of the register of deeds of Wayne County.

The plaintiffs are now in possession of said land, claiming title thereto under Clyde Newsome Davis.

On or about 1 November, 1935, the plaintiffs and the defendant entered into a contract by which the plaintiffs agreed to sell and convey to the defendant in fee simple the land described in the agreed statement of facts by a deed sufficient to vest in the defendant a good and indefeasible title to said land, and by which the defendant agreed that upon plaintiff's compliance with their agreement he would pay to the plaintiffs the agreed purchase price for said land.

The plaintiffs have executed and tendered to the defendant a deed which they contend is a full compliance with their agreement.

The defendant contends that said deed is not sufficient to vest in him a good and indefeasible title to the land described therein, and for that reason has declined to accept said deed, and has refused to pay to the plaintiffs the agreed purchase price for said land.

It was agreed that if the court should be of opinion that on the facts agreed the deed executed by the plaintiffs and tendered by them to the defendant is sufficient to convey the land described therein to the defendant in fee simple, and to vest in the defendant a good and indefeasible title to said land, judgment should be rendered that defendant accept said deed, and that plaintiffs recover of the defendant the amount of the agreed purchase price; otherwise, that the controversy without action be dismissed and that the costs be taxed against the plaintiffs.

From judgment in accordance with the contentions of the plaintiffs the defendant appealed to the Supreme Court, assigning as error the signing of the judgment.

W. A. Dees for plaintiffs.
George E. Hood for defendant.

CONNOR, J. If Clyde Newsome Davis, at her death, shall leave a child or children surviving her, such child or children will take no interest or estate under Item IV of the will of W. S. Newsome, in the land devised therein to Clyde Newsome (Davis) for the reason that under said Item IV, Clyde Newsome Davis does not take an estate in said land for her life, with remainder to her child or children, surviving her. *Whitfield v. Garris,* 131 N. C., 148, 42 S. E., 568; *S. c.,* 134 N. C., 24, 45 S. E., 905. In such case, the estate of Clyde Newsome Davis in said land, which during her life is a defeasible fee (*West v. Murphey,* 197 N. C., 488, 149 S. E., 731), will become an indefeasible fee, and the deed executed by the plaintiffs, who claim under Clyde Newsome Davis, if accepted by the defendant, will vest in him a good and indefeasible title to the land conveyed by said deed.

If Clyde Newsome Davis, at her death, shall leave no child or children surviving her, the land devised to her by Item IV of the will of W. S. Newsome will revert to his estate, to be equally divided among (between?) his nephews and nieces, then living. If at the death of Clyde Newsome Davis the land shall revert to the estate of W. S. Newsome, as provided in Item IV of his will, and at that date there be living nephews and nieces of the testator, the land will go to such nephews and nieces. In that case, by reason of the agreed facts and of the deed dated 19 December, 1925, the nephews and nieces of the testator, living at the death of Clyde Newsome Davis, will be estopped from claiming as against the plaintiffs any right, title, interest, or estate in and to the land described in the agreed statement of facts. In such case, the deed executed by the plaintiffs, who claim under Clyde Newsome Davis, if accepted by the defendant, will vest in him a good and indefeasible title to the land conveyed by the said deed.

But if at her death Clyde Newsome Davis shall leave no child or children surviving her, and there shall then be no living nephew or niece of the testator, the land will go to the heirs at law of W. S. Newsome living at the death of Clyde Newsome Davis. In such case, such heirs at law will not be estopped from claiming the land described in the agreed statement of facts, as against any person or persons claiming under Clyde Newsome Davis, and the deed executed by the plaintiffs, who claim under Clyde Newsome Davis, if accepted by the defendant, will not vest in him a good and indefeasible title to the land conveyed by said deed. See *Burden v. Lipsitz,* 166 N. C., 523, 82 S. E., 863.

The deed executed by the plaintiffs and tendered to the defendant is sufficient to convey all the right, title, interest, or estate in the land described therein, which was owned by Clyde Newsome Davis under Item IV of her father's will, and under the deed executed on 19 December, 1925, by the then living nephews and nieces of the testator. It cannot be determined until the death of Clyde Newsome Davis whether or not the nephews or nieces of the testator who executed the deed dated 19 December, 1925, have any right, title, interest, or estate in the land described in their deed. It may be that none of them will be living at the death of Clyde Newsome Davis. In that case, the title which Clyde Newsome Davis had to the land devised to her by Item IV of the will of her father will not be fortified by the deed executed by the nephews and nieces living at the date of the deed.

There is error in the judgment.

Reversed.

STACY, C. J., dissents.

R. L. STONE, OTIS STONE, J. R. GROGAN, J. D. JOYCE, FRANK CRADDOCK, C. N. KALLAM, S. T. HODGIN, TOM LESTER, J. B. KING, TOM LEMONS, SUSIE SMITH, ANNA LEE PRICE, C. H. LESTER, MARTIN LEMONS, CHARLIE KNIGHT, ET AL., v. BOARD OF COMMISSIONERS OF THE TOWN OF STONEVILLE, OTIS JOYCE, MAYOR OF THE TOWN OF STONEVILLE, AND STEVE SMITH, CLERK AND TAX-LISTER OF THE TOWN OF STONEVILLE.

(Filed 15 June, 1936.)

1. **Appeal and Error F b—An exception to failure to find certain facts will not be considered unless party has aptly requested such findings.**

An exception to the failure of the court to find certain facts deemed material by a party will not be considered unless the party has aptly requested the court to make such findings, and the mere tender of judgment and exception to the court's refusal to sign same is insufficient for this purpose.

2. **Taxation F c—Compromise and settlement of tax by town authorities held not subject to upset in mandamus proceedings in this case.**

Defendant town commissioners compromised and settled a claim for taxes against the purchasers of property of an insolvent corporation which had been given immunity to taxation by the town for a period of ten years, under the terms of a resolution passed by the commissioners of the town, the corporation becoming insolvent prior to the expiration of the prescribed time. The action of the commissioners was ratified by act of the Legislature (Private Laws of 1935, ch. 87, sec. 3). Plaintiffs, taxpayers of the town, brought this *mandamus* proceeding to compel the commissioners to list and assess the property for taxation for the prior five years. *Held:* In the absence of a finding that the board of commissioners acted in bad faith in making the compromise settlement of the tax, or abused its discretion in so doing, *mandamus* was properly denied. N. C. Code, 7971 (50), subsec. 5.

3. **Mandamus A b—**

Mandamus will lie only to compel the performance of a clear legal duty, and then only at the instance of a party having a clear legal right to demand its performance.

STACY, C. J., and CONNOR, J., dissent.

APPEAL by plaintiffs, petitioners, from *Clement, J.*, at March Term, 1936, of ROCKINGHAM. Affirmed.

This is a civil action for *mandamus* to compel the board of commissioners of the town of Stoneville to list and assess certain property located within the town of Stoneville. Plaintiffs appealed from judgment of Clement, J., denying the writ.

The judgment of the court below is as follows:

"This cause coming on to be heard, and being heard upon the verified petition, affidavits filed, arguments and admissions of counsel, the court finds the following facts:

"That the plaintiffs are citizens, residents, and taxpayers of the town of Stoneville, N. C. That the defendants are the commissioners and tax collector of the town of Stoneville. That said commissioners are the governing body of the town and have power to levy and collect taxes.

"That certain property belonging to a corporation known as the Stoneville Cabinet Company, and its successors, C. K. Nolan, J. H. Holland, and R. T. Stone, was not listed for taxation by the town of Stoneville for the years 1924 to 1934, inclusive. That said property consisted largely of a furniture factory, land, buildings, machinery, fixtures, lumber, and materials for manufacture. That said property has been listed for the purposes of taxation by Rockingham County for the entire period of ten years. That for the five-year period ending 1934, the entire property, at the valuations listed by Rockingham County and at the tax rate of the town of Stoneville, would have yielded taxes in the sum of $1,263.09. That all of the said unlisted property did not lie within the town of Stoneville; that the corporate line of said town lay through the lands and property aforesaid, and although the greater portion of said property was within the corporate limits of said town, there has been no separate appraisals of the properties which lay within the corporate limits and those which lay without the corporate limits.

"That the purpose of this proceeding is to force the governing body of the town of Stoneville to list for taxation and collect the taxes on the unlisted property, heretofore described, within the corporate limits, for the five-year period ending with the year 1934.

"That, about the year 1924, a mass meeting of the citizens of the town of Stoneville was held; that in order to induce the construction of a factory, the proposal was made to exempt the property from taxation for a period of ten years; that the governing body of the town, acting upon such proposal and resolution adopted by the mass meeting, attempted to exempt the property from taxation for a period of ten years; that upon faith of the inducement the Stoneville Cabinet Company was organized and started business.

"That, prior to the expiration of the ten-year period, the Stoneville Cabinet Company became insolvent and was sold for the benefit of creditors; that the purchasers, J. H. Holland, C. K. Nolan, and R. T. Stone, bought the property at said sale. That the value of the property for taxable purposes was ascertainable.

"That during the period during which taxation is sought to be enforced, some of the property, including machinery and fixtures, lumber and materials, have been sold and have gone into hands of purchasers.

"That when the petition in this cause was served upon the commissioners, said governing body called upon the then owners of the remaining properties known as the Stoneville Cabinet Company and demanded tax on the properties lying within the corporate limits of the town; that the owners refused to pay the tax; that said owners offered to pay $100.00 by way of compromise; that the said governing body accepted the offer by way of compromise.

"That the Legislature of North Carolina enacted a statute entitled 'An Act to Validate the Acts of the Town of Stoneville with Regard to Taxation,' chapter 87, Private Laws of 1935. That said act provides: 'That the acts of the board of commissioners of the town of Stoneville in compromising and settling said claim for taxes against the property of the Stoneville Cabinet Company, Inc., and its successors in title, for the years prior to one thousand nine hundred and thirty-five be and are hereby ratified, approved, and validated.'

"Upon the facts found, the court is of the opinion that *mandamus* will not lie. It is therefore considered, ordered, and adjudged that the petition be and is hereby denied. J. H. Clement, Judge, 11th Judicial District."

To the signing of the foregoing judgment the plaintiffs, petitioners, excepted, assigned error, and appealed to the Supreme Court.

Sharp & Sharp and Fred S. Hutchins for plaintiffs, petitioners.
P. W. Glidewell and Allen H. Gwyn for defendants.

CLARKSON, J. The plaintiffs except and assign error on the ground that the court below erred in failing to make the findings of fact and holdings of law requested by the plaintiffs in Judgment Nos. 1 and 2, and failing to sign same. We do not think these exceptions and assignments of error are borne out by the record.

The record discloses: (1) "The petitioners tendered Judgment No. 1 and requested the court to sign it. This the court refused to do, whereupon petitioners except." (2) "Petitioners then tendered Judgment No. 2, and requested the court to sign the same; this the court refused to do. To this refusal, the petitioners excepted."

There is set forth in the record Judgment Nos. 1 and 2 tendered by plaintiffs, petitioners. It is well settled in this jurisdiction, "If a party thinks that certain findings of fact should be made as material to the case, he should present the same to the court with the request to make such findings; otherwise they will not be considered on appeal." N. C. Prac. and Proc. in Civil Cases (McIntosh), p. 555.

Const. of N. C., Art. V, sec. 3, in part, is as follows: "Laws shall be passed taxing, by a uniform rule, all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise; and, also, all real and personal property, according to its true value in money," etc. This constitutional provision has been recently discussed in several cases. *Ins. Co. v. Stinson, ante,* 69; *Mecklenburg County v. Sterchi Bros. Stores, Inc., ante,* 79; *County of Mecklenburg v. Piedmont Fire Ins. Co., ante,* 171.

N. C. Code, 1935 (Michie), sec. 7971 (50) 5, in part, is as follows: "The board of county commissioners or the governing body of any municipal corporation is hereby authorized and empowered to settle and adjust all claims for taxation arising under this section or any other section authorizing them to place on the tax list any property omitted therefrom."

Private Laws of 1935, ch. 87, sec. 3, is as follows: "That the acts of the board of commissioners of the town of Stoneville in compromising and settling said claim for taxes against the property of the Stoneville Cabinet Company, Inc., and its successors in title for the years prior to one thousand nine hundred and thirty-five, be and are hereby ratified, approved, and validated."

The governing body of the town of Stoneville settled this controversy under the provisions of law above set out and the General Assembly "ratified, approved, and validated" the compromise and settlement.

There is no finding of fact that the defendant board of commissioners of the town of Stoneville acted in bad faith in making the compromise settlement of the tax, or abused its power or discretion in so doing. So, the only question presented is: Can *mandamus* be resorted to? We think not.

In *Woodmen of the World v. Comrs. of Lenoir,* 208 N. C., 433 (434), speaking to the subject, it is said: "The extraordinary writ of *mandamus* is never issued unless the party seeking it has a clear legal right to demand it, and the defendant must be under a legal obligation to perform the act sought to be enforced. *John v. Allen,* 207 N. C., 520."

The judgment of the court below is

Affirmed.

STACY, C. J., and CONNOR, J., dissent.

MRS. ALICE T. BURTON v. MRS. PEARL T. STYERS, ADMINISTRATRIX OF ESTATE OF G. D. WILLIAMS,

and

D. C. BURTON v. MRS. PEARL T. STYERS, ADMINISTRATRIX OF ESTATE OF G. D. WILLIAMS.

(Filed 15 June, 1936.)

1. **Evidence D b—Husband and wife held competent to testify, each in the other's favor, as to transaction with decedent.**

   Husband and wife instituted separate suits to recover, each respectively, for personal services rendered by them to defendant's testate. The actions were consolidated for trial with defendant's consent. The husband and wife were allowed to testify as to what services each saw the other render testate, and as to declarations of testate made to the other in the hearing of the witness. Upon the admission of the testimony, and again in the charge, the court instructed the jury that the testimony of the husband was to be considered by them only in regard to the wife's action, and that the testimony of the wife was to be considered by them only in regard to the husband's action. *Held:* Each witness was competent to testify for the other, since neither had a direct pecuniary interest in the action of the other, and was not therefore an interested party in the other's action within the meaning of C. S., 1795, and the testimony not being as to a transaction between the witness and the deceased, but between a third party and deceased, and the fact that the husband and wife, upon former employment, had placed their earnings in a common fund does not alter this result, since it is insufficient to show that either had a pecuniary interest in the other's recovery in the respective actions involved.

2. **Executors and Administrators D b—**

   In an action to recover for personal services rendered decedent upon *quantum meruit*, and also upon alleged expressed promise to pay, the will of decedent is properly excluded from evidence as not being material to the issue.

APPEAL by defendant from *Rousseau, J.*, at November Term, 1935, of ROCKINGHAM.

Two separate actions for personal services to decedent, one on the part of Mrs. Alice T. Burton and the other on the part of D. C. Burton, were by consent of all parties and for convenience tried together.

In each case the plaintiff alleged a cause of action for services rendered to defendant's testator, an aged and feeble person, and sought compensation both on the ground of express agreement to pay and upon *quantum meruit*.

The plaintiff in the first named action and the plaintiff in the second are husband and wife.

During the trial, Mrs. Alice T. Burton was permitted, over objection, to testify to what services she saw D. C. Burton render to decedent, and D. C. Burton was permitted, over objection, to testify to what services he saw Mrs. Alice T. Burton render to decedent, the judge in each instance cautioning the jury to consider the evidence of the wife only in the husband's suit, and the evidence of the husband only in the wife's suit. This caution was repeated in the charge to the jury at the close of the testimony.

Separate issues in each case were submitted to the jury and answered in favor of the respective plaintiffs, and from judgments thereon defendant appealed.

P. T. Stiers and Henry P. Lane for plaintiffs.
H. R. Scott and Sharp & Sharp for defendant.

DEVIN, J. The determinative question presented by the appeal in these cases involves the competency of the testimony of Mrs. Burton in behalf of and in support of her husband's suit, and of the testimony of Mr. Burton in behalf of and in support of his wife's suit, against the administratrix of a deceased person. Was this testimony rendered incompetent by C. S., 1795? This statute, since its enactment as a part of the Code of Civil Procedure of 1868, has been frequently considered by this Court and discriminating distinctions drawn as to its application to varying facts. It provides, in effect, that "upon the trial of an action . . . a party or person interested in the event . . . shall not be examined in his own behalf or interest . . . against the administrator of a deceased person . . . concerning a personal transaction or communication between the witness and the deceased."

It has been consistently held by this Court that the prohibition against the testimony of a "person interested in the event" extends only to those having a "direct legal or pecuniary interest," and not to the sentimental interest the husband or wife would naturally have in the lawsuit of the other. *Hall v. Holloman,* 136 N. C., 34; *Helsabeck v. Doub,* 167 N. C., 205; *Vannoy v. Stafford,* 209 N. C., 748; C. S., 1801.

Hence, the fact of the relationship of husband and wife would not of itself render the testimony of either Mrs. Burton or Mr. Burton incompetent under the statute. These were separate suits. In the suit of D. C. Burton against the administratrix of G. D. Williams, deceased, Mrs. Burton had no legal or pecuniary interest in the recovery by her husband of compensation for services rendered by him to the decedent. In that suit she was neither a party nor interested in the event. The same rule would apply to Mr. Burton when testifying in the suit of

Mrs. Alice Burton against the same administratrix. The trial of the two actions together would not have the effect to alter this rule. It would only impose upon the trial judge the duty to keep clearly in the minds of the jurors the distinction that the testimony of the one was to be considered only in the case of the other, and this the careful and painstaking judge seems to have done, both at the time the evidence was admitted and in his charge to the jury. The defendant consented that the two actions be tried together and cannot now complain of any difficulty occasioned by this situation.

The testimony of Mr. Burton in the one case and of Mrs. Burton in the other, consisted of statements as to what services each saw the other render to the decedent, and as to declarations of the decedent made in the hearing of the witness. It has been repeatedly held that an interested witness may testify of "any substantive and independent fact," that is not a communication or personal transaction with the deceased (*Witty v. Barham,* 147 N. C., 479), and of facts which the witness knew otherwise than from a transaction or communication with the deceased. *Gray v. Cooper,* 65 N. C., 183.

And in *March v. Verble,* 79 N. C., 19, it was held that the testimony of an interested witness of a substantive and independent fact was not rendered incompetent because in association with other matters, proved *aliunde,* it tended to charge the intestate's estate. The statute prohibits an interested witness from giving evidence of a personal transaction between the witness and the deceased, not one between witness and a third party, even though the transaction or communication took place in the presence of the deceased. *Barton v. Barton,* 192 N. C., 453; *In re Mann,* 192 N. C., 248.

In *Abernathy v. Skidmore,* 190 N. C., 66, an action to correct a mistake in a deed, it was held that an interested witness was not precluded by this statute from testifying to a conversation between the deceased and one who was then a party to the action. In stating the opinion of the court in that case, *Clarkson, J.,* uses this language: "The mischief the statute was passed to prevent was the giving of testimony by a witness interested in the event as to a personal transaction or communication between witness and the deceased person whose lips are sealed in death."

In *Zollicoffer v. Zollicoffer,* 168 N. C., 326, it was said: "There could be no valid objection to it (the testimony of the plaintiff), as the witness was not speaking of any communication or transaction between him and the deceased, but of one between the deceased and a third party."

The latest utterance on the subject by this Court is found in *Vannoy v. Green,* 206 N. C., 80, wherein *Brogden, J.,* quoted from *Johnson v.*

Cameron, 136 N. C., 243, as follows: "But here the witness testified as to no transaction or communication between herself and W. M. Cameron. It was a transaction between W. M. Cameron and her husband, and as to that she is a competent witness, notwithstanding her interest. . . . This case does not turn upon the witness being a party or interested in the event, she is both. But the transaction with the deceased here testified to by a party to the action was not between the witness and the deceased, and hence, by the terms of the statute and by the decisions, . . . the witness was properly admitted to testify in regard thereto."

The holding in *Brown v. Adams,* 174 N. C., 490, is not in conflict with this view. In that case the plaintiff Maggie Brown, in the same action, brought suit for herself individually and as administratrix of her deceased mother for compensation for services rendered to the decedent by both her and her mother. On the trial she offered to testify to a conversation in her presence between the deceased and her mother, wherein the intestate agreed to compensate her for services, and this evidence was held incompetent, the Court pointing out that this involved a personal transaction, a conversation, between the plaintiff and the deceased. The distinction between that case and the one under consideration is obvious. Here the testimony in each case is by a disinterested witness as to substantive and independent facts.

It was urged that this testimony should have been excluded on the ground that a partnership relation existed between the plaintiffs, in view of the testimony that Mr. and Mrs. Burton had previously been separately employed, and that their earnings were placed in a common fund. But this evidence could not be held to be sufficient to show that either had a legal or pecuniary interest in the recovery the other might secure as compensation for services to defendant's testator. *Croom v. Lumber Co.,* 182 N. C., 217. Nor was there error in sustaining the objection to the introduction of the will of G. D. Williams. This evidence was not material to any issue here raised and its exclusion was in no way prejudicial.

The plaintiffs' evidence was strongly controverted by the defendant, but this left it a matter for the jury. The cases seem to have been fairly presented by the trial judge. The triers of the facts have spoken in favor of the plaintiffs, and on the record we find no good ground for disturbing the result.

No error.

MALITTA WEST v. THE PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY.

(Filed 15 June, 1936.)

Insurance J b—Wrongful termination of contract by insurer does not relieve insured from obligation to pay or tender payment of premiums.

The beneficiary of a life certificate under a group policy may not recover the amount thereof upon the death of the insured employee upon the contention that the termination of the insurance by the insurer prior to insured's death was wrongful, when it appears that insured, after notice of termination by insurer, accepted his wages without deduction for premiums for a period of nine consecutive months, and failed to make protest or tender the premiums, it being incumbent on insured, even if insurer's termination of the contract was wrongful, to keep the insurance in force by paying, or offering to pay, the premiums called for in his contract.

APPEAL by plaintiff from *Clement, J.*, at March Term, 1936, of ROCKINGHAM. Affirmed.

Action by plaintiff beneficiary upon an insurance certificate issued by defendant on the life of W. A. West, her husband, heard upon agreed statement of facts.

It was admitted that on 14 May, 1930, upon execution of application and "pay roll deduction authorization" by W. A. West, an employee of Southern Railway Company, the defendant issued its policy of accident and health insurance No. 1110601, and attached thereto Life Certificate No. N. D. 19861 on the life of said W. A. West. The Life Certificate, at the top, carried the words: "Issued in connection with Accident and Health Policy No. 1110601."

The "pay roll deduction authorization" was in the following words:

"To Treasurer, Southern Railway Company, and/or its affiliated companies:

"Having made application for Accident and Health Insurance under the Southern Railway and/or its affiliated companies Employees Group Accident and Health Plan, I hereby authorize you to deduct from my wages which may be earned in the month of June, 1930, $3.35 (deduction covering one month's premium), and $3.35 per month each month thereafter during the life of such insurance, and to apply each deduction in payment of premiums for accident and health insurance issued to me by the Provident Life and Accident Insurance Company of Chattanooga, Tenn. (Signed) W. A. West."

Pursuant to said pay roll deduction authorization, the Southern Railway Company paid for W. A. West to the defendant all premiums necessary to keep said insurance in force to June 1, 1934. No payments

on premiums were made by insured except by means of said deduction authorization.

On 24 May, 1934, the defendant wrote the Southern Railway paymaster that the W. A. West Policy No. 1110601 was "to be terminated upon payment of May premium installment," and no further deductions on defendant's account were to be made. After 1 June, 1934, all wages which W. A. West earned, including all sums which had heretofore been deducted and remitted to defendant to cover premiums on said insurance, were paid to and received by W. A. West from the Southern Railway Company.

On 28 May defendant wrote the insured W. A. West as follows:

"MR. W. A. WEST,
"Reidsville, N. C.

"DEAR SIR:—In connection with your recent claim, we find that you are now employed as section laborer, which is different to the work you were performing at the time you first secured your Provident policy. Therefore, in accordance with its conditions and provisions, this is notice that the same will not be renewed or continued in force after next anniversary date June 1st. However, we shall be glad to consider issuing you a new policy at that time for a principal sum of $500.00 and $20.00 monthly accident and health indemnity, together with a $500.00 Natural Death certificate.

"If you have no disposition to make application for the new policy, but desire to convert your Natural Death Certificate No. 19861 to a policy of ordinary life insurance of a like amount, then we will be glad to consider doing so, if you will make application for such conversion within 30 days from June 1st. The premium on the new policy will be higher than you are paying under the Certificate."

To the letter to him W. A. West wrote the defendant to its home office on 11 June, 1934, referring to policy No. 1110601, and denied there had been any change in the character of his work. W. A. West did not, subsequent to 1 June, 1934, make application to defendant for the conversion of Certificate 19861 into an ordinary life policy, as allowed under the Certificate.

On 21 February, 1935, the said W. A. West died. Payment of the insurance was refused on the ground that at the time of the death of W. A. West the insurance was not in force.

The Accident and Health Insurance Policy No. 1110601 contained the provision that "the company may cancel this policy at any time by written notice delivered to the insured, or mailed to his last address." And the Life Certificate attached to the said policy provided: "In the

event of the cancellation of the Accident and Health Policy in connection with which this certificate is issued, the insured shall be entitled to have issued by the company, without medical examination, . . . a policy of Ordinary Life Insurance in equal amount."

From judgment of nonsuit, the plaintiff appealed.

W. R. Dalton for plaintiff.
Brown & Trotter for defendant.

DEVIN, J. The plaintiff challenges the correctness of the judgment on the ground that the Life Certificate issued by defendant on the life of W. A. West and attached to the accident and health insurance policy was a separate contract of insurance on the life of the insured, and that in the certificate, as distinguished from the policy, there is no right to cancel reserved by the defendant; that, at most, an option is therein extended to the insured to have a policy of ordinary life insurance issued him by the company.

But, without deciding whether the contract of insurance issued in this case by the defendant was indivisible or consisted of two separable contracts, the nonsuit must be sustained upon another ground.

The Life Certificate, under which plaintiff claims, obligated the insured to pay on the first day of each month a monthly premium of sixty cents. It is admitted that nine consecutive monthly premiums were unpaid at the time of the death of the insured, and that after due notice from the defendant of the termination of the accident and health policy, including the Life Certificate, and cessation of pay roll deductions for the payment of premiums, the insured raised no objection, offered no protest, made no payments, and neither tendered nor offered a single monthly premium during his life, but, on the contrary, received his wages undiminished by any deductions.

Even if the defendant wrongfully terminated the insurance, that did not relieve the insured, if he desired to insist on its continuance, from his obligation to pay, or offer to pay, the premiums called for in his contract.

In *Trust Co. v. Ins. Co.*, 173 N. C., 558, it was held that if the insurer refused to perform its part of the contract, and so notified the insured, three remedies were given the latter:

"(1) He may elect to consider the policy at an end and recover its value. (2) He may sue to have the policy declared in force. (3) He may tender the premiums and treat the policy as in force and recover the amount payable on it at maturity."

"A party to a contract cannot maintain an action for its breach without averring and proving performance of his own antecedent obligations

or some legal excuse for nonperformance." *Wade v. Lutterloh,* 196 N. C., 116; *Edgerton v. Taylor,* 184 N. C., 571; *Supply Co. v. Roofing Co.,* 160 N. C., 443; *Ducker v. Cochrane,* 92 N. C., 597.

In *Whitmire v. Insurance Co.,* 205 N. C., 101, this Court had under consideration a policy of accident and health insurance issued by this same defendant. There the policy had been canceled in accordance with its terms. In the opinion of the Court, written by *Stacy, C. J.,* we find these words: "The plaintiff (the insured) did not reply to this letter, but received, without protest, his October earnings without any premium deduction."

Judgment affirmed.

W. E. SHUFORD v. BLUE RIDGE BUILDING AND LOAN ASSOCIATION AND B. E. GREENE, RECEIVER.

(Filed 15 June, 1936.)

1. Appeal and Error F b—

In an action tried by the court by agreement, an exception to the judgment presents the single question of whether the findings of fact are sufficient to support the judgment.

2. Building and Loan Associations D a—Borrowing stockholder held not entitled to preference for amount paid on stock after limitation of association's operations by Insurance Commissioner.

Defendant building and loan association was ordered by the Insurance Commissioner to cease making loans and paying out its funds and selling capital stock after the Commissioner had found, upon investigation, that its capital stock was impaired. Two years and three months thereafter a receiver was appointed to liquidate its affairs. Petitioner seeks to have payments on capital stock, made by him during the two years and three months after the association's operations were restricted, declared a preference against its assets. *Held:* The Commissioner did not find upon his audit that the association was insolvent, but only that its capital stock was impaired, and it does not appear that, at that time, there was no prospect of the association's resuming former operations, and the corporate existence of the association was not terminated and its assets placed in liquidation until the date the receiver was appointed, and petitioner is not entitled to the preference claimed by him.

APPEAL by petitioner, J. M. Westall, from *McElroy, J.,* at April Term, 1936, of BUNCOMBE. Affirmed.

In the above entitled action, after the appointment of a receiver, J. M. Westall filed a petition asking to have the payments made by him subsequent to 30 September, 1933, on his subscriptions to stock in the defendant Building and Loan Association, which had been pledged as security for a loan to him by the association, declared a preferential claim, which petition the receiver denied.

Counsel waived trial by jury, and the court, by consent, found the facts and entered judgment denying the petitioner the right to a preferential claim, to which the petitioner excepted and appealed to the Supreme Court.

Sale, Pennell & Pennell for petitioner, appellant.
Johnston & Horner for defendants, appellee.

SCHENCK, J. There is but one assignment of error and that is to "the signing of the judgment," and this presents the single question as to whether the facts found are sufficient to support the judgment. *Wilson v. Charlotte,* 206 N. C., 856. The facts found are contained in the third paragraph of the judgment, which is as follows:

"That on or about 16 July, 1931, J. M. Westall became a subscriber for 59 shares of Series 75-B stock of the Blue Ridge Building and Loan Association, and that on said date he borrowed from said association the sum of $11,800.00, securing same by deed of trust on improved real estate within the city of Asheville and pledged the stock as additional collateral for said loan; that since 17 July, 1931, the said J. M. Westall made payments on said stock subscription totaling $3,466.25, of which sum $1,740.50 was paid prior to 30 September, 1933, and $1,725.75 was paid after 30 September, 1933, and prior to 26 December, 1935; that prior to 30 September, 1933, the sum of $89.68 was allocated to the stock subscribed for by J. M. Westall as earnings or profits of the association; that on 30 September, 1933, it became apparent by an audit conducted by the Commissioner of Insurance for the State of North Carolina that there was an impairment in the value of the stocks of the Blue Ridge Building and Loan Association to the extent of sixteen per cent, and the Blue Ridge Building and Loan Association was thereupon directed by the Commissioner of Insurance to cease making loans or paying out funds on stock by reason of the said impairment, and was further directed to make no further sales of its capital stock; that thereafter, and on 26 December, 1935, an order was made appointing E. L. Ray, trustee, of the Blue Ridge Building and Loan Association, for the purpose of liquidating, and that upon the resignation of the said E. L. Ray, as trustee, B. E. Greene was duly appointed receiver, and is now the duly qualified and acting receiver of the Blue Ridge Building and Loan Association; that said Blue Ridge Building and Loan Association has no creditors in excess of two hundred ($200.00) dollars, other than subscribers to its stock."

The decision of this case turns upon the determination of the status of the Blue Ridge Building and Loan Association after 30 September, 1933, and prior to 26 December, 1935, the date the first receiver was

appointed. The payments involved were made between 30 September, 1933, and 26 December, 1935. If the corporate defendant ceased to do business on 30 September, 1933, then it would appear that the position of the petitioner is well taken but, on the other hand, if the corporate defendant did not cease to do business until 26 December, 1935, then the position of the petitioner is untenable.

The determinative facts are "that on 30 September, 1933, it became apparent by an audit conducted by the Commissioner of Insurance for the State of North Carolina that there was an impairment in the value of the stock of the Blue Ridge Building and Loan Association to the extent of sixteen per cent, and the Blue Ridge Building and Loan Association was thereupon directed by the Commissioner of Insurance to cease making loans or paying out funds on stock by reason of said impairment, and was further directed to make no further sales of its capital stock." It will be noted that the court does not find that the Commissioner of Insurance found that the Blue Ridge Building and Loan Association was insolvent on 30 September, 1933, but only finds that it became apparent at that time that there was an impairment of the stock, and that the court does not find that the Commissioner of Insurance at that time did anything to take over the business of the association by the appointment of a receiver or otherwise, but only limited its business by directing that it cease making loans and paying out funds and selling capital stock, thereby conserving assets and avoiding new liabilities. While the Blue Ridge Building and Loan Association, from 30 September, 1933, to 26 December, 1935, was limited in its operation, still it remained in business as a building and loan association under its charter and in its own name. This the petitioner recognized by continuing to make his regular monthly payments on his subscriptions to stock up until 26 December, 1935. While the limitation placed upon the operation of the association by the Commissioner of Insurance may have given to the petitioner, or to any other corporator, the right to have had the association judicially declared insolvent and a receiver appointed, thereby terminating the existence of the association and bringing about a liquidation of its assets, in the absence of any action instituted for this purpose there was no termination of the association's corporate existence.

The corporate existence of the Blue Ridge Building and Loan Association ceased on 26 December, 1935, the date the receiver was appointed. Such was the holding in *Strauss v. Building and Loan Association,* 117 N. C., 308, relied upon in appellant's brief. In that case it is said: "On 24 July the first receiver was appointed, and the corporation ceased at that time, Endlich, *supra,* 528," and again, "The appointment of the receivers of this insolvent corporation caused the debts and mortgages due the concern to mature, and they may be collected at once. Endlich, *supra,* sec. 523."

In Endlich on Building and Loan Associations (2d Ed.), par. 527, it is said: ". . . Where a building association has become incompetent to perform its obligations to its shareholders, by reason of insolvency, and its affairs have actually been placed in the hands of receivers, with no remaining prospect that the building association will ever resume its former operations," a shareholder "is not liable to be charged for periodical dues and fines, accruing subsequently to the receiver's appointment, as if the association were continuing in business and would be able to discharge its obligations toward him during its probable duration." In other words, the obligations of a subscriber for stock under his contract with a building and loan association cease when the association's "affairs have actually been placed in the hands of receivers, with no remaining prospect that the building association will ever resume its former operations." In the case at bar, the affairs of the association had not been actually placed in the hands of a receiver on 30 September, 1933, nor does it appear that at that time there was no remaining prospect of the association's resuming former operations.

Holding as we do that the Blue Ridge Building and Loan Association did not cease to exist until the appointment of the receiver on 26 December, 1935, any payments made by the petitioner on his subscriptions to stock prior to that date were made by him as a corporator to the association, and therefore "must first be credited in discharge of his pro rata share of the losses of the concern just as, in a contrary event, he would have been credited with his share of the profits, and after payment of such losses the mortgaged property as well as himself is liable for the assessments necessary to mature his stock." *B. and L. Association v. Blalock*, 160 N. C., 490. Such was the result of the judgment entered in the Superior Court.

Affirmed.

MARSHALL CASKEY, CARRIE LYLES, ETTA HOWELL, BERTHA CARMON, JULIE M. GAITHER, LUCILLE O. JOHNSON AND OSCAR L. JOHNSON, THE LAST TWO BEING MINORS, AND APPEARING BY THEIR NEXT FRIEND, D. S. JOHNSON, v. MARY E. WEST, J. H. WEST, SAM WEST, GOLDIE WEST, ANNIE MAY WEST, DICK WEST, AND CORDIE J. WEST.

(Filed 15 June, 1936.)

Adverse Possession B b—Whether possession was taken during life of ancestor held determinative, since heirs' disabilities would not stop running of statute if it began to run against ancestor.

Defendants claimed the *locus in quo* by twenty years adverse possession. Plaintiffs claimed title as heirs at law of their deceased mother, who had

good record title. It appeared that the person under whom defendants claim, by tacking possession, was the husband of one defendant and the father of the other defendants, and had been in open, notorious, continuous, exclusive, and adverse possession of the land for over twenty years, but the evidence was conflicting as to whether he went into such possession before or after the death of plaintiffs' mother. *Held:* If the person under whom defendants claim went into possession after the death of plaintiffs' mother, plaintiffs' right of action did not accrue until after the death of their father and the termination of his tenancy by the curtesy, which was less than twenty years before institution of the action, but if the person under whom defendants claim went into possession prior to the death of plaintiffs' mother, then the statute began to run in defendants' favor before the death of plaintiffs' mother, and did not stop running at her death, but continued to run against plaintiffs notwithstanding any disabilities by reason of their infancy or by reason of their father's tenancy by the curtesy, and the time when defendants' ancestor went into possession is determinative of the rights of the parties, and the issue arising thereon should have been submitted to the jury. C. S., 430.

APPEAL by defendants from *Clement, J.*, at November Term, 1935, of IREDELL. New trial.

This is an action to recover possession of a tract of land situate in Iredell County, North Carolina, and containing fifteen acres, more or less.

It is alleged in the complaint that the plaintiffs, as heirs at law of Mary Caskey, deceased, are the owners and are entitled to the immediate possession of the tract of land described in the complaint, and that the defendants are in the wrongful and unlawful possession of said tract of land, claiming title thereto under C. J. West, deceased, who prior to his death wrongfully and unlawfully entered into the possession of said tract of land. These allegations are denied in the answer. The defendants allege that they, and those under whom they claim, have been in the open, notorious, continuous, exclusive, and adverse possession of the tract of land described in the complaint, under known and visible lines and boundaries, for twenty years and more.

The facts admitted in the pleadings and shown by all the evidence at the trial are as follows:

1. On 14 September, 1893, Emory Hussey conveyed the tract of land described in the complaint to Mary Caskey by a deed which is duly recorded in the office of the register of deeds of Iredell County.

2. Mary Caskey died intestate on 4 July, 1900, leaving surviving her husband, J. E. Caskey, and the following named children: (1) Marshall Caskey, who was born on 5 September, 1888; (2) Carrie Lyles, who was born on 9 January, 1890; (3) Etta Howell, who was born on 13 April, 1892; (4) Bertha Carmon, who was born on 2 July, 1894; (5) Julie M. Gaither, who was born on 9 April, 1896; and (6) Jennie Smith, who was born on 21 March, 1898.

Jennie Smith died intestate on 10 February, 1923, leaving surviving two children, Lucille O. Johnson and Oscar L. Johnson, both of whom are now minors.

J. E. Caskey, the surviving husband of Mary Caskey, deceased, died on 22 June, 1928.

The evidence for the plaintiffs tended to show that C. J. West, husband of the defendant Mary E. West, and father of the other defendants, entered into the possession of the tract of land described in the complaint after the death of Mary Caskey, under whom the plaintiffs claim, to wit, during the year 1902.

The evidence for the defendants tended to show that C. J. West, husband of the defendant Mary E. West and father of the other defendants, entered into the possession of the tract of land described in the complaint before the death of Mary Caskey, under whom the plaintiffs claim, to wit, during the year 1894, and that he was in possession of said tract of land at her death.

All the evidence showed that from the date on which he entered into possession of the tract of land described in the complaint until the date of his death in 1933, the said C. J. West was in the open, notorious, continuous, exclusive, and adverse possession of said tract of land, and that since his death the defendants, claiming under him, have been in such possession of said tract of land.

This action was begun on 7 April, 1934.

The issues submitted to the jury are as follows:

"1. Are the plaintiffs the owners and entitled to the immediate possession of the tract of land described in the complaint? Answer: ....

"2. Have the defendants been in the open, notorious, continuous, exclusive, and adverse possession of the tract of land described in the complaint for twenty years next preceding the commencement of this action? Answer: ...."

The court instructed the jury that on the facts shown by all the evidence they should answer the first issue "Yes" and the second issue "No." The defendants duly excepted to the instructions of the court to the jury as to both issues.

The jury, in accordance with the instructions of the court, answered the first issue "Yes" and the second issue "No."

From judgment that the plaintiffs are the owners and are entitled to the immediate possession of the tract of land described in the complaint, and that they recover of the defendants the costs of the action, the defendants appealed to the Supreme Court, assigning as error the instructions of the court to the jury.

Adams, Dearman & Winberry for plaintiffs.
Lewis & Lewis for defendants.

CONNOR, J. At the death of Mary Caskey, intestate, on 4 July, 1900, the tract of land described in the complaint, which had been conveyed to her by Emory Hussey by deed dated 14 September, 1893, descended to her children, as her heirs at law, subject to the life estate of her husband, J. E. Caskey, who survived her. C. S., 2519.

The plaintiffs, as heirs at law of Mary Caskey, deceased, were not entitled to the possession of the tract of land described in the complaint until the death of their father, J. E. Caskey, on 22 June, 1928. *Blount v. Johnson*, 165 N. C., 25, 80 S. E., 882; *Hauser v. Craft*, 134 N. C., 319, 46 S. E., 756; *Huneycutt v. Brooks*, 116 N. C., 788, 21 S. E., 588. The statute of limitations, C. S., 430, therefore did not begin to run against the plaintiffs and in favor of the defendants until 22 June, 1928, and the action of the plaintiffs to recover possession of said tract of land is not barred by the statute, unless the statute began to run against Mary Caskey, under whom the plaintiffs claim, prior to her death. In that case, the statute having begun to run during the life of the ancestor of the plaintiffs, did not stop running at her death, but continued to run against her heirs at law, notwithstanding their disabilities, if any, under the statute or otherwise. *Holmes v. Carr*, 172 N. C., 213, 90 S. E., 152. In *Chancey v. Powell*, 103 N. C., 159, 9 S. E., 298, it is said: "We regard it as well settled that if the statute begins to run against the ancestor or devisor, it continues to run after his death notwithstanding the infancy of the heir or devisee. There is no difference between voluntary and involuntary disability."

There was error in the instructions of the court to the jury as to both issues submitted to the jury at the trial of this action.

The question of fact as to whether C. J. West entered into possession of the land described in the complaint before or after the death of Mary Caskey should have been submitted to the jury. The answer to this question will be determinative of the action.

If the jury shall find, in answer to an appropriate issue involving this question, that C. J. West entered into possession of the land described in the complaint after the death of Mary Caskey—that is, in 1902, as the evidence for the plaintiffs tends to show—then and in that case the statute of limitations did not begun to run against the plaintiffs, until *their* cause of action accrued, to wit: On 22 June, 1928. In that case, the action of the plaintiffs is not barred by the statute of limitations, and the plaintiffs are entitled to recover in this action.

If on the other hand, the jury shall find that C. J. West entered into possession of said land before the death of Mary Caskey—that is, in 1894, as the evidence for the defendants tends to show, then and in that case the statute of limitations began to run during the life of Mary Caskey, and was running in favor of C. J. West at her death. It con-

tinued to run after her death in favor of C. J. West and against the heirs at law of Mary Caskey, notwithstanding *their* cause of action did not accrue until the death of their father. When the tract of land described in the complaint descended to the heirs at law of Mary Caskey at her death, they succeeded to her title to said land, which vested in them subject to such rights as had been acquired by C. J. West against Mary Caskey. If C. J. West was in the adverse possession of the tract of land at the death of Mary Caskey, then, upon remaining in such possession continuously for twenty years, he acquired a title in fee to said land against Mary Caskey and all persons claiming under her. C. S., 430. In that case, the plaintiffs cannot recover in this action.

The defendants are entitled to a new trial. It is so ordered.

New trial.

GREENSBORO ICE AND FUEL COMPANY v. SECURITY NATIONAL BANK.

(Filed 15 June, 1936.)

1. **Banks and Banking F e—Evidence held not to disclose that corporation was negligent in failing to discover forgeries of its bookkeeper.**

   The evidence disclosed that plaintiff corporation employed its bookkeeper after investigation disclosing his character to justify such employment, that for a period of months the bookkeeper forged checks on the corporation's account with defendant bank, and obtained the canceled checks from the bank at the end of each month and destroyed the forged checks. *Held:* The bank may not resist recovery by the corporation of the amount paid on the forged checks on the ground that the corporation was negligent in failing to discover the forgeries, since the evidence discloses that the corporation used due care in employing its bookkeeper, and that one of his duties was to examine the bank's statement. and that the corporation was not, therefore, negligent in failing to have another employee also examine the statement for errors and forgeries.

2. **Same—Depositor must notify bank of forgeries within sixty days from receipt of bank's statement by depositor's authorized agent.**

   The receipt of a corporation's bank statement by the corporation's bookkeeper is receipt of the statement by the corporation, and the corporation may not recover against the bank for the payment of forged checks against its account when notice of such forgeries is not given the bank within sixty days after such receipt of the bank statement, C. S., 220 (h), even though the checks were forged by the bookkeeper, who destroyed them after he received the canceled checks from the bank.

APPEAL by plaintiff from *Rousseau, J.*, at January Term, 1936, of GUILFORD. New trial.

This is an action to recover the aggregate amount of certain checks set out in the complaint, which were drawn on and paid by the defendant, and subsequently charged by the defendant to the account of the plaintiff.

It is alleged in the complaint that plaintiff did not draw or authorize the payment of the checks set out in the complaint. This allegation is denied in the answer.

In further defense of the action the defendant alleges in its answer that if the checks set out in the complaint were not drawn by the plaintiff, and are forgeries, the forgeries were committed by Roy L. Smith, who was employed by the plaintiff as a bookkeeper, and that plaintiff failed to exercise due care in employing Roy L. Smith as a bookkeeper, and should be and is estopped by its negligence from recovering in this action for any loss which it has suffered by reason of the dishonesty of the said Roy L. Smith.

In further defense of the action the defendant alleges in its answer that the checks set out in the complaint, after they had been paid by the defendant and charged to plaintiff's account, were returned to the plaintiff marked "Paid," at the end of the month during which they were paid, and that plaintiff failed to exercise due care to discover that said checks were forgeries, and failed to notify defendant within a reasonable time after the return of said checks that they were forgeries, and should be and is estopped by its negligence from recovering in this action for any loss which it has suffered by reason of its failure to exercise due care to discover that said checks are forgeries, and to notify the defendant of such discovery.

In further defense of the action the defendant alleges in its answer that plaintiff failed to notify defendant within 60 days after the return of said checks that said checks were forgeries, and that for that reason under the provisions of C. S., 220 (h), the defendant is not liable to the plaintiff in this action.

It was admitted in the pleadings which were offered as evidence at the trial that checks drawn on the defendant were paid and charged to plaintiff's account by the defendant, as follows:

(1)	Check dated 22 June,	1934, for.........	$ 33.00
(2)	Check dated 30 June,	1934, for.........	100.00
(3)	Check dated 10 July,	1934, for.........	140.00
(4)	Check dated 30 July,	1934, for.........	95.25
(5)	Check dated 4 August,	1934, for.........	200.00
(6)	Check dated 13 August,	1934, for.........	150.00
(7)	Check dated 21 August,	1934, for.........	218.02
(8)	Check dated 6 September,	1934, for.........	150.00

(9)	Check dated 27 September,	1934, for	$	62.35
(10)	Check dated 9 October,	1934, for		200.00
(11)	Check dated 13 November,	1934, for		200.00
(12)	Check dated 27 November,	1934, for		50.00
(13)	Check dated 4 December,	1934, for		45.00
(14)	Check dated 10 December,	1934, for		93.03
	Total			$1,736.65

At the trial it was stipulated and agreed by the parties to the action that all of the checks set out in the complaint are forgeries; that the said checks were forged by Roy L. Smith, who at the time they were forged was employed by the plaintiff as a bookkeeper; and that at the end of each month during which said checks were paid and charged to plaintiff's account they were delivered by the defendant, with a statement of plaintiff's account, to Roy L. Smith, who destroyed said checks.

The evidence for the plaintiff showed that the secretary of the plaintiff, who had charge of plaintiff's business, did not check the statement of plaintiff's account with the defendant at the end of each month, and thereby ascertain whether the items charged on said account were supported by canceled checks returned by the defendant with said statement, and that plaintiff did not discover that said forged checks had been paid by defendant and charged to plaintiff's account, during the months of June, July, August, September, October, November, and December, 1934, until 14 December, 1934, and that immediately upon such discovery plaintiff notified defendant that said checks were not drawn by the plaintiff and demanded that defendant pay to plaintiff the aggregate amount of said checks. Upon such demand, the defendant refused to pay said amount.

The issues submitted to the jury were answered as follows:

"1. Was the plaintiff guilty of negligence which proximately contributed to the payment of the forged checks, as alleged? Answer: 'Yes.'

"2. What amount, if any, is the plaintiff entitled to recover of the defendant? Answer: 'Nothing.' "

From judgment that plaintiff recover nothing by their action, and that the defendant recover of the plaintiff the costs of this action, the plaintiff appealed to the Supreme Court, assigning errors in the trial.

Sapp & Sapp for plaintiff.
Frazier & Frazier for defendant.

CONNOR, J. Conceding without deciding that negligence on the part of the plaintiff, as alleged in the answer, would have estopped the plain-

tiff from recovery in this action, we are of the opinion that there was no evidence at the trial tending to sustain these allegations. The submission of the first issue and the instructions in the charge of the court to the jury with respect to said issue was error for which the plaintiff is entitled to a new trial.

The evidence showed that at the time plaintiff employed Roy L. Smith as its bookkeeper, plaintiff, through its officers, made due inquiry as to his character and qualification as a bookkeeper, and that the information disclosed by such inquiry justified his employment by the plaintiff. Plaintiff had no reason to suspect that its bookkeeper, Roy L. Smith, was a forger until 14 December, 1934, when an investigation of his accounts as recorded in plaintiff's books showed discrepancies in said accounts which led to the discovery that he had forged and collected from the defendant the checks set out in the complaint.

The evidence further showed that it was the duty of Roy L. Smith, as the bookkeeper of the plaintiff, to keep plaintiff's account with the defendant, and at the end of each month to call for and receive from the defendant the monthly statement of said account, together with all checks which had been paid by the defendant and charged to plaintiff's account during the preceding month. It was not the duty of the secretary or of any other officer of the plaintiff to examine said statement and canceled checks. Roy L. Smith was employed by the plaintiff for that purpose, and plaintiff relied on him to examine the said monthly statements and canceled checks, for the purpose of ascertaining whether or not there were any errors in the statements. The receipt by Roy L. Smith, as the authorized agent of the plaintiff, of the canceled checks paid by the defendant during the preceding month, at the end of the month, was the receipt of said checks by the plaintiff.

On all the facts admitted in the pleadings and at the trial, the liability of the defendant to the plaintiff in this action must be determined by the provisions of the statute (C. S., 220 [h]), which reads as follows:

"No bank shall be liable to a depositor for payment by it of a forged check or other order to pay money, unless within sixty days after the receipt of such voucher by the depositor he shall notify the bank that such check or order is forged."

Under the provisions of this statute, the defendant is not liable to the plaintiff for any of the forged checks set out in the complaint and paid by the defendant more than sixty days preceding 14 December, 1934. The defendant is liable to plaintiff for all said checks which were paid by the defendant within sixty days preceding 14 December, 1934.

The action is remanded to the Superior Court of Guilford County for a new trial in accordance with this opinion.

New trial.

G. W. BRADDY v. H. F. PFAFF, HUGH PFAFF, ALLEN PFAFF AND WIFE, MARIA PFAFF, AND J. W. MASENCUP.

(Filed 15 June, 1936.)

1. **Evidence I c—Executrix' report showing payment of debt to estate by devisee held competent in action by creditor of devisee.**

Under the terms of the will in this case, the payment of a certain sum to the estate by the devisee was made a condition precedent to the vesting of title in him. Plaintiff, purchaser of the real property at execution sale of a judgment against the devisee, offered in evidence, as proof of payment and that title had vested in the devisee, a special report, duly verified, filed by the executrix stating that the devisee had paid the estate the amount stipulated by the will. *Held:* The special, verified report of the executrix was a document authorized and required to be recorded, was relevant to the issue, and was competent in evidence, its recording purporting verity, C. S., 938, 952, 105, and objection to its admission on the ground of hearsay in that it contained a declaration of a person not a party to the action is untenable, the recorded, verified report being more than a mere declaration by the executrix. C. S., 1779.

2. **Payment A b—Documentary evidence establishing prima facie payment is not conclusive, but is subject to rebuttal.**

A verified report of an executrix, showing payment to the estate of a sum required of a devisee as a condition precedent to the vesting of title in him to the land devised, is *prima facie* proof of payment, but is subject to rebuttal, and where such evidence is challenged by competent evidence to the contrary, the issue of payment is for the determination of the jury.

3. **Trial E c—**

Where it appears that the charge, when read contextually as a whole, was not prejudicial in its manner of stating the evidence and contentions of the parties, an exception, based upon detached portions thereof, will not be sustained. C. S., 564.

APPEAL by defendants from *Clement, J.,* at February Term, 1936, of FORSYTH. No error.

Action to recover certain land by virtue of sheriff's deed in execution against defendant Herbert F. Pfaff. It was denied by defendants that defendant Herbert F. Pfaff had title to said land, and that therefore plaintiff acquired no title by sheriff's deed.

Plaintiff offered evidence tending to show that O. V. Pfaff, father of defendants Herbert F. Pfaff and Allen Pfaff, died December, 1923, seized and possessed of the land in controversy, leaving a last will and testament wherein he appointed his wife, Minerva Pfaff, his executrix. The will contained the following provision: "Herbert Pfaff shall pay what amount he may be owing me to my estate and then the old home place where he now lives will be his."

On 10 January, 1924, the executrix filed inventory, listing, among other personal property, "balance on account of Herbert Pfaff for purchase of land, $5,356.36."

On 10 May, 1924, judgment against Herbert F. Pfaff in favor of Gardner Milling Company in the sum of $702.28, and interest, was duly docketed.

On 19 December, 1925, the following report was filed with the clerk of the Superior Court and recorded in Book 10, page 381:

"NORTH CAROLINA—FORSYTH COUNTY.
IN THE SUPERIOR COURT, BEFORE THE CLERK.

"In the Matter of Minerva Pfaff, Executrix of O. V. Pfaff, Deceased.

"*To C. M. McKaughan, Clerk of the Superior Court:*

"The undersigned, Minerva Pfaff, Executrix of O. V. Pfaff, deceased, reports that in accordance to section 2 of the will of O. V. Pfaff, deceased, wherein he devises to Herbert Pfaff a certain tract of land known as the Home Place, on which he now lives, whenever said Herbert Pfaff pays to the estate the balance due for said land which he had previously contracted to purchase of the said O. V. Pfaff, deceased; and the undersigned Executrix herewith reports that the balance due on the said land on 14 March, 1925, was $5,027.61, and that the same has been paid in full by the said Herbert Pfaff; and I herewith make this special report in order that the title may be vested in the said Herbert Pfaff.

MINERVA PFAFF, *Ex.*,
Executrix of O. V. Pfaff, Dec'd.

"Sworn and subscribed to before me, this 19 December, 1925.

L. C. MCKAUGHAN, *N. P.*
(Notary Seal.)

"My commission expires 26 November, 1927.

"Filed 19 December, 1925.
"C. M. McKaughan, C. S. C.
"Book 10, page 381.
"6-7-1926."

Plaintiff offered deed from Herbert F. Pfaff and wife and Hugh Pfaff and wife to Allen Pfaff, dated 3 January, 1933, for "all their right, title, and interest" in and to the land in controversy.

Plaintiff offered deed to himself from the sheriff, following sale of the land under execution against Herbert F. Pfaff on the Gardner Milling Company judgment, dated 24 October, 1933.

On behalf of the defendants, Minerva Pfaff testified in substance that the report dated 19 December, 1925, though signed and verified by her, was not filed by her, that same was an error, that she signed the paper only for the purpose of aiding Herbert F. Pfaff, if he could, to borrow money sufficient to pay the debt due the estate on the land, and that in fact no money was paid her. That she filed a corrected report as soon as she learned of it on 31 December 1933, which was duly recorded. Defendants Herbert F. Pfaff and Allen Pfaff testified to the same effect.

The corrected report of December, 1933, was offered in evidence, as were also annual accounts of receipts and disbursements of said executrix, dated February, 1926; January, 1928; 19 December, 1931, duly recorded, on which appear no receipts from Herbert F. Pfaff.

Upon issues submitted to the jury there was verdict for plaintiff, and from judgment thereon the defendants appealed.

W. Reade Johnson for plaintiff.
Benbow & Hall and Parrish & Deal for defendants.

DEVIN, J. The correctness of the judgment is assailed on two principal grounds: (1) That the evidence of payment by defendant Herbert F. Pfaff of his indebtedness to the estate was incompetent; and (2) there were errors in the court's instructions to the jury.

1. By the provisions of the will of O. V. Pfaff, the original source of title, the payment of "what amount he may be owing me, to my estate," was made a condition precedent to the vesting of title to the described land in the defendant Herbert F. Pfaff. To show that this condition had been complied with, the plaintiff offered in evidence the report of the executrix, filed and recorded in the office of the clerk of the Superior Court, to the effect that the balance due on said land had been paid in full by said Herbert Pfaff.

Was this competent?

It is a well settled rule that where record books are required or authorized to be kept because the entries therein are of public interest and notoriety, the production of the books by the lawful custodian renders their contents competent if material and pertinent to the issue. 1 Greenleaf Evidence, secs. 483-485. Wherever there is a duty to record official doings, the record thus kept is admissible. Wigmore Evidence, sec. 1639; C. S., 1779; *In re Thorp,* 150 N. C., 487; *Allen v. Royster,* 107 N. C., 278. Here the will had been duly probated and recorded wherein appeared the provision requiring payment by defendant Herbert F. Pfaff as a condition precedent to the vesting of title to devised land; the inventory of the executrix had been duly filed and recorded, and this

showed the debt of Herbert as an asset of the estate. And later, when a duly verified report of the executrix showing receipt of the balance due on this debt was filed, it was a document authorized and required to be recorded, and when so recorded on the official record book, it purported verity and was competent to be received in evidence. C. S., 938; C. S., 952; C. S., 105.

The authorities cited by the defendants are in support of the principle that the declarations of one not a party are violative of the hearsay rule. But in the instant case, the question was not as to a mere declaration of Minerva Pfaff. It was the competency from a record book in the office of the clerk of the Superior Court of the contents of a paper authorized to be filed and recorded there. This report, so recorded, was *prima facie* only, and was subject to be rebutted, corrected, or modified by other competent evidence. The defendants' evidence sharply challenged the correctness of this report and denied the facts therein stated, but that left it a matter for the jury to determine, under appropriate instructions from the court. *Heilig v. Foard,* 64 N. C., 710; *Allen v. Royster, supra; Bean v. Bean,* 135 N. C., 92; *In re Hege,* 205 N. C., 625; *Turner v. Turner,* 104 N. C., 566.

2. It was urged for error that in charging the jury the learned judge stated the evidence and contentions of the parties in a manner not in accord with C. S., 564, and prejudicial to the defendants. Standing alone, some expressions might be capable of an interpretation in support of defendants' contentions, but when taken as a whole and the entire context considered, we find no reversible error.

Unless it appears with ordinary certainty that his manner of arraying and presenting the evidence was likely to be prejudicial, it will not be treated as error. *S. v. Jones,* 67 N. C., 285; *S. v. Browning,* 78 N. C., 555.

"Slight inaccuracies in the statement of the evidence by the court in its charges to the jury, not called to its attention at the time, cannot be held as prejudicial error." *S. v. Sterling,* 200 N. C., 18; *S. v. Sinodis,* 189 N. C., 565.

The case seems to have been fairly presented and the issues of fact determined by the verdict of the jury. Upon the record, we find no sufficient ground to disturb the result.

No error.

M. D. CAFFEY, ADMINISTRATOR, AND ADMINISTRATOR C. T. A. OF THE ESTATE OF W. T. OSBORNE, SR., DECEASED, v. MARY F. OSBORNE, B. A. OSBORNE AND WIFE, LEE OSBORNE; FRANCES GARDNER BENNETT AND HUSBAND, WILLIAM BENNETT; ELIZABETH GARDNER SLATE AND HUSBAND, W. P. SLATE; WILLIAM GARDNER AND WIFE, LEONA GARDNER; JAMES GARDNER AND WIFE, MARGARET GARDNER; CATHERINE GARDNER, J. R. RAYNOR AND WIFE, ETTA OSBORNE RAYNOR; LAURA OSBORNE, EVELYN OSBORNE POWELL AND HUSBAND, G. E. POWELL; PAUL OSBORNE AND WIFE, MARY OSBORNE; MARIEL OSBORNE BLAND AND HUSBAND, J. H. BLAND; MARIE OSBORNE JOHNSON AND HUSBAND, J. B. JOHNSON; HAROLD OSBORNE; FLORENCE OSBORNE CAFFEY AND HUSBAND, M. D. CAFFEY; S. L. RUDD AND WIFE, CLARA OSBORNE RUDD; C. L. OSBORNE AND WIFE, ANNIE APPLE OSBORNE; MRS. MATTIE GILCHRIST OSBORNE, AND HAYWOOD OSBORNE.

(Filed 15 June, 1936.)

1. **Executors and Administrators E a—Order directing administrator to mortgage lands in proceeding had in conformity with statute held valid.**

Plaintiff administrator filed a petition to be authorized to mortgage lands of the estate to raise money to pay debts, the petition alleging that the personalty was insufficient to discharge debts of the estate, and that it was to the best interest of the heirs that the lands be mortgaged rather than a part thereof sold. All beneficiaries of the estate were duly served with summons, and the clerk, upon the verified petition and upon satisfactory proof of its allegations, ordered and directed the administrator to execute the mortgage, and the order of the clerk was duly approved by the judge of the Superior Court, who also directed that the mortgage be executed. *Held:* The order was authorized by N. C. Code, 75, and the motion thereafter made by some of the heirs that it be set aside as not authorized by law was correctly denied.

2. **Executors and Administrators D d—Administrator personally paying debts of estate in good faith is subrogated to rights of creditors.**

Where an administrator, in good faith pending the mortgaging of property of the estate to pay debts, personally pays the debts of the estate, he is entitled to be subrogated to the rights of the creditors whose debts he had paid, and upon the execution of the mortgage, upon order of court, is entitled to repay himself from the proceeds of the loan.

APPEAL by movants, Leon Rudd and wife, from judgment rendered by *Rousseau, J.*, at Chambers, 11 February, 1936. From GUILFORD. Affirmed.

This was a motion in the cause by defendants Rudd and wife to have declared void and set aside an order entered in a special proceeding authorizing the administrator to execute a mortgage on real estate of the decedent to pay the debts of the estate.

There was no controversy as to the material facts.

W. T. Osborne, Sr., died in 1925. The defendants are his widow and children and grandchildren, and only heirs at law. The plaintiff M. D. Caffey is the duly qualified and acting administrator of his estate. The decedent left personal property of the value of about ten dollars, and certain real estate consisting of four small tracts of land aggregating about one hundred and six acres. There were debts of the estate in the sum of about $800.00, including funeral expenses, taxes, and costs of administration, and a $313.00 note payable to one Lucas. The administrator borrowed the money and paid these debts. In August, 1932, the administrator instituted a special proceeding in which all the heirs of the decedent (including the movants), were made parties and petitioned the court for authority to mortgage or sell the real estate for the payment of the aforementioned debts. Guardian *ad litem* for the infant defendants filed answer admitting all allegations of the petition and joining in the prayer that the real estate be mortgaged to pay said debts. No answer was filed by any of the adult defendants.

Thereupon, on 8 March, 1933, the clerk of the Superior Court made an order adjudging that all the defendants were properly before the court, finding the facts as alleged, and that it was impossible to rent the real estate for sufficient return to pay the indebtedness, and that the interest of the beneficiaries of the estate would be materially promoted by executing a mortgage on the real estate for that purpose; that the estate was still open and not settled and closed, and authorizing the administrator to borrow a sum sufficient to pay the debts and costs of administration and to secure the same by mortgage on said real estate.

On 8 March, 1933, the order and decree of the clerk was approved and confirmed by the judge of the Superior Court holding the courts of that district, and the plaintiff administrator empowered and directed to borrow the money and to execute the mortgage for the payment of the debts and costs, in accordance with the order of the clerk.

Pursuant to the order of the clerk and the approval of the judge, the plaintiff administrator executed note and mortgage on the said real estate in the sum of $914.00, being the amount found necessary to pay said debts, interest, and costs. The administrator's accounts for the disbursement of this sum in accordance with the order were audited and approved by the clerk.

On 25 October, 1935, the defendants Leon Rudd and wife filed a motion in the cause asking that the order and judgment of the clerk be set aside and declared void on the ground that the court had no jurisdiction to entertain the petition of the plaintiff; that the administrator could not fix liability on the estate for debts arising after death of the decedent; that it constituted an abuse of discretion to permit the execution of the mortgage with no prospect of repayment, and that an order

for sale of part of the land should have been entered instead of authorizing the execution of a mortgage on the whole.

Upon this motion there was a hearing before the clerk, and the motion was denied. Movants appealed to the judge of the Superior Court, who affirmed the ruling of the clerk, and from the judgment of the Superior Court there was an appeal to this Court.

H. R. Stanley for plaintiff, appellant.
Hobgood & Ward for defendants, appellees.

DEVIN, J. The movants attack the order and judgment of the clerk authorizing the execution of a mortgage on decedent's land by the plaintiff administrator, on two grounds:

(1) That there was no authority in law for making such an order.

(2) That the mortgage was in whole or in part to reimburse the plaintiff for money which he had borrowed to pay the debts of the estate.

Originally, an administrator had no authority to deal with or encumber the real estate of his intestate, and where the personalty was insufficient to pay the debts, he could only file proper petition to sell the real estate to create assets for that purpose. But by statute, Acts 1913, ch. 49, the court was empowered in certain cases to permit him, instead of asking for an immediate sale of the real estate, to rent the same and to borrow the money to pay the debts and to repay such borrowed money from the rents; and by a later statute, Acts 1927, ch. 222, this power was further enlarged, as follows: "In lieu of renting said property or borrowing on the general credit of the estate, as hereinbefore authorized, the said executor, or administrator, may apply by petition, verified by oath, to the Superior Court, showing that the interest of the beneficiaries of the estate, for which he is executor or administrator, would be materially promoted by mortgaging said estate, in whole or in part, to secure funds to be used for the benefit of said estate, . . . which proceeding shall be conducted as in other cases of special proceedings; and the truth of the matter alleged in the petition having been ascertained by satisfactory proof, a decree may thereupon be made that a mortgage be made by such executor, or administrator, in his representative capacity, in such way and on such terms as may be most advantageous to the interest of said estate; but no mortgage shall be made until approved by the judge of the court, nor shall the same be valid unless the order or decree therefor is confirmed and directed by the judge and the proceeds of the mortgage shall be exclusively applied and secured to such purposes and on such trusts as the judge shall specify."

These statutes are brought forward as section 75 of the Consolidated Statutes (Michie's Code).

It is apparent that the proceeding here attacked was carried out in substantial accord with the provisions of the statute. There were findings by the clerk upon the undenied allegations of the verified petition and upon satisfactory proof that mortgaging the land to secure sufficient money to pay the debts of the estate would materially promote the interest of the beneficiaries of the estate. This order and the findings of the clerk were approved, and the execution of the mortgage directed by the judge of the Superior Court. The movants were parties to this proceeding and filed no answer, and no objection seems to have been raised until more than eighteen months after the mortgage was made pursuant to the order and judgment of the clerk and the confirmation and direction of the judge.

The fact that the plaintiff paid the debts of the estate is not controverted. His good faith is in no way impugned. He was not an officious intermeddler. He was therefore entitled to be subrogated to the rights of the creditors whose debts he had paid. *Williams v. Williams,* 17 N. C., 69; *Sanders v. Sanders,* 17 N. C., 262; *Turner v. Shuffler,* 108 N. C., 643; *Denton v. Tyson,* 118 N. C., 542; *Ray v. Honeycutt,* 119 N. C., 510; *Morton v. Lumber Co.,* 144 N. C., 31.

The estate was still unsettled and unclosed, and the debts, so far as the heirs were concerned, were unpaid. Plaintiff would therefore have had the right to require a sale of the land, and this right was extended by virtue of the quoted statutes to the execution of a mortgage for the purpose of acquiring assets to pay debts. C. S., 74 and 75.

While later events may have shown that some other method would possibly have produced a more favorable result to the heirs, the proceeding here seems to have been in all respects according to law, and the judgment of the court below must be

Affirmed.

STATE v. HUGH N. PACE.

(Filed 15 June, 1936.)

1. **Criminal Law L e—Where sentences on several counts run concurrently, error must affect all counts to entitle defendant to a new trial.**

   Where defendant is convicted on several counts of equal gravity, and sentence is imposed on the first count with sentences on the subsequent counts to run concurrently therewith, defendant is not entitled to a new trial for alleged error committed on some of the counts which does not affect the other counts, nor is the contention tenable that error on the first count would upset the concurrent sentences on the remaining counts for lack of valid judgment on the first count.

2. Embezzlement A d—

Restitution by defendant of sums embezzled by him after the crime of embezzlement had been fully consummated is no defense to a prosecution for such embezzlement, such restitution affecting only the civil rights of the parties.

3. Embezzlement A b—

Where a treasurer appropriates funds coming into his hands, the fact that he had not been directed to pay out the funds to those entitled thereto at the time he was apprehended does not constitute a defense, but is correctly submitted to the jury on the question of intent.

APPEAL by defendant from *Williams, J.,* at December Term, 1935, of NEW HANOVER.

Criminal prosecution, tried upon indictment charging the defendant (a person over the age of sixteen years), in seven counts, with embezzlement.

As treasurer and acting recording secretary of Jeff Davis Council, No. 63, Junior Order United American Mechanics, the defendant is charged with receiving from the National Council of said order seven funeral benefit checks or vouchers, in the sum of $250 each, intended for beneficiaries of deceased members of the local council, but which were cashed by defendant and fraudulently converted to his own use. The total amount of money involved is $1,750.

Receipt of the checks is admitted, the defendant contending that he cashed them and had the money in his safe, awaiting an audit and instructions from the trustees of the local council as to the payment of the respective amounts, when he was arrested and charged with the embezzlement of said funds. He contends that thereafter his safe was robbed and the funds stolen.

The evidence of the State is plenary as to the irregular handling of the checks in question—cashing them rather than depositing them in the usual way—failing to pay the beneficiaries upon repeated demands—and refusing to account to the trustees of the local council after numerous requests.

It appears that the items mentioned in the first and second counts of the bill were paid to the beneficiaries entitled to receive them; and defendant contends he was never authorized or instructed to pay the item covered by the seventh count in the bill.

Verdict: "Guilty on all counts."

Judgment: Imprisonment in the State's Prison for a term of not less than four nor more than seven years on each count; "the sentence on all counts to run concurrently with the sentence in the first count."

Defendant appeals, assigning errors.

Attorney-General Seawell and Assistant Attorney-General McMullan for the State, appellee.

Herbert McClammy, W. F. Jones, Alan A. Marshall, and George Rountree for defendant, appellant.

Hugh N. Pace, in propria persona.

STACY, C. J. By indictment in seven counts the defendant is charged with embezzlement of funds which came into his hands as treasurer and acting recording secretary of Jeff Davis Council, No. 63, Junior Order United American Mechanics. Receipt of the money is admitted; likewise, its irregular handling. Indeed, the defendant's own testimony would carry the case to the jury. When an agent, entrusted with funds belonging to his principal, withdraws several items from the general account (according to his own statement), and places the withdrawals in a safe without sufficient reason therefor, soon or late, he may expect such conduct to be the subject of investigation. And so it was here. The record discloses little more than an issue of fact, determinable alone by the twelve.

Even if it be conceded, which it is not, that error was committed in respect of the 1st, 2d, and 7th counts, still such concession, without more, would avail the defendant naught on the present record. There are four other counts in the bill in respect of which no serious question is raised, and the defendant has been sentenced alike on each count, all sentences to run concurrently. In this state of the record, appellant must show error which affected the whole case, or all the counts, before a new trial could be awarded. *S. v. Sheppard,* 142 N. C., 586, 55 S. E., 146; *S. v. Maslin,* 195 N. C., 537, 143 S. E., 3; *S. v. Switzer,* 187 N. C., 88, 121 S. E., 43; *S. v. Ridings,* 193 N. C., 786, 138 S. E., 134; *S. v. Newton,* 207 N. C., 323, 177 S. E., 184. The contention made by the defendant, in arguing his own case, that, as the sentences on the last six counts are "to run concurrently with the sentence in the first count," should error appear in respect of the first count, the sentences on the remaining counts would necessarily be upset for lack of any valid judgment on the first count with which to run concurrently, is a more valuable contribution to sophistry than it is to the law. It does show, however, that the defendant is not without some ingenuity or sprightliness of thought.

The fact that the funds covered by the 1st and 2d counts were ultimately paid to the beneficiaries entitled to receive them cannot excuse the defendant or justify his prior embezzlement of such funds, as the jury has found, because, in the law of crimes, restitution does not work absolution. *S. v. Summers,* 141 N. C., 841, 53 S. E., 856. "It needs no citation of authorities to show that, as a matter of law, the restitution of money that has been either stolen or embezzled, or a tender or offer to return the same or its equivalent to the party from whom it was

stolen or embezzled, does not bar a prosecution by indictment and conviction for such larceny or embezzlement. The effect of the tender and payment into court may be a discharge from the indebtedness for the deposit fraudulently received, so far as the depositor and his civil remedies are concerned"—*Baker, J.*, in *Meadowcroft v. People*, 163 Ill., 56.

The crime of embezzlement having been fully consummated before indictment found, it is not within the power of the defendant and the private prosecutor, or either of them, by adjusting their civil differences, or otherwise, to compromise or take away the right of the State to insist upon a conviction for the offense already committed. *Spalding v. People*, 172 Ill., 40.

Nor can the defendant justify his embezzlement of the funds covered by the 7th count, as the jury has found, on the ground that no authority or direction had been given to him to pay over such funds to the beneficiary entitled to receive them. *S. v. Summers, supra.*

The defendant had the full benefit of his own explanation as to how the funds in question were handled and what became of them. The question of intent was submitted to the jury with appropriate instructions (*S. v. Cahoon*, 206 N. C., 388, 174 S. E., 91), and we find no error on the record of which the defendant can justly complain. *S. v. Dula*, 206 N. C., 745, 175 S. E., 80.

That the result is disastrous to the defendant, we are fully aware. His personal plea in behalf of himself and those dependent upon him, while unusual, was not without its sympathetic appeal. Blasted hopes and shattered dreams are always heartrending. The ministry of suffering is not easily understood; it is difficult to comprehend. Each individual and each family has about as much sorrow as it can bear. Consequently, the administration of the criminal law is freighted with many unpleasant tasks. But wrong is never right, and with a record free from reversible error, our one duty is to affirm.

No error.

STATE v. GEORGE ALSTON.

(Filed 15 June, 1936.)

1. Criminal Law I c—

The order in which the witnesses are called to testify is in the sound discretion of the trial court.

2. Homicide H c—

Where all the evidence shows defendant intentionally killed deceased with a deadly weapon, it is not error for the court to refuse to submit to the jury the question of manslaughter.

3. Criminal Law I g—

Where the court repeatedly charges the jury that the burden is on the State to prove every element of the offense beyond a reasonable doubt, and then fully defines "reasonable doubt," the charge is sufficient on this aspect, and an exception to its failure to call attention to the presumption of innocence is untenable.

4. Homicide H c—

Where all the evidence establishes an unlawful killing with a deadly weapon committed by defendant, it is not error for the court to instruct the jury that if they believe the evidence beyond a reasonable doubt to return a verdict of guilty of murder in the second degree, at least.

5. Homicide B a: H c—Intoxication precludes verdict of first degree murder only when sufficient to prevent premeditation and deliberation.

Since premeditation and deliberation are essential elements of the crime of murder in the first degree, intoxication to the extent that the mind is incapable of this essential mental process, precludes a verdict of first degree murder, but the charge in this case *is held* without error in this respect on defendant's appeal from a conviction of the capital crime.

APPEAL by defendant from *Barnhill, J.*, at December Term, 1935, of ORANGE. No error.

Indictment for murder. The jury returned a verdict of guilty of murder in the first degree, and from judgment imposing sentence of death therefor defendant appealed.

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

C. P. Hinshaw and E. C. Brooks, Jr., for defendant.

DEVIN, J. The State's evidence tended to show an unprovoked, willful, and premeditated killing. It appeared that defendant met the deceased, a girl named Helen Massey, on the street in Chapel Hill on the evening of 6 May, 1935, and after some words she ran from him, and he pursued her; that she took refuge in a cafe and locked the front door behind her; that he ran around to the back and she, in the effort to escape, unlocked the front door, when he suddenly rushed back to the front, entered the cafe, and shot her three times, and pursued her as she fled mortally wounded; that he had formerly kept company with her, but she had apparently tired of his attention and ceased to go with him; that he had stated he intended to kill her and this intent had been communicated to her; that he had been employed for six or seven years as servant and gardener for Mr. McClamrock in Chapel Hill; that the pistol used on the occasion was one he had taken from the dresser drawer in the home of his employer; that he had been drinking for some time before this, and had been drinking at the time of the shooting.

On behalf of the defendant, Dr. Harry W. Crane, an expert in the field of abnormal psychology, testified the defendant was mentally defective, with the mental development only of a child. There was evidence from Dr. Ashby, superintendent of State Hospital at Raleigh, and from defendant's employer and others that he knew right from wrong, that he had been a faithful servant in and about the home of his employer for a number of years, and his general reputation was good. Counsel for defendant during the trial withdrew plea of insanity and admitted that defendant had shot the deceased with a pistol and inflicted wounds from which she shortly thereafter died.

Defendant noted several exceptions during the trial, all of which we have examined with the care which the gravity of the consequences to the defendant requires. The objection to the court's permitting Dr. Ashby to testify out of turn is untenable. It was a matter of discretion and in no way prejudicial. The defendant excepted to the court's failure to charge as to manslaughter. There was no evidence of manslaughter and the trial judge properly excluded the consideration of that degree of homicide from the jury.

Nor can the objection that in the charge the judge failed to call attention to the presumption of innocence be sustained. The burden on the State to prove every element of the offense charged beyond a reasonable doubt was repeatedly and fully stated to the jury, and the meaning of reasonable doubt explained. This was sufficient. *S. v. Rose,* 200 N. C., 342; *S. v. Herring,* 201 N. C., 543; *S. v. Ferrell,* 202 N. C., 475.

Both in the oral argument and by brief the counsel for the defendant forcefully presented his view that there was error in the charge of the court as to second degree murder and as to the effect of intoxication upon the capacity of the defendant to form the intent necessary to sustain the charge of murder in the first degree.

The excerpt from the charge specifically assigned as error is as follows: "Now, gentlemen, upon the evidence, if you believe it beyond a reasonable doubt, and find therefrom that the defendant killed the deceased with a deadly weapon, a pistol, that is, that he shot her, inflicted a wound, that she died as a proximate result of wounds thus inflicted, if you find that to be a fact beyond a reasonable doubt, and from the evidence and from the admissions, then it would be your duty to return a verdict of at least guilty of murder in the second degree."

This charge is in accord with the principles laid down in the authoritative decisions of this Court. *S. v. Ferrell, supra; S. v. Miller,* 197 N. C., 445; *S. v. Walker,* 193 N. C., 489; *S. v. Fowler,* 151 N. C., 731. In the case at bar the trial judge had defined fully and accurately the different degrees of murder, and explained that murder in the second degree was the unlawful killing of a human being with malice, and

defined malice in law as "that condition of the mind which prompts a person to take the life of another intentionally without just cause, excuse, or justification," and that it was implied from a killing with a deadly weapon. *Betts v. Jones,* 208 N. C., 410.

The defendant contends the court below failed to charge as to the necessity of finding a specific intent on the part of defendant, and that if the defendant was so intoxicated as to be incapable of entertaining such specific intent, and unable to premeditate and deliberate, he could not be guilty of murder in the first degree.

But upon examination of the charge as a whole, we find no error in this respect. After calling the attention of the jury fully to the evidence offered by the defendant as to his intoxication and his defective mentality, and stating his contention that as a result of one or both of these causes he could not premeditate and deliberate, and could not arrive at a conclusion and form a purpose to kill, and that the jury should have a reasonable doubt as to his capacity to do so at the time, the court charged the jury as follows: "The court further instructs you, as it has already done, that there are two things necessary, that is, that he must deliberate upon it and form the fixed design to kill, then he must deliberate and in cold blood execute that design, so that if you find he had thought about it and revolved it over in his mind prior to that particular night, but on that particular night he was so much under the influence of liquor that he did not have the capacity to deliberately execute the design, he would not be guilty of murder in first degree."

"Likewise, the court instructs you that the fact that he may have taken some whiskey would not be ground upon which you could refuse to return a verdict of guilty of murder in the first degree; so far as the charge of murder in the second degree is concerned a drunken condition doesn't excuse him, but where he is charged with murder in the first degree, it is your duty to consider whether or not in the first place he had taken any whiskey, and in the second place if he had taken a sufficient quantity so that he could not deliberate or premeditate the killing. And if his mind was in such condition from the use of liquor or from the fact that it had not developed, or from any other cause, that he could not premeditate and deliberate, then you would not return a verdict of guilty of murder in the first degree."

It is well settled in this jurisdiction that, while voluntary drunkenness is no legal excuse for crime, this principle is not allowed to prevail when in addition to the overt act it is required that a definite specific intent be established as an essential element of the crime. "When a specific intent is essential to constitute crime, the fact of intoxication may negative its existence." Clark's Crim. Law, 72.

Since the crime of murder has been divided into two degrees and it becomes necessary in order to convict the defendant of murder in the first degree to establish that the killing was willful, deliberate, and premeditated, and that the purpose to kill was previously formed after weighing the matter, a mental process embodying a specific, definite intent is involved, and if it is shown that the person charged was so drunk as to be unable to form or entertain this mental purpose, he should not be convicted of murder in the first degree. This principle, however, does not apply to murder in second degree or manslaughter. *S. v. Murphy,* 157 N. C., 614; *S. v. English,* 164 N. C., 497; *S. v. Foster,* 172 N. C., 960; *S. v. Allen,* 186 N. C., 302; *S. v. Williams,* 189 N. C., 616; *S. v. Ross,* 193 N. C., 25; *S. v. Hauser,* 202 N. C., 738; *S. v. Vernon,* 208 N. C., 340.

The judge's charge to the jury gives the defendant no just ground of complaint, and the exceptions thereto cannot be sustained.

After a careful examination of the entire record, we conclude that in the trial there was

No error.

EVA ENLOE v. CHARLOTTE COCA-COLA BOTTLING COMPANY.

(Filed 15 June, 1936.)

Bill of Discovery A b—

Where a party reads in evidence an examination of an adverse party had under the provisions of C. S., 899, *et seq.*, he must read the whole of the examination, and the admission in evidence of the direct examination of such party while omitting the cross-examination is reversible error. C. S., 902.

APPEAL by the defendant from *Alley, J.*, at October Term, 1935, of MECKLENBURG. New trial.

This is a civil action by an ultimate consumer to recover of a bottler damages resulting from drinking bottled beverage containing noxious substance. The case was formerly before us, 208 N. C., 305.

The jury found that the plaintiff had been injured by the negligence of the defendant and assessed damages, and from a judgment based upon the verdict the defendant appealed, assigning errors.

D. E. Henderson and Carswell & Ervin for plaintiff, appellee.
John M. Robinson and Hunter M. Jones for defendant, appellant.

SCHENCK, J. The plaintiff read in evidence a portion of the examination of George C. Snyder, secretary and treasurer and general manager

of the defendant corporation, taken pursuant to the statutes providing for the examination of adverse parties, to which the appellant reserved exception. The portion of the examination read was the testimony given in chief in response to interrogatories propounded by plaintiff's counsel, and the portion of the examination not read was the testimony given on cross-examination in response to interrogatories propounded by defendant's counsel. The testimony in chief was to the effect that the physical equipment, machinery, management, and location of the defendant's plant had been substantially the same since December, 1930. The testimony on cross-examination was a full and detailed description of the machinery and of its operation in the plant of the defendant from December, 1930, to the present time, and was to the effect that said machinery was of the type in general and approved use.

The defendant's eleventh assignment of error is: "That the court erred in permitting the plaintiff to introduce in evidence that part of the adverse examination of George C. Snyder taken before the trial consisting of questions propounded to him by plaintiff's counsel and the answers thereto, without offering the remainder of said examination, consisting of the cross-examination or questions propounded to him by the attorney for the defendant and the answers thereto."

This assignment raises a question that has not heretofore been presented to this Court, namely: Can a party to an action introduce in evidence a part of the examination of an adverse party taken pursuant to the provisions of Article 44, chapter 12, Consolidated Statutes (sections 899 to 907), without introducing the whole of such examination?

C. S., 902, provides that "the examination shall be taken and filed, . . . and may be read by either party on the trial." In *Phillips v. Land Co.,* 174 N. C., 542, *Clark, C. J.,* writes: "The examination of the adverse party, under Revisal, 865 (C. S., 900), is a substitute for the former bill of discovery, and as Revisal, 867 (C. S., 902), provides that it may be read by either party on the trial, it is, like a deposition, *de bene esse,* in that it becomes 'the evidence of the law.' So to speak, it is 'canned evidence,' kept in cold storage, for it cannot be altered." Evidence may be altered by omissions as well as by additions or changes, and it would seem that the late learned Chief Justice had in mind that if the "canned evidence" was read by either party on the trial it must be read *in toto* and not "altered" by omitting a part thereof.

The general provisions of the statutes relating to examination of adverse parties are in many respects similar to those of Article 8, chapter 35, Consolidated Statutes (sections 1809 to 1822), relative to depositions. This Court has definitely held that it is error to permit one party to introduce a part of a deposition in evidence without introducing the entire deposition. *Boney v. Boney,* 161 N. C., 615; *Sternberg v.*

Crohon, 172 N. C., 731; *Savings Club v. Bank,* 178 N. C., 403. In the last cited case it is said: "Plaintiff offered the deposition of one Boll, but declined to introduce the last question and answer. Defendant excepted. This was error. This question has been decided differently by different courts, but the weight of authority is that the party offering the deposition must introduce the whole of it, including the cross-examination."

We can see no valid reason why the law should require the introduction of the whole of a deposition if any of it is to be read in evidence, and not require the introduction of the whole of an examination of an adverse party if it is to be read in evidence. On the contrary, every logical reason seems to dictate that there should be no differentiation. We therefore hold that the trial judge erred in permitting the plaintiff to read in evidence a part of the examination of an adverse party without requiring her to so read the whole of such examination.

Our conclusion upon the eleventh assignment of error entitles the defendant to a new trial and renders any discussion of the other assignments unnecessary.

New trial.

LARKIN FULLER PARKER v. HATTIE JOHNSON PARKER.

(Filed 15 June, 1936.)

Divorce A d—Party abandoning spouse is not entitled to divorce on ground of two years separation.

The right to a divorce on the ground of two years separation is based upon a "separation" which is predicated upon a prior agreement, and means more than "abandonment," and while the applicant need not be the injured party, the statute does not authorize a divorce where the husband has separated himself from his wife, or the wife has separated herself from her husband, without cause and without agreement, express or implied. N. C. Code, 1659 (a).

APPEAL by defendant from *Clement, J.,* at March Term, 1936, of ROCKINGHAM. New trial.

This is an action for divorce, on the ground that after their marriage the plaintiff and the defendant separated from each other, and since such separation have lived separate and apart for more than two years.

The issues submitted to the jury were answered as follows:

"1. Were the plaintiff and the defendant married to each other, as alleged in the complaint? Answer: 'Yes.'

"2. Have the plaintiff and the defendant lived separate and apart from each other for a period of two years next preceding the institution of this action, and the filing of the complaint? Answer: 'Yes.'

"3. Has the plaintiff been a resident and citizen of the State of North Carolina for one year next preceding the institution of this action? Answer: 'Yes.'

"4. Has the plaintiff willfully abandoned the defendant and failed to support her adequately? Answer: 'No.'"

From judgment that the bonds of matrimony heretofore existing between the plaintiff and the defendant be and that they are dissolved, the defendant appealed to the Supreme Court, assigning errors in the trial.

W. R. Dalton and P. W. Glidewell for plaintiff.
Pritchard & James for defendant.

CONNOR, J. At the trial of this action, the court instructed the jury as follows:

"The burden is on the plaintiff, gentlemen of the jury, to satisfy you by the greater weight of the evidence that *he* has lived separate and apart from the defendant for a period of two years or more, and if he has so satisfied you that *he* has lived separate and apart from her for a period of two years, or for a longer period than two years, then it will be your duty to answer the second issue 'Yes'; otherwise, you would answer the issue 'No.'

On her appeal to this Court, the defendant assigns this instruction as error. The assignment is sustained.

The statute applicable to this action is chapter 72, Public Laws of North Carolina, 1931, as amended by chapter 163, Public Laws of North Carolina, 1933, and reads as follows:

"Marriages may be dissolved and the parties thereto divorced from the bonds of matrimony, on application of either party, if and when there has been a separation of husband and wife, either under a deed of separation or otherwise, and they have lived separate and apart from each other for two years, and the plaintiff in the suit for divorce has resided in this State for a period of one year." N. C. Code of 1935, section 1659 (a).

This statute authorizes a divorce on the application of either the husband or the wife, without regard to whether or not the applicant is the injured party (*Long v. Long,* 206 N. C., 706, 175 S. E., 85; *Campbell v. Campbell,* 207 N. C., 859, 176 S. E., 250), where there has been a voluntary separation, under a deed of separation or otherwise, of husband and wife, and after such separation they have lived separate and apart from each other for two years. It does not authorize a divorce where the husband has separated himself from his wife, or the wife has separated herself from her husband, without cause and without an agreement, express or implied, although after such separation, he or she has

lived separate and apart from the abandoned wife or husband for two years. It is manifest from the language of the statute that it was not the purpose of the General Assembly to authorize a divorce in this State where a husband has abandoned his wife, without cause, as in the instant case, and in disregard of his legal and moral duty, has absented himself from her for more than two years, although he has from time to time provided her with money for her support.

The word "separation," as applied to the legal status of a husband and wife, means more than "abandonment"; it means "A cessation of cohabitation of husband and wife, by mutual agreement." *Lee v. Lee,* 182 N. C., 61, 108 S. E., 352.

Where a husband and wife have lived separate and apart from each other for two years, following a separation by mutual agreement, express or implied, their marriage may be dissolved; but where they have lived separate and apart from each other for two years, without a previous agreement between them, neither is entitled to a divorce, under the statute, C. S., 1659 (a).

The defendant is entitled to a new trial. It is so ordered.

New trial.

STATE v. ARTHUR ROBERTSON.

(Filed 15 June, 1936.)

1. Criminal Law J a—

Insufficiency of the evidence to support the verdict may not be taken advantage of by motion in arrest of judgment, since want of evidence to support the verdict is not an error or defect in the record.

2. Criminal Law I l—

Where there is plenary evidence of defendant's guilt of the crime charged, a judgment upon a verdict of guilty of a lesser degree of the crime will not be held for error for want of evidence of guilt of such degree of the crime, the judgment in such case being favorable to defendant.

APPEAL by defendant from *Clement, J.,* at January Term, 1936, of ROCKINGHAM. No error.

The defendant was tried on an indictment in which he was charged with burglary in the first degree, as defined by statute, C. S., 4232. He entered a plea of not guilty.

At the trial there was evidence for the State tending to show that the defendant was discovered in the dwelling house of George Stanley and his wife, Mae Stanley, in Rockingham County, some time between 6 and

7 o'clock p.m., on 5 December, 1935, and that he had entered said dwelling house with the felonious intent to steal and carry away certain articles of personal property then in said dwelling house.

There was evidence for the State tending to show further that the defendant had broken into and entered said dwelling house, during the nighttime, while the same was occupied, with the felonious intent as charged in the indictment. An inference was permissible, however, from said evidence that at the time the defendant entered said dwelling house, the same was unoccupied.

The evidence for the State tended to show that when the defendant was discovered in said dwelling house by Mrs. Mae Stanley, upon her return from a visit to a neighbor, he assaulted her, and that when she screamed and fired her pistol, he ran from the house, and that as he ran he dropped certain articles of personal property which he had taken and carried away from said house.

The evidence for the defendant tended to sustain his defense that at the time the crime charged in the indictment is alleged to have been committed, he was elsewhere. The testimony of the defendant to that effect was strongly supported by the testimony of witnesses for the defendant, whose credibility was not impeached.

All the evidence was submitted to the jury, under a charge by the judge, to which there was no exception by the defendant.

The jury returned as their verdict: "Guilty of an attempt to commit burglary in the second degree."

The defendant moved for the arrest of judgment on the ground that there was no evidence at the trial tending to support the verdict returned by the jury. The motion was denied, and the defendant excepted.

From judgment that he be confined in the county jail of Rockingham County for a term of eighteen months, and that he be assigned to work under the supervision of the State Highway and Public Works Commission, the defendant appealed to the Supreme Court, assigning as error the refusal of the trial court to allow his motion for arrest of judgment, and the judgment.

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

Jule McMichael and Sharp & Sharp for defendant.

CONNOR, J. There was no error in the refusal of the trial court to allow defendant's motion for the arrest of judgment in this action, on the ground that there was no evidence at the trial to support the verdict returned by the jury. In the absence of any error or defect on the face of the record in this action, the motion for the arrest of judgment was

properly denied. The want of evidence at the trial to support the verdict is not a defect or error in the record, for which the judgment may be arrested. *S. v. McKnight,* 196 N. C., 259, 145 S. E., 281.

It may be conceded that all the evidence for the State, if believed by the jury, showed that defendant is guilty of burglary in the second degree, at least, and that there was no evidence tending to show that defendant is guilty only of an attempt to commit burglary in the second degree. It does not follow, however, that the acceptance by the court of the verdict returned by the jury was error prejudicial to the defendant. In *S. v. Smith,* 201 N. C., 494, 160 S. E., 577, it is said: "A verdict for a lesser degree of the crime charged is logically permissible only when there is evidence tending to support a milder verdict, although there are decisions to the effect that if without supporting evidence a verdict is returned for the lesser offense, it will not be disturbed because it is favorable to the prisoner. *S. v. Ratcliff,* 199 N. C., 9, 153 S. E., 605."

In the instant case, the defendant does not contend in this Court that he is entitled to a new trial. His contentions that there was error in the refusal of his motion for arrest of the judgment, and in the judgment, cannot be sustained. The judgment is affirmed.

No error.

ELIZABETH T. MILLER, ADMINISTRATRIX OF W. R. MILLER, AND ELIZABETH T. MILLER, INDIVIDUALLY, AND MARY ELIZABETH MILLER, BY HER NEXT FRIEND, ELIZABETH T. MILLER, v. WORTH POTTER AND WIFE, ANNIE E. POTTER, M. A. HATCHER, HOME MORTGAGE COMPANY, MORTGAGE SERVICE CORPORATION, THE FIDELITY BANK, AND V. S. BRYANT, SUBSTITUTED TRUSTEE.

(Filed 15 June, 1936.)

1. **Mortgages G b—Where mortgage debt is paid from proceeds of insurance on life of purchaser assuming debt, his estate is not entitled to subrogation as against subsequent purchasers who assumed debt.**

The transferee of the equity of redemption assumed the mortgage debt by agreement in his deed, and the mortgagee took out and paid the premiums on a policy of insurance on his life, in which it was named beneficiary. The equity of redemption was thereafter transferred, consecutively, to two other purchasers, each of whom assumed the mortgage debt. The original purchaser of the equity died, and the mortgagee applied the proceeds of the insurance policy to the payment of the debt and sent the canceled mortgage to the last purchaser. *Held:* The estate of the original purchaser of the equity of redemption is not entitled to be subrogated to the rights of the mortgagee as against the later transferees of the equity, since neither the original purchaser of the equity nor his estate paid the mortgage debt.

2. **Subrogation A a—**

The right to subrogation arises from the payment of a debt for which another is primarily liable, and where it appears that the party claiming such right has not paid the debt, but that the debt was paid out of insurance funds in which he had no interest, the asserted right of subrogation fails.

3. **Insurance D b—**

A creditor has an insurable interest in the life of his debtor, and as the beneficiary has a vested interest in the policy, and upon the death of the insured, neither his heirs at law nor his personal representative may sue to recover the proceeds of the policy, but the creditor beneficiary must apply the proceeds of the policy to the payment of the debt.

STACY, C. J., and DEVIN, J., dissent.

APPEAL by defendants from *Phillips, J.*, at February Term, 1936, of RICHMOND. Modified and affirmed.

W. R. Jones for plaintiffs, appellees.

A. M. Stack and Nash LeGrand for defendants Worth Potter and wife, appellants.

SCHENCK, J. This was a civil action, heard upon the pleadings and findings of fact by a referee. The findings of fact, to which no exceptions were filed, were substantially as follows: On 15 October, 1928, the Home Mortgage Company made a loan in the sum of $3,000 to one M. W. Nash and wife, and took a deed of trust to secure the same on a house and lot in Hamlet, North Carolina. On May 17, 1929, M. W. Nash and wife conveyed the said house and lot to W. R. Miller. As part of the purchase price, Miller "assumed and agreed to pay" said deed of trust. On 11 June, 1929, to better secure the loan the Home Mortgage Company, under the provisions of the deed of trust, took out a twelve-year term reducing policy of insurance on the life of Miller in the sum of $3,000, had itself made the beneficiary in the policy, and paid the premiums thereon. On 8 September, 1930, Miller and wife conveyed said house and lot to M. A. Hatcher, who also assumed the payment of said debt just as Miller had done. On 19 September, 1930, Hatcher conveyed said house and lot to Worth Potter and wife, Annie E. Potter, who also assumed the payment of said debt just as Miller and Hatcher had done. On 11 March, 1933, while title to said house and lot was in Worth Potter and wife, W. R. Miller died, and in December, 1933, the creditor beneficiary, the Home Mortgage Company, collected insurance in the amount of $2,475.39, marked the deed of trust paid, and mailed the same to Worth Potter, who had it canceled of record.

Elizabeth T. Miller, widow of W. R. Miller, later qualified as his administratrix, and with his only child, Mary Elizabeth Miller, brought

this action (a) to recover the balance of the insurance proceeds over and above the indebtedness; (b) for subrogation to the rights of the creditor to that part of the insurance proceeds used in paying the indebtedness; and (c) to have the deed of trust restored and the cancellation on the record stricken out, to the end that the estate of W. R. Miller should hold the deed of trust as a valid and subsisting lien against said house and lot in Hamlet, North Carolina.

Upon the findings of fact of the referee, the court drew conclusions of law and entered judgment in accord with the prayer of the plaintiffs.

All parties agreed that the $226.18, representing the balance of insurance money after the total indebtedness secured by the deed of trust had been paid, should be recovered by the plaintiffs, and the portion of the judgment that so adjudges is affirmed.

Upon the facts found, but one question is presented, namely: Can the legal representatives of W. R. Miller, deceased, invoke the principle of subrogation to the securities held by the creditor, the Home Mortgage Company?

When W. R. Miller bought from Nash and assumed payment of the debt he became liable as principal, and when he sold to Hatcher he became liable also as surety. He was thereafter liable as both principal and surety. *Bank v. Page,* 206 N. C., 18. The Home Mortgage Company, as creditor, could have sued Miller on his contract of assumption without foreclosing the deed of trust. *Rector v. Lyda,* 180 N. C., 577. By the application of the proceeds of the insurance policy to the payment of the debt secured by the deed of trust Miller's estate had its debt paid. However, while the debt of Miller's estate was paid, neither Miller nor his estate paid it, and since neither paid the debt, the estate is not entitled to subrogation. *Ætna Life Ins. Co. v. Middleport,* 124 U. S., 534, 31 L. Ed., 537. "It is generally held that the doctrine of subrogation requires that the person seeking its benefit must have paid a debt due to a third person before he can be substituted to that person's rights." 25 R. C. L., par. 4, p. 1315. True, if Miller or his estate had been compelled to pay the debt he or his representative would have been subrogated to the rights of the creditor, the Home Mortgage Company. *Moring v. Privott,* 146 N. C., 558; *Ætna Life Ins. Co. v. Middleport, supra.*

As a creditor of W. R. Miller, the Home Mortgage Company had an insurable interest in his life, *Maynard v. Ins. Co.,* 132 N. C., 711, and as the beneficiary in the policy had a vested interest therein, which could not be destroyed or altered by any action of the insured. *Walser v. Ins. Co.,* 175 N. C., 350. Neither the heirs at law, next of kin, nor the administratrix of the insured can sue for the proceeds of a policy payable to a third party. *Maynard v. Ins. Co., supra.*

It was the right, if indeed not the duty, of the creditor, the Home Mortgage Company, as beneficiary under the policy to apply the proceeds thereof to the payment of the debt. This was the purpose for which the insurance was taken out. By so applying the proceeds of the policy the creditor, the Home Mortgage Company, released the estate of Miller, as well as Nash, Hatcher, and the Potters from any further liability without either of them having to pay any part of the debt.

That portion of the judgment which adjudges that the plaintiffs are entitled to be subrogated to the rights of the creditor to that part of the proceeds of the insurance policy applied on the payment of the debt secured by the deed of trust, $2,249.21, and ordering the rescission of the cancellation of the deed of trust is reversed.

Modified and affirmed.

STACY, C. J., and DEVIN, J., dissent.

STATE v. ALGER SPILLMAN.

(Filed 15 June, 1936.)

1. **Bastards B c—Statute making willful neglect to support illegitimate child a misdemeanor held not to violate due process of law.**

   N. C. Code, 276 (a), making the parent's willful neglect to support his illegitimate child a misdemeanor, does not violate due process of law or impose imprisonment but by the law of the land (14th Amendment to the Federal Constitution, Art. I, sec. 17, of the Constitution of North Carolina), since the statute raises no presumption against a person accused thereunder, the failure to support being evidence of willfulness, but raising no presumption thereof, but to the contrary, the statute requires the State to overcome the presumption of innocence both as to the willfulness of the neglect to support the illegitimate child and defendant's paternity of the child.

2. **Same—Paternity of child need not be judicially determined prior to prosecution of defendant for his willful neglect to support it.**

   It is not necessary to a prosecution for willful neglect to support an illegitimate child that defendant's paternity of the child should be first judicially determined, but the State must prove on the trial, first, defendant's paternity of the child, and then his willful neglect or refusal to support the child.

3. **Criminal Law I g—**

   A party must aptly tender written request for special instructions desired by him in order for an exception to the charge for its failure to contain such instructions to be considered on appeal. C. S., 565.

STACY, C. J., dissenting.

CONNOR, J., concurs in dissent.

APPEAL by the defendant from *Clement, J.,* at February Term, 1936, of FORSYTH. No error.

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

Webster & Little and Ingle & Rucker for defendant, appellant.

SCHENCK, J. The defendant was tried and convicted upon a bill of indictment charging a violation of section 1, chapter 228, Public Laws 1933, section 276 (a) of N. C. Code of 1935 (Michie), which reads: "Any parent who willfully neglects or who refuses to support and maintain his or her illegitimate child shall be guilty of a misdemeanor, and subject to such penalties as are hereinafter provided."

The prosecuting witness testified that she and the defendant had intimate relations during the month of April, 1934, that she became pregnant in May, 1934, and that her child was born 3 January, 1935, and that the defendant was the father of her child; she further testified that the defendant had furnished nothing toward the support of the child, and that although she had charged the defendant with being the father of her child, she did not procure a warrant for him until December, 1935. The State offered other adminicular evidence. The defendant offered no evidence.

At the close of the evidence, the defendant moved for judgment of not guilty and dismissal, and the court's refusal to grant this motion gives rise to the only question presented on this appeal.

The defendant contends in his brief that the statute contravenes the "due process" clause of the 14th Amendment to the United States Constitution, and section 17, Article I, of the North Carolina Constitution, providing that no person shall be imprisoned but by the law of the land, and relies upon *S. v. Griffin,* 154 N. C., 611. The reasoning in that case is not applicable to the case at bar. There is no presumption prescribed by the statute under which the defendant was convicted. On the contrary, this Court specifically held in *S. v. Cook,* 207 N. C., 261, that "The father of an illegitimate child may be convicted of neglecting to support such child only when it is established that such neglect was willful, that is, without just cause, excuse, or justification. The willfulness of the neglect is an essential ingredient of the offense, and as such must not only be charged in the bill, but must be proved beyond a reasonable doubt. The presumption of innocence with which the defendant enters the trial includes the presumption of innocence of willfulness in any failure on his part to support his illegitimate child. The failure to support may be an evidential fact tending to show a willful neglect, but it does not raise a presumption of willfulness."

The defendant further contends in his brief that he could not be convicted of willfully refusing to support the child until it had been judicially determined that he was the father thereof, or until he had acknowledged the paternity thereof. This position is untenable. The statute makes it a crime for any parent to willfully neglect or refuse to support and maintain his illegitimate child. The first essential element of the offense, which the State is called upon to establish, is the defendant's paternity of the child, and then the willful neglect or refusal to support.

There is no exception to the charge except to the failure to charge the jury as set forth in an assignment of error. This assignment is untenable, since there was no written request for such an instruction. C. S., 565. The charge was in accord with the principle enunciated in *S. v. Cook, supra.*

On the record we find

No error.

STACY, C. J., dissenting: It is not perceived how one can be guilty of a *willful* neglect of duty until he first knows that duty belongs to him. *S. v. Cook,* 207 N. C., 261, 176 S. E., 757; *S. v. Falkner,* 182 N. C., 793, 108 S. E., 756. In May, 1934, the prosecuting witness charged the defendant with being the father of her unborn child, which he denied. Thereafter no demand was ever made upon him for the support of said child, which was born 3 January, 1935. The mother testifies: "I haven't made any demand on the defendant. I haven't asked him for any support for my child." Moreover, there is nothing on the record to show whether the prosecuting witness is married or single, or whether her child is legitimate or illegitimate.

The verdict is not supported by the record.

CONNOR, J., concurs in dissent.

STATE v. THURSTON BROOKS.

(Filed 15 June, 1936.)

Automobiles G b—Jury must find that truck's attachment was trailer as defined by statute before applying speed limit of thirty miles per hour.

Where the evidence in a prosecution for manslaughter is not conclusive as to whether the truck operated by defendant had attached thereto a trailer or semitrailer as defined by sec. 1, ch. 148, Public Laws of 1927 (N. C. Code, 2621 [1]), and all the evidence shows that the defendant was driving the truck between thirty and thirty-five miles per hour, it is error for the court to instruct the jury that defendant's speed was limited to thirty miles per hour as prescribed for trucks with trailers attached,

under sec. 2, ch. 235, Public Laws of 1931 (N. C. Code, 2621 [46a]), the burden being upon the State to prove that the truck had a trailer attached thereto as defined by statute in order to reduce the maximum lawful speed at which the vehicle might be operated from thirty-five miles per hour as prescribed for trucks without trailers, to thirty miles per hour, as laid down in the charge.

APPEAL by the defendant from *Williams, J.*, at October Term, 1935, of PENDER. New trial.

This was a criminal action, wherein the defendant was convicted of manslaughter. It was the contention of the State that the deceased, while walking on the edge of the highway, was killed by being struck by an attachment to a motor vehicle operated in an unlawful manner by the defendant.

From judgment based upon the verdict the defendant appealed, assigning errors.

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

J. A. Jones for defendant, appellant.

SCHENCK, J. The appellant's fifth assignment of error is to a portion of the court's charge as follows:

"No motor vehicle designed, equipped for, or engaged in transporting property shall be operated over the highways of the State at a greater rate of speed than 35 miles, and no such motor vehicle to which a trailer is attached shall be operated over such highways at a greater rate of speed than 30 miles an hour. I charge you in the case that you are now considering, under the evidence here, the speed limit as read to you as 30 miles an hour applies." The foregoing charge assumes that the defendant was operating a motor vehicle to which a trailer was attached. The evidence does not warrant the court in assuming, as a matter of law, that the attachment to the truck driven by the defendant was a trailer. It is true that all of the evidence tends to show, and that the defendant does not deny, that there was an attachment to the motor vehicle operated by him, but since the statute makes a distinction between a trailer and a semitrailer, and applies the 30 miles per hour limitation only to trucks with trailers attached, it was error to assume that the attachment to the motor vehicle operated by the defendant was a trailer.

Section 1, chapter 148, Public Laws 1927, reads:

"Section 1. Definitions. The following words and phrases when used in this act shall for the purpose of this act have the meanings respectively ascribed to them in this section. . . .

"(g) 'Trailer.' Every vehicle without motive power designed for carrying property or passengers wholly on its own structure and for being drawn by a motor vehicle.

"(h) 'Semitrailer.' Every vehicle of the trailer type so designed and used in conjunction with a motor vehicle that some part of its own weight and that of its own load rests upon or is carried by another vehicle." These provisions are brought forward as section 2621 (1), N. C. Code of 1935 (Michie).

Section 2, chapter 235, Public Laws 1931, amends chapter 148, Public Laws 1927, by adding thereto: "Section 69. Restrictions on speed of trucks. No motor vehicle designed, equipped for, or engaged in transporting property shall be operated over the highways of the State at a greater rate of speed than thirty-five (35) miles an hour, and no such motor vehicle to which a trailer is attached shall be operated over such highways at a greater rate of speed than thirty (30) miles an hour." This amendment is brought forward as section 2621 (46a) of N. C. Code, *supra.*

The defendant testified: "I was driving between 30 and 35 miles an hour, around 33. I had been driving it right around 33." The witness who was sitting on the seat of the truck with the defendant testified: "As we approached the point of this accident this truck was traveling between 30 and 35. It wouldn't do but 35 at the very best." There is no evidence in the record that the truck was being driven by the defendant at a greater rate of speed than 35 miles per hour. It was therefore of vital importance to the defendant that the jury be instructed that before they could find that he had violated the statute last quoted they must find beyond a reasonable doubt that there was attached to the motor vehicle operated by him a trailer as defined in the statute.

The only evidence in the record directly bearing upon the question as to whether the attachment to the truck driven by the defendant was a trailer or a semitrailer is the statement of a State's witness, who testified that "the front of the trailer was built on the chassis of the truck." While this witness speaks of the attachment as a trailer, his statement that the front thereof "was built on the chassis of the truck" would seem to indicate that it was indeed a semitrailer. However this may be, the burden was upon the State to satisfy the jury beyond a reasonable doubt that the attachment was a trailer before they could apply the 30 miles per hour limitation to the speed of the motor vehicle involved, and the defendant was entitled to have the jury so instructed, and it was therefore error for the court to charge the jury that "in the case you are now considering under the evidence here the speed limit as read to you as 30 miles an hour applies."

Our conclusion upon the fifth assignment of error renders any discussion of the other assignments unnecessary.

New trial.

L. H. BECK, TRUSTEE IN BANKRUPTCY OF THE ESTATE OF A. G. BLANCHARD, SR., BANKRUPT, v. DEXTER BLANCHARD, MAGGIE E. BLANCHARD, A. J. BLANCHARD, A. G. BLANCHARD, JR., AND OTHERS.

(Filed 15 June, 1936.)

Deeds A a—Instrument in this case held a deed and not a will.

A husband and wife executed a paper writing purporting to convey the lands therein described, but stipulating that it was understood that they "retain and reserve to themselves their right and title to all the above lands during their life, and this deed to become effective at and after the death" of the husband and wife. *Held:* The instrument is a deed and not a will, since it evidences the intent that title should pass to the person therein named upon the execution of the instrument, reserving the right of possession in the husband and wife, and the instrument conveys the title with the right to possession postponed until after the death of the surviving husband or wife.

APPEAL by defendants from *Barnhill, J.*, at March Term, 1936, of WAKE. Reversed.

This is an action to recover judgment that a certain paper writing, dated 15 September, 1931, and executed by A. G. Blanchard and his wife, Maggie E. Blanchard, purporting to convey the lands described therein to the defendants, is ineffective and inoperative as a deed of conveyance, because of certain provisions contained in said paper writing, or, if said paper writing is a deed of conveyance, that it is void, because executed without consideration and in fraud of creditors, and for judgment in either case that plaintiff is the owner and is entitled to the immediate possession of the lands described in said paper writing, as an asset of the estate of A. G. Blanchard, bankrupt.

The action was heard on plaintiff's motion for judgment on the admissions in the pleadings that the paper writing described in the complaint is ineffective and inoperative as a deed of conveyance. The facts admitted in the pleadings are as follows:

On 15 September, 1931, A. G. Blanchard and his wife, Maggie E. Blanchard, executed a paper writing, which purports to convey the lands described therein to the defendants, subject to the following provision which is contained in the paper writing:

"It is expressly understood that the said A. G. Blanchard, Sr., and his wife, Maggie E. Blanchard, do hereby retain and reserve to themselves their right and title to all the above lands during their life, and this deed to become effective at and after the death of A. G. Blanchard, Sr., and his wife, Maggie Blanchard."

The said paper writing was duly recorded in the office of the register of deeds of Wake County on 29 October, 1931.

After the said paper writing had been recorded, in a proceeding in bankruptcy pending in the District Court of the United States for the Eastern District of North Carolina, on or about 19 May, 1932, A. G. Blanchard, Sr., was duly adjudged a bankrupt, and thereafter the plaintiff was elected, appointed, and duly qualified as trustee in bankruptcy of the estate of A. G. Blanchard, Sr., bankrupt. Thereafter, and prior to the commencement of this action, A. G. Blanchard, Sr., died, leaving surviving as his widow the defendant Maggie E. Blanchard.

At the hearing of plaintiff's motion, the court was of opinion that the paper writing dated 15 September, 1931, and executed by A. G. Blanchard, Sr., and his wife, Maggie E. Blanchard, is ineffective and inoperative as a deed of conveyance, because of the provisions contained therein whereby A. G. Blanchard and his wife, Maggie E. Blanchard, retained and reserved to themselves their right and title to the lands described in said paper writing, and whereby they declared that it was understood that said paper writing was to become effective at and after the death of the said A. G. Blanchard, Sr., and his wife, Maggie E. Blanchard, and accordingly so adjudged.

It was further ordered and adjudged by the court that the plaintiff, as trustee in bankruptcy of the estate of A. G. Blanchard, Sr., bankrupt, is the owner and is entitled to the immediate possession of the lands described in the paper writing, subject to the dower rights of the defendant Maggie E. Blanchard, widow of A. G. Blanchard, Sr., deceased.

The defendants excepted to the judgment and appealed to the Supreme Court, assigning as error the signing of the judgment by the court.

Burgess & Baker for plaintiff.
John W. Hinsdale for defendants.

CONNOR, J. It is manifest, we think, from the language of the paper writing which was executed by A. G. Blanchard, Sr., and his wife, Maggie E. Blanchard, on 15 September, 1931, that it was their intention thereby to convey the lands described in the paper writing to the defendants, reserving the right to the possession of said lands to themselves during their joint lives, and to the survivor during his or her life. It is clear that it was not their intention to devise said lands to the defendants. The paper writing is therefore a deed and not a will. See *Phifer v. Mullis,* 167 N. C., 405, 83 S. E., 582. In that case it is said: "If the grantor intended that the title to the property described in it should pass *eo instanti* upon execution to the grantee, it (*i.e.,* the paper

writing) is a deed, although the interest conveyed or the enjoyment of it is postponed until the death of the grantor."

The effect of the clause contained in the paper writing, and set out in the statement of the case, when properly construed (see *Dick v. Miller,* 150 N. C., 63, 63 S. E., 176), is to postpone the right of the defendants to the possession of the lands conveyed to them to the death of the grantors. The title to the lands described in the paper writing vested in the defendants immediately upon the execution and delivery of the paper writing.

The judgment is reversed and the action remanded to the Superior Court of Wake County for the trial of the issues raised by the pleadings.

Reversed.

MRS. DELLA LUTHER v. J. W. LEMONS AND W. G. SMITHERMAN

and

RAYMOND LUTHER v. J. W. LEMONS AND W. G. SMITHERMAN.

(Filed 15 June, 1936.)

1. **Limitation of Actions C a—Where endorser waives extension of time, payment of interest by maker for definite extension prevents running of statute in favor of endorser.**

   Where the face of the note contains an agreement of the parties to remain bound, notwithstanding any extension of time granted the principal debtor, and waiver of notice of such extension, successive payments of interest for one year in advance by the maker and extension of the maturity of the note for one year from such payment by request of the maker, prevents the running of the statute of limitations in favor of an endorser before delivery, and the cause of action against such endorser accrues at the expiration of the last extension of time for the definite period of one year.

2. **Bankruptcy E c—**

   The discharge in bankruptcy of the maker of a note does not affect the liability of an endorser of the note before delivery.

APPEALS by plaintiffs from *Clement, J.,* at September Term, 1935, of MONTGOMERY. New trial.

The above entitled actions were consolidated for trial by consent, and were tried together on the issues arising on the pleadings in each action. Both actions were begun on 31 October, 1934.

On 24 January, 1927, the defendant J. W. Lemons executed and delivered to the plaintiffs, respectively, two notes, one in the sum of

$1,800, payable to the plaintiff Mrs. Della Luther, and the other in the sum of $1,200, payable to the plaintiff Raymond Luther. The consideration for each note was money loaned to the defendant J. W. Lemons by the payee in said note. Each of said notes was due and payable one year after its date, with interest after its maturity at the rate of six per cent per annum until paid, and was endorsed before its delivery by the defendant W. G. Smitherman. Each of said notes at the time it was executed by the defendant J. W. Lemons, and at the time it was endorsed by the defendant W. G. Smitherman, contained a paragraph as follows:

"All parties and endorsers to this note hereby waive protest, presentation and notice of dishonor, and agree to continue and remain bound for payment of this note, and interest, notwithstanding any extension of time granted to the principal debtor, hereby waiving all notice of such extension of time."

The defendant J. W. Lemons, as maker and as principal debtor, paid interest on each of said notes annually, in advance, up to and including 24 January, 1931. At his request, the maturity of said note was extended by the holder for one year from the date of each payment of interest. The defendant W. G. Smitherman had no notice of such extension and did not know until some time during the year 1933 that said notes had not been paid at their maturity by the defendant J. W. Lemons.

On 28 April, 1931, the defendant J. W. Lemons filed a petition in bankruptcy, and on 3 July, 1931, received his discharge. The plaintiff in each of the actions filed a claim in the bankrupt court against the estate of the bankrupt, and received a dividend from said estate which was duly credited on his note. Since his discharge, the defendant J. W. Lemons has made payments on each of said notes, which have been duly credited by the holder of said note.

The court instructed the jury that each of the actions is barred as to the defendant W. G. Smitherman by the three-year statute of limitations, that plaintiff in said action is not entitled to recover of the said defendant, and that the jury should answer the 2d issue "Yes," and 3d issue "Nothing."

The plaintiffs duly excepted to these instructions.

In accordance with the instructions of the court, the jury found in answer to issues submitted by the court in each action that said action is barred as to the defendant W. G. Smitherman by the statute of limitations, as alleged in the answer, and that plaintiff in said action is not entitled to recover of the said defendant.

From judgments in accordance with the verdict, the plaintiffs appealed to the Supreme Court, assigning as error the instructions of the court to the jury on the 2d and 3d issues.

J. M. Daniel, Jr., for plaintiffs.
Howard M. Klutz and R. T. Poole for defendant W. G. Smitherman.

CONNOR, J. The evidence for the plaintiffs at the trial of these actions tended to show that the maturity of each of the notes sued on was extended from year to year, by the plaintiff in each action, as the holder of said note, at the request of the defendant J. W. Lemons, the maker, and therefore the principal debtor on each note, to 24 January, 1932. By reason of such extensions, the cause of action on each note did not accrue until 24 January, 1932. Both actions were begun on 31 October, 1934. Neither action is therefore barred by the three-year statute of limitations as against the defendant W. G. Smitherman, who at the time he endorsed both notes agreed to continue and remain bound for the payment of said notes, notwithstanding any extension of time granted to the principal debtor, and waived all notice of such extensions.

In *Bank v. Hessee,* 207 N. C., 71, 175 S. E., 826, it is said: "Ordinarily, payments made by a principal will not deprive an endorser of the benefit of the defense of the bar of the statute of limitations. *Houser v. Fayssoux,* 168 N. C., 1, 83 S. E., 692; *Franklin v. Franks,* 205 N. C., 96, 170 S. E., 692. This principle, however, does not apply where the endorser has consented in the body of the instrument itself to such extensions; provided, of course, that such extensions are for a definite period of time. *Revell v. Thrash,* 132 N. C., 803, 44 S. E., 596." See *Miller v. Bumgarner,* 209 N. C., 735, 184 S. E., 468.

The discharge of the defendant J. W. Lemons in the bankruptcy proceeding instituted by the petition filed by him did not affect the liability of the defendant W. G. Smitherman as an endorser on the notes sued on. Section 34 of the National Bankruptcy Act is as follows: "The liability of a person who is a codebtor with, or guarantor or in any manner a surety for, a bankrupt, shall not be altered by the discharge of such bankrupt."

For error in the peremptory instructions of the court on the 2d and 3d issues submitted to the jury, the plaintiffs are each entitled to a new trial. It is so ordered.

New trial.

LILLA Y. ALEXANDER, EXECUTRIX OF J. E. ALEXANDER, SR., v. ABNER ALEXANDER, VIRGINIA ANNE ALEXANDER, NANCY ALEXANDER, ISADORE ALEXANDER, WEBB S. ALEXANDER, LILLA Y. ALEXANDER, JOSEPH E. ALEXANDER, JR., FRANCES WINGFIELD ALEXANDER (ORIGINAL PARTIES DEFENDANT), AND JOE W. JOHNSON, GUARDIAN AD LITEM (ADDITIONAL PARTY DEFENDANT).

(Filed 15 June, 1936.)

Wills E b—Devise in this case held for life with full power of disposition, and not a devise in fee simple.

The language of the will involved read, "I lend to my wife the balance of my estate . . . for and during her widowhood," with full power of disposition, "and at the termination of her preceding particular estate the balance of my estate to be equally divided between my two children." *Held:* The word "lend" is equivalent to "give" or "devise," and the devise created an estate limited at most to the life of the widow, and did not convey to the widow a fee simple, notwithstanding the provisions of C. S., 4162, and notwithstanding the rule that a gift of an estate to a person generally or indefinitely with power of disposition ordinarily carries the fee, since it is apparent from the words of the devise that testator did not intend to confer the fee simple.

APPEAL by plaintiff and by defendant Frances Wingfield Alexander from *Hill, J.*, at March Term, 1936, of FORSYTH.

Action to construe certain provisions in the will of J. E. Alexander, Sr., deceased, and heard upon agreed statement of facts.

The testator died leaving a widow, the plaintiff, and two children, one a son by a former marriage, and the other a daughter by the last marriage, Frances Wingfield Alexander, represented here by a guardian *ad litem.*

The testator's estate consists largely of real estate of the appraised value of $52,000, with indebtedness of about $16,000.

In Item 3 of the testator's will is contained the following provision: "I lend to my said wife the balance of my estate not covered in items one and two above, for and during her widowhood, and authorize in as full and ample manner as I am able to do for her to sell any part of it she may think desirable, without any order of court, and to execute such conveyance as may be necessary, and not to limit herself in any amount she may wish to spend; and at the termination of her preceding particular estate I desire the balance of my estate to be equally divided between my two children."

The principal controversy was as to the proper construction of the quoted provision in the will. Plaintiff contended that this gave her a fee simple estate in the property devised, while the guardian *ad litem* for infant defendants presented the opposite view.

The court below held that, while the plaintiff had full power of disposition of the property and to the use of the proceeds, so much of the property or its proceeds as remained unused or undisposed of at the time of her remarriage or death should be equally divided between the testator's two children.

From judgment in accordance with this ruling, the plaintiff and the defendant Frances Wingfield Alexander, by her guardian *ad litem,* appealed.

W. T. Wilson for plaintiff, appellant.
Joe W. Johnson for defendant, appellant.

DEVIN, J. The language used by the testator in the third item of his will clearly conveys his intention. In substance he says: "I lend to my wife the balance of my estate . . . for and during her widowhood" with full power of disposition, "and at the termination of her preceding particular estate the balance of my estate to be equally divided between my two children."

The word "lend" used in this item of the will was equivalent to "give" or "devise." *Jarman v. Day,* 179 N. C., 318; *Smith v. Smith,* 173 N. C., 124; *Sessoms v. Sessoms,* 144 N. C., 121.

The devise to his wife during her widowhood limited the estate given her, at most, to a life interest. *Sink v. Sink,* 150 N. C., 444; *In re Brooks,* 125 N. C., 136.

Blackstone lays it down that an estate granted to a woman during widowhood will be reckoned an estate for life because the time for which it will endure being uncertain, it may possibly last for life if the contingency upon which it is to determine does not sooner happen. 2 Blackstone, 121.

In *Sink v. Sink, supra,* the will contained the following language: "I give and bequeath to my wife the remainder of my land, . . . to have and to hold to her own proper use and behoof . . . during the term of her widowhood, and after her marriage to be equally divided between my brothers and sisters."

This was held to confer no more than a life estate.

In the *Brooks case, supra,* the devise was in these words: "I will and bequeath all my real and personal property to my beloved wife, to have and possess as long as she remains my widow. Should she marry the law is my will."

It was held that sec. 2180 of the Code (now C. S., 4162), could not be invoked for the purpose of extending the estate to a fee, as it was clearly the intention of the testator to limit it at most to an estate for life.

While the gift of an estate to a person generally or indefinitely with power of disposition ordinarily carries a fee, this rule will not be allowed to prevail when the testator gives to the first taker by express terms an estate for life only, though coupled with power of disposition. *Hambright v. Carroll,* 204 N. C., 496; *Roane v. Robinson,* 189 N. C., 628; *Tillett v. Nixon,* 180 N. C., 195; *Carroll v. Herring,* 180 N. C., 369; *Fellowes v. Durfey,* 163 N. C., 305; *Chewning v. Mason,* 158 N. C., 578; *Herring v. Williams,* 158 N. C., 1.

This view is strengthened by the use in this will of the words "At the termination of her preceding particular estate, I desire the balance of my estate to be equally divided between my two children." This language is inconsistent with an intention to confer a fee simple.

There was no other exception to the findings and judgment of the court below.

Judgment affirmed.

STATE v. TONY HAMPTON.

(Filed 15 June, 1936.)

1. Criminal Law I k—

Where there are several counts in the bill of indictment, and the verdict does not refer to one or more of them, the verdict amounts to an acquittal upon the counts not referred to.

2. Criminal Law A b—

The solicitation of another to commit a felony is a crime, although the solicitation is of no effect, and the crime is not committed, the common law rule being in effect and controlling.

3. Common Law A a—

So much of the common law as is not destructive of, repugnant to, or inconsistent with our form of government, and which has not been repealed or abrogated by statute or become obsolete, is in full force and effect in this jurisdiction. C. S., 970.

APPEAL by defendant from *Shaw, Emergency Judge,* at November Special Term, 1935, of ROCKINGHAM.

Criminal prosecution, tried upon indictment charging the defendant (1) with attempting to burn the dwelling house of one Lottie Wells, in violation of C. S., 4246; and (2) with soliciting Glenn Haymour to burn said dwelling house by proffering him a pistol as a reward for his act, and offering to furnish the matches and oil needed in the burning.

There was evidence tending to show a dispute between the defendant and Lottie Wells over the title to her dwelling house. Failing to adjust the matter amicably, the defendant, on 28 June, 1935, solicited Glenn

Haymour to set fire to the house by offering him a pistol as a reward for his act, and also offering to furnish matches and oil for said use. Haymour, a boy fifteen years of age, declined the offer and reported the conversation to the officers, who arrested the defendant.

Verdict: "Guilty of soliciting the commission of a felony, as charged in the second count."

Judgment: Twelve months on the roads.

Defendant appeals, assigning errors.

Attorney-General Seawell and Assistant Attorney-General McMullan for the State, appellee.

P. W. Glidewell, Karl Massey, and T. C. Bethea for defendant, appellant.

STACY, C. J. The defendant, being disgruntled with his neighbor, solicits another to burn her dwelling house. The solicitation is spurned. Is the defendant guilty of a crime?

It is observed the defendant has been acquitted on the charge of attempting to burn the dwelling house in question. C. S., 4246; *S. v. Addor,* 183 N. C., 687, 110 S. E., 650. It was said in *S. v. Taylor,* 84 N. C., 773, that where there are several counts in a bill, "if the jury find the defendant guilty on one count and say nothing in their verdict concerning the other counts, it will be equivalent to a verdict of not guilty as to them." This was quoted with approval in *S. v. Fisher,* 162 N. C., 550, 77 S. E., 121, and is very generally held for law. See, also, *S. v. Sorrell,* 98 N. C., 738, 4 S. E., 630. The principle should not be confused with the practice, authorized by C. S., 4640, which permits the conviction of a "less degree of the same crime" when included in a single count. *S. v. Wall,* 205 N. C., 659, 172 S. E., 216; *S. v. Gregory,* 203 N. C., 528, 166 S. E., 387.

The defendant is not charged with conspiracy, which is a completed offense without execution of the unlawful design. *S. v. Anderson,* 208 N. C., 771. Nor is he charged with "counseling, procuring, or commanding" another to commit a felony, nor with being an accessory before the fact, an accomplice, or a principal in the second degree. C. S., 4175; *S. v. McKeithan,* 203 N. C., 494, 166 S. E., 336.

It is conceded that we have no statute covering the precise question or the particular situation. The inquiry then arises: Is it a substantive common-law offense to solicit another to commit a felony, when the solicitation is of no effect, and the crime solicited is not in fact committed? By the clear weight of authority, the question must be answered in the affirmative. *Commonwealth v. Flagg,* 135 Mass., 545 (solicitation to burn barn); *S. v. Schleifer,* 99 Conn., 432, 121 Atl., 805,

35 A. L. R., 952 (solicitation from public platform to murder and rob); *Wiseman v. Commonwealth,* 143 Va., 631, 130 S. E., 249 (solicitation to embracery); *S. v. Bowers,* 35 S. C., 262, 14 S. E., 488, 28 A. L. R., 847, 15 L. R. A., 199 (solicitation to burn dwelling house); 16 C. J., 117; 8 R. C. L., 350. The facts in the last cited case from South Carolina are identical in principle with those in the case at bar. True, it was held in the *Bowers case, supra,* that soliciting one to set fire to the dwelling house of another and giving him matches for that purpose, besides offering him a reward, although the matches were not so used and the offer was rejected, constituted an attempt to commit the crime of arson, but it was also held that solicitation within itself was a separate indictable offense at common law.

The defendant's contention that the interposition of a resisting will between his bare solicitation, on the one hand, and the proposed illegal act, on the other, afforded him an opportunity to resort to the *locus penitentiæ* of the law, cannot avail, because the solicitation was complete before the resisting will of another had refused its assent and coöperation. Wharton Crim. Law, 179.

It is provided by C. S., 970, 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," is in full force and effect in this jurisdiction. *Speight v. Speight,* 208 N. C., 132, 179 S. E., 461.

The verdict and judgment must be upheld. It is so ordered.

No error.

MARY E. REEP, ADMINISTRATRIX OF THOMAS H. REEP, v. SOUTHERN RAILWAY COMPANY.

(Filed 15 June, 1936.)

Railroads D c: Negligence B b—Evidence held insufficient to support doctrine of last clear chance.

Evidence disclosing that intestate was sitting on a crosstie of a railroad track, with his head resting upon the extended fingers of his right hand, *is held* insufficient to support the submission of an issue involving the doctrine of the last clear chance in an action against the railroad for wrongful death, since under the evidence the engineer of the train, which struck and killed intestate, had the right to assume up to the last moment that the intestate would get off the track in time to avoid the accident.

CLARKSON, J., dissents.

APPEAL by the defendant from judgment based on verdict entered by *Pless, J.,* at November Term, 1935, of GUILFORD. Reversed.

Younce & Younce for plaintiff, appellee.
Richard C. Kelly and Kenneth M. Brim for defendant, appellant.

SCHENCK, J. This action was instituted to recover damages for the wrongful death of the plaintiff's intestate, alleged to have been proximately caused by the negligence of the defendant.

Construing the evidence most favorably to the plaintiff, it tends to show that the intestate was sitting on the end of a crosstie of the railroad track of the defendant, with his head resting against the extended fingers of his right hand, when he was struck by the engine of a passenger train of the defendant.

The jury, in answer to the first and second issues, found that the plaintiff's intestate was injured by the negligence of the defendant, and that the plaintiff's intestate was guilty of contributory negligence; and in answer to the third issue found that notwithstanding the negligence of the plaintiff's intestate the defendant by the exercise of reasonable care could have avoided the injury to said intestate.

The defendant excepted to the submission of the third issue, and moved for judgment as of nonsuit both at the conclusion of the plaintiff's evidence and at the close of all of the evidence. The exception was overruled and the motions were denied. These rulings of the court present the question as to whether there was sufficient evidence in this case to justify the submission of the issue involving the doctrine of the last clear chance.

All that the evidence discloses is that the intestate was sitting on the crosstie with his head resting upon the extended fingers of his right hand. This was not sufficient to put the engineer upon notice that the intestate would not get off of the track before the engine reached and struck him. There is no evidence that any disability of the intestate was known or was apparent to the engineer. The engineer therefore had a right to assume up to the last moment that the intestate would get off of the track. We therefore conclude that his Honor erred in submitting the third issue, and that the answers to the first and second issues entitle the defendant to judgment. This case is governed by the principle enunciated in *Redmon v. R. R.,* 195 N. C., 764; *Rives v. R. R.,* 203 N. C., 227; and *Stover v. R. R.,* 208 N. C., 495.

The judgment below is
Reversed.

CLARKSON, J., dissents.

F. J. LINDSAY v. J. F. SHORT, TRADING AND DOING BUSINESS AS J. F. SHORT, LOCAL AND LONG DISTANCE HAULING, OF HALIFAX, VA.

(Filed 15 June, 1936.)

1. **Appearance A a: Pleadings D a—**

A defendant has the right to make a special appearance and move to dismiss the action for want of jurisdiction.

2. **Process B e—N. C. Code, 491 (a), does not authorize service of process in action for abuse of process against nonresident auto owner.**

The statute authorizing service of summons on nonresident auto owners by service on the Commissioner of Revenue does not warrant the service of summons in the manner provided upon a nonresident owner in an action for abuse of process based upon such owner's arrest of plaintiff after a collision between their cars in this State, since the action for abuse of process does not arise out of a collision in which defendant was involved by reason of the operation of his automobile in this State.

APPEAL by the defendant from *Warlick, J.,* at April Term, 1936, of ROCKINGHAM. Reversed.

This was a civil action to recover damages (1) for injuries arising out of a collision between the automobile of the plaintiff and the truck of the defendant, alleged to have been caused by the negligence of the defendant, and (2) for abuse of process in having the plaintiff arrested.

Service of summons was had upon the Commissioner of Revenue of North Carolina, as agent of the nonresident defendant, J. F. Short, under chapter 75, Public Laws 1929, section 491 (a), N. C. Code of 1935 (Michie). The defendant entered a special appearance and moved to dismiss the alleged cause of action for abuse of process for the reason that the court was without jurisdiction thereof, due to the fact that there had been no legal and valid service of process therein. The motion was granted by the clerk of the court, but, upon appeal, was denied by the judge holding the courts of the district, and the defendant appealed to the Supreme Court, assigning such denial as error.

Sharp & Sharp for plaintiff, appellee.
Brown & Trotter for defendant, appellant.

SCHENCK, J. "The right to dismiss an action for want of jurisdiction by entering a special appearance for the purpose is imbedded in our procedure." *Smith v. Haughton,* 206 N. C., 587.

It is provided by the statute, section 491 (a), N. C. Code of 1935 (Michie), that the acceptance by a nonresident of the right and privilege to operate a motor vehicle on the public highways of the State "shall be

deemed equivalent to the appointment by such nonresident of the Commissioner of Revenue . . . to be his true and lawful attorney upon whom may be served all summonses or other lawful process in any action or proceeding against him, growing out of any accident or collision in which said nonresident may be involved by reason of the operation by him, for him, or under his control or direction, express or implied, of a motor vehicle on such public highway of this State, and said acceptance or operation shall be a signification of his agreement that any such process against him shall be of the same legal force and validity as if served on him personally."

We are of the opinion, and so hold, that the foregoing statute does not embrace an action for abuse of process in having the plaintiff arrested. An action for abuse of process cannot be said to be an action growing out of any accident or collision in which the defendant was involved by reason of the operation by him, for him, or under his control or direction, of a motor vehicle on a public highway of this State.

The action for abuse of process not being embraced in the statute, the service of summons upon the Commissioner of Revenue was void in so far as such action is concerned, and the judgment of the Superior Court upholding such service is

Reversed.

STATE v. WILLIE LEE GALLMAN.

(Filed 15 June, 1936.)

Homicide H b—Evidence of defendant's guilt of murder in the first degree held sufficient to be submitted to the jury.

Evidence for the State tending to show that after a fight between defendant and another, and after both had left the scene, defendant returned some thirty minutes later, overtook his antagonist as he was hauling wood in the pursuit of his business, and shot him three times, inflicting mortal wounds, *is held* sufficient to be submitted to the jury on the charge of murder in the first degree, and defendant's contention, based solely on his own evidence, and with entire disregard to the State's evidence, that there was no evidence of premeditation and deliberation, is untenable.

APPEAL by defendant from *Clement, J.*, at January Term, 1936, of FORSYTH.

Criminal prosecution, tried upon indictment charging the defendant with the murder of one John Gaston.

Verdict: Guilty of murder in the first degree.

Judgment: Death by asphyxiation.

The prisoner appeals, assigning errors.

Attorney-General Seawell and Assistant Attorneys-General McMullan and Bruton for the State, appellee.

John D. Slawter for defendant, appellant.

STACY, C. J. The evidence on behalf of the State tends to show that on 31 December, 1935, John Gaston and another were shooting pool for money at a pool room in the city of Winston-Salem. The defendant was present, acting as stakeholder. Upon winning the game, as he contended, Gaston demanded the stakes, which the defendant declined to give him. An argument ensued and resulted in a fight between the defendant and Gaston, his son and brother, who were also present. The defendant broke away and ran. In about thirty minutes he returned with a 22-rifle. Gaston and his son, in the meantime, had gone about their business hauling wood. The defendant overtook them at Lucy Gunter's home. As Gaston started off with his truck, the defendant shot him three times, inflicting wounds from which he died several days thereafter.

The defendant contended that the deceased was alighting from the truck in a threatening manner, and that he shot in self-defense. The jury accepted the State's version of the killing and rejected the defendant's plea.

The defendant's first contention that no evidence of premeditation and deliberation appears on the record is without substantial merit, as it is based solely upon his own evidence, and disregards entirely the evidence offered by the State. The motions to nonsuit on the capital charge, made under the Mason Act, C. S., 4643, were properly overruled. *S. v. Buffkin,* 209 N. C., 117; *S. v. Evans,* 198 N. C., 82, 150 S. E., 678; *S. v. Miller,* 197 N. C., 445, 149 S. E., 590; *S. v. Lipscomb,* 134 N. C., 689, 47 S. E., 44.

The remaining exceptions are equally untenable. They have all been examined, with the care which a capital case imposes, and found wanting in merit. It would be only a matter of repetition to consider them *seriatim* in an opinion.

The defendant has been tried in strict conformity to the established rules and sentenced as the law commands.

The verdict and judgment will be upheld.

No error.

STATE v. J. W. BRADLEY AND JAMES MADDREY.

(Filed 15 June, 1936.)

1. **Criminal Law J a—**

A motion in arrest of judgment properly challenges the sufficiency of the warrant to charge a crime.

2. **Concealed Weapons B a—Warrant held fatally defective in failing to charge that defendant carried concealed weapon off his own premises.**

In this prosecution for carrying a concealed weapon, the warrant *is held* fatally defective in failing to embrace in the charge the essential element of the offense that the weapon was carried concealed by defendant off his own premises, the warrant itself excluding the charge that the weapon was carried off the premises by charging that defendant carried an unconcealed weapon off his premises. C. S., 4410.

3. **Criminal Law J a—**

A motion in arrest of judgment for fatal defect appearing upon the face of the record may be made at any time in any court having jurisdiction of the matter.

APPEAL by defendants from *Hill, Special Judge,* at March Term, 1936, of FORSYTH.

Criminal prosecutions, consolidated and tried upon identical warrants, each charging that the defendant therein named "did unlawfully and willfully have and carry concealed about his person a deadly weapon, to wit, a certain pistol, and did carry off his premises, unconcealed, a deadly weapon, to wit, a certain......................," against the form of the statute in such cases made and provided, etc.

Verdict: "Guilty of C. C. W."

Judgments: Two years on the roads as to each of the defendants.

Defendants appeal, assigning errors.

Attorney-General Seawell and Assistant Attorney-General McMullan for the State, appellee.

John C. Wallace and Parrish & Deal for defendants, appellants.

STACY, C. J. Do the warrants charge a crime? The question is properly presented by motions in arrest of judgment. *S. v. Tarlton,* 208 N. C., 734; *S. v. McKnight,* 196 N. C., 259, 145 S. E., 281; *S. v. Grace,* 196 N. C., 280, 145 S. E., 399; *S. v. Mitchem,* 188 N. C., 608, 125 S. E., 190.

It is provided by C. S., 4410, that if anyone, "except when on his own premises," or "not being on his own lands," shall carry concealed about his person, any pistol, gun, or other deadly weapon, he shall be guilty of a misdemeanor." It was said in *S. v. Perry,* 120 N. C., 580,

26 S. E., 915, that the use of these exceptive phrases in the statute has the effect of restricting the legal right to carry concealed weapons to those who are in the privacy of their own premises. *S. v. Terry,* 93 N. C., 585.

Being off the premises of the accused, or not being on his own lands, is an integral part of the offense condemned by the statute. *S. v. Johnson,* 188 N. C., 591, 125 S. E., 183; *S. v. Connor,* 142 N. C., 700, 55 S. E., 787. Even if this were considered an exception or proviso, not necessary to be negatived in the indictment (*S. v. Smith,* 157 N. C., 578, 72 S. E., 853), still the present warrants would seem to be insufficient, for it is expressly alleged the defendant "did carry off his premises, unconcealed, a deadly weapon." This would seem to exclude the idea that the first allegation was also intended to mean while off his own premises. *S. v. Vanderburg,* 200 N. C., 713, 158 S. E., 248.

A motion in arrest of judgment, perforce predicated upon some fatal error or defect appearing on the face of the record, may be made at any time in any court having jurisdiction of the matter. *S. v. Baxter,* 208 N. C., 90, 179 S. E., 450; *S. v. McKnight, supra.*

Judgments arrested.

GEORGE BEVAN, BY HIS NEXT FRIEND, F. C. BEVAN, v. G. E. CARTER.

(Filed 15 June, 1936.)

1. Evidence K b—Opinion testimony in this case held incompetent as invading the province of the jury.

This was an action to recover for injuries sustained when plaintiff was struck by a car driven by defendant. Defendant contended that the accident was unavoidable, and was permitted to testify that it was not possible for him to have avoided hitting plaintiff. *Held:* The testimony invaded the province of the jury, and its admission constitutes reversible error.

2. Negligence D a—

It is necessary that defendant plead contributory negligence in order to be entitled to the submission of the issue to the jury. C. S., 523.

3. Negligence C b—

A four-year-old child is incapable of negligence, primary or contributory.

APPEAL by plaintiff from *Pless, J.,* at September Term, 1935, of DAVIDSON.

Civil action to recover damages for alleged negligent injury to plaintiff, a four-year-old child, who sustained a broken leg when hit by a Ford sedan automobile owned and operated by the defendant.

The evidence is in conflict as to whether plaintiff's injury was the result of defendant's negligence or unavoidable accident.

The defendant, as a witness in his own behalf, was permitted to testify as follows: "Q. State to the jury whether there was any possible way for you to avoid hitting the child." (Objection; overruled; exception.) "A. None that I could see."

The following instruction to the jury constitutes one of plaintiff's exceptive assignments of error:

"The question of contributory negligence of the plaintiff is usually submitted to the jury in a separate issue. In cases of this kind, however, due to the age of this young boy, the court is submitting it all to you in one issue, but you will consider that question, the question of the alleged contributory negligence of the young boy in determining the answer to the first issue." Exception.

In substance, this instruction was repeated several times during the charge.

The jury answered the issue of negligence in favor of the defendant.

From judgment on the verdict plaintiff appeals, assigning errors.

Ford M. Meyers for plaintiff, appellant.

J. M. Daniel, Jr., and Phillips & Bower for defendant, appellee.

STACY, C. J. Was it competent for the defendant to express the opinion that there was no possible way for him to avoid hitting the plaintiff? The authorities say, "No."

In *Jeffries v. R. R.*, 129 N. C., 236, 39 S. E., 836, the following question, propounded to the engineer of the railroad company, was held to be objectionable: "After you saw the child, was anything not done that could have been done to save the child?" Likewise, in *Phifer v. R. R.*, 122 N. C., 940, 29 S. E., 578, a new trial was ordered because the plaintiff was asked, "Were you careful?" and was allowed to answer, "Yes, I was careful." This was the very question the jury was impaneled to decide. *Stanley v. Lbr. Co.*, 184 N. C., 302, 114 S. E., 385; *Raynor v. R. R.*, 129 N. C., 195, 39 S. E., 821.

Second: Was it proper to submit to the jury the contributory negligence of the plaintiff? The answer is, "No."

It was said in *Campbell v. Laundry*, 190 N. C., 649, 130 S. E., 638, "A child 4 years old is incapable of negligence, primary or contributory." Furthermore, there is no plea of contributory negligence. C. S., 523. Nor would such a plea avail as against a four-year-old plaintiff. *Jordan v. Asheville*, 112 N. C., 743, 16 S. E., 760.

New trial.

WACHOVIA BANK AND TRUST COMPANY, EXECUTOR OF HARRY E. NISSEN, v. ATLANTIC GREYHOUND LINES ET AL.

(Filed 15 June, 1936.)

1. Death B b—Mortuary tables are but evidence of life expectancy.

The mortuary tables, C. S., 1790, are but evidence of life expectancy, to be taken in connection with other evidence of health, constitution, and habits, and an instruction that intestate's life expectancy was so many years, based upon the tables, violates this rule and the rule against an expression of opinion by the court as to whether a fact is sufficiently proven. C. S., 564.

2. Appeal and Error J g—

Where a new trial is awarded on one exception, other exceptions relating to matters which may not arise upon a subsequent hearing need not be considered.

3. Appeal and Error A f—

Where judgment is entered on appeal to the Superior Court granting defendants a new trial, they are not entitled to be heard on their appeal to the Supreme Court unless and until reversible error has been made to appear on plaintiff's appeal.

APPEAL by plaintiff and defendants from *Hill, Special Judge,* at January Term, 1936, of FORSYTH.

Civil action to recover damages for death of plaintiff's testator, alleged to have been caused by the wrongful act, default, or neglect of the defendants.

Plaintiff's testator, Harry E. Nissen, who was chief of the fire department of the city of Winston-Salem, was killed between 2:00 and 3:00 o'clock on the morning of 28 November, 1932, at a street intersection, when a bus of the defendant Atlantic Greyhound Lines, driven by Bernie W. Phillips, collided with an automobile in which Nissen was being driven to a fire. The case was tried in the Forsyth County court and resulted in verdict and judgment for plaintiff. The defendants appealed to the Superior Court of Forsyth County, assigning forty-four errors.

Upon hearing the appeal in the Superior Court, four of defendants' assignments of error were sustained, the cause remanded for a new trial, and the remaining forty assignments of error were overruled. We are invited to review the entire judgment of the Superior Court, both plaintiff and defendants appealing.

Manly, Hendren & Womble and Parrish & Deal for plaintiff.

Hutchins & Parker, Ratcliffe, Hudson & Ferrell, and James E. Gay for defendants.

STACY, C. J. The trial court instructed the jury with respect to the mortuary table as follows: "So the court instructs you, by referring to the mortuary table of the statute, that the expectancy of a person 59 years of age would be fourteen and seven-tenths years." This was assigned as error, and the Superior Court sustained the exception. The ruling is supported by the decisions in *Taylor v. Construction Co.,* 193 N. C., 775, 138 S. E., 129, and *Hubbard v. R. R.,* 203 N. C., 675, 166 S. E., 802.

The use of the mortuary table seems quite easily misunderstood. It is competent as evidence, but only "as evidence, with other evidence as to the health, constitution, and habits" of such person. C. S., 1790; *Young v. Wood,* 196 N. C., 435, 146 S. E., 70. For the court to make it definitive violates not only the evidence rule, but also the prohibition against expression of opinion as to "whether a fact is fully or sufficiently proven." C. S., 564; *Cogdill v. Hardwood Co.,* 194 N. C., 745, 140 S. E., 732.

Rulings upon other exceptions could only be anticipatory, perhaps supererogatory, as they may not arise on another hearing, hence, we affirm the judgment without presently adverting to them. *Pemberton v. Greensboro,* 208 N. C., 466, 181 S. E., 258.

The defendants are not entitled to be heard on their appeal unless and until reversible error has been made to appear on plaintiff's appeal. *Williams v. Stores Co.,* 209 N. C., 591; *Letterman v. Miller,* 209 N. C., 709.

Plaintiff's appeal, Affirmed

Defendants' appeal, Dismissed.

STATE v. JOHN KINYON.

(Filed 15 June, 1936.)

Criminal Law L a—

Where defendant, convicted of a capital felony, fails to file a brief in the Supreme Court, the appeal will be dismissed on motion of the Attorney-General after an examination of the record discloses no error. Rules of Practice in the Supreme Court 27 and 28.

APPEAL by defendant from *Grady, J.,* at November Term, 1935, of GRANVILLE.

Motion by the State to dismiss defendant's appeal.

Appeal dismissed.

DEVIN, J. The defendant was tried upon a bill of indictment charging him with the felony of rape, and was convicted and sentenced to death. Defendant gave notice of appeal and has filed in this Court statement of case on appeal, but has filed no brief.

The Attorney-General moves to dismiss the appeal for failure to comply with Rules 27 and 28 of this Court. This motion must be allowed, but, as is customary in capital cases, we have examined the record to see if any error appears. The only exception noted at the trial was to the refusal of the trial court to allow defendant's motion for judgment as of nonsuit.

In this we find no error, nor do we find any error in the record. *S. v. Dunlap,* 208 N. C., 432.

Appeal dismissed.

JOHN L. ATKINS, ON BEHALF OF HIMSELF AND ALL OTHER CITIZENS AND TAXPAYERS OF THE CITY OF DURHAM, WHO MAY DESIRE TO JOIN HIM IN THIS ACTION, V. CITY OF DURHAM.

(Filed 15 June, 1936.)

1. **Municipal Corporations B c—Establishment and maintenance of playgrounds held governmental function of populous city.**

Municipal corporations are given authority by N. C. Code, 2795, 2776 (b), 2787 (12), to establish parks and playgrounds necessary to the maintenance of the health of their inhabitants, and an ordinance of a populous industrial city which provides for the issuance of bonds to establish and maintain parks and playgrounds for the children of the city *is held* a valid exercise of its police power under legislative authority for the promotion of the public health, safety, and morals.

2. **Taxation A a—Bonds to establish and maintain playgrounds in populous city held for necessary municipal expense not requiring vote.**

Defendant municipality proposed to issue its bonds to establish and maintain playgrounds for its children. It appeared that defendant is a populous industrial city, that it had never defaulted on its bonds, principal or interest, that its tax rate is within the prescribed limitations, and that no petition had been filed demanding that the question be submitted to the voters, although the ordinance provided that it should not take effect for thirty days in order to afford the prescribed time for the filing of such petition under the Municipal Finance Act. *Held:* The bonds are for a necessary municipal expense within the meaning of Art. VII, sec. 7, of the Constitution of North Carolina, and it is not required that the issuance of the bonds be submitted to a vote of qualified electors of the municipality.

APPEAL by plaintiffs from *Frizzelle, J.,* at 4 May Term, 1936. From DURHAM. Affirmed.

This is an action brought by plaintiffs against defendant to restrain it from issuing $25,000 of bonds for public parks and playgrounds. The prayer of plaintiffs is as follows:

"1. That the defendant be perpetually restrained and enjoined from issuing and selling the said bonds, and from levying and collecting the said tax upon the taxable property of the city of Durham, authorized to pay the principal and interest of said bonds, for the reason that,

"(a) The acquiring of lands or rights in lands for public parks and playgrounds and the development and improvement of such lands and other lands now owned by the city of Durham, and the furnishing thereof with equipment and apparatus, is not a necessary expense of the city.

"(b) The said bonds are for a purpose other than the payment of the necessary expenses of the city, and the question of the issuance of the said bonds and the levy of said tax has not been approved by the voters of the municipality at an election as provided in the said the Municipal Finance Act.

"(c) That the city is attempting to pledge its faith and loan its credit and collect a tax for purposes other than a necessary expense of the city, without the vote of a majority of the qualified voters therefor."

The defendant set up certain facts showing that the proposed bonds were for a necessary expense in the promotion of health, safety, and morals of the people of the city of Durham. That the estimated population of the city of Durham at this time is 64,000. That there are 7,580 white children in the public schools of the defendant city, and 4,890 colored children in the public schools of the defendant city. That there are approximately 12,700 industrial workers, residents of the defendant city. That the assessed valuation of real and personal property for taxation for the fiscal year 1935-1936 is $70,718,558. That the city tax rate for the said fiscal year is $1.70 on the $100 valuation. That the defendant city has never defaulted in the payment of interest or bonds.

By agreement of counsel, the case was heard on its merits by his Honor, J. Paul Frizzelle, Judge presiding, at Durham, N. C.

After hearing the evidence and argument of counsel, the court held as a matter of law that the ordinance authorizing the $25,000 Public Park Bonds was a valid and subsisting ordinance of the city of Durham, and that said defendant in enacting said ordinance was performing a governmental function, useful and necessary in the preservation and promotion of the health, safety, and morals of the people, to which plaintiff excepted and assigned same as error. Exception No. 1.

After hearing the evidence and argument of counsel, the court held as a matter of law that the proposed issuance of said bonds for public park purposes and the proposed levying of a tax to pay the same and the

annual interest thereon is a necessary expense and does not fall within the inhibition of Article VII, section 7, of the Constitution of the State of North Carolina; to which plaintiff excepted and assigned the same as error. Exception No. 2.

The court signed the judgment as set out in the record, to which plaintiff excepted and assigned same as error. Exception No. 3.

The following judgment was rendered in the court below: "This cause coming on for a hearing upon the complaint of the plaintiff, to be used as an affidavit, before his Honor, J. Paul Frizzelle, Judge presiding, and the defendant entering a general appearance and filing answer, upon the answer used as an affidavit in motion to dismiss, and by agreement of counsel, the case being heard on its merits, after the hearing of the pleadings and evidence offered, and the arguments of counsel, I find the following facts:

"1. That the plaintiff is a taxpayer of the city of Durham.

"2. That the defendant city of Durham is a municipal corporation, duly created, organized, and existing under and by virtue of law, and possessed with certain powers and authorities conferred upon and delegated to it by the Legislature of the State of North Carolina, in particular, those powers set out in section 2787, section 2776, and section 2795, Consolidated Statutes of North Carolina.

"3. That the population of the city of Durham in 1870 consisted of 256 inhabitants; and that the population of the city of Durham in 1890 was 5,485; and in 1900 was 6,679; and in 1910 was 18,241; and in 1920 was 21,719; and in 1930 was 52,037; and that the estimated population of said city of Durham at this time is 64,000.

"4. That the outlays and maintenance of the public parks and playgrounds for recreational department of the city of Durham for the year 1925 were $5,400; and that said amount has gradually arisen, and said outlays aforesaid for the year 1935 were $20,937.25. That small fees are charged and collected in connection with the operation of the swimming pools and use of said conveniences in the public parks and playgrounds of said defendant city, which fees are grossly less than the actual annual outlays and expenses incident for the maintenance of said parks, playgrounds, and recreational centers.

"5. That the assessed valuation of real and personal property listed for taxation for the fiscal year 1935-1936 is $70,718,558, and that the defendant city of Durham has never defaulted in the payment of interest and bonds.

"6. That the governing body of the defendant city of Durham on 20 April, 1936, duly adopted an ordinance authorizing $25,000 Public Park Bonds, all in the form, words, and figures as set out in the complaint.

"From the foregoing facts, the court arrives at the following conclusions of law:

"1. That the ordinance authorizing $25,000 Public Park Bonds was duly passed by the governing body of the defendant city of Durham, on 20 April, 1936, and the same is a valid and subsisting ordinance of the defendant city of Durham, and said defendant city of Durham, in enacting said ordinance, was performing a governmental function, useful and necessary in the preservation and promotion of the health, safety, and morals of the people.

"2. That the proposed issuance of said bonds for said public park purposes, and the proposed levying of a tax to pay the same and the annual interest thereon, is a necessary expense, and does not fall within the inhibition of Article VII, section 7, of the Constitution of the State of North Carolina.

"From the foregoing findings of facts and conclusions of law, it is ordered, adjudged, and decreed that the prayer for the restraining order herein be and the same is denied, and this cause is dismissed and the defendant will recover its costs, to be taxed by the clerk. J. Paul Frizzelle, Judge presiding."

The plaintiffs made the following exceptions and assignments of error: "His Honor erred in holding that the ordinance authorizing the $25,000 Public Park Bonds is a valid and subsisting ordinance of the defendant city of Durham, and that said city of Durham in enacting said ordinance was performing a governmental function, useful and necessary in the preservation and promotion of the health, safety, and morals of the people. His Honor erred in holding as a matter of law that the proposed issuance of said bonds for said public park purposes and the proposed levying of a tax to pay the same and the annual interest thereon is a necessary expense and does not fall within the inhibition of Article VII, section 7, of the Constitution of the State of North Carolina. His Honor erred in signing the judgment as set out in the record."

The exceptions and assignments of error made by plaintiffs and other necessary facts will be set forth in the opinion.

W. H. Hofler for plaintiffs.
S. C. Chambers for defendant.
J. L. Morehead, amicus curiæ.

CLARKSON, J. We do not think that any of the exceptions and assignments of error made by plaintiffs can be sustained. The record discloses that the city of Durham now has many parks and playgrounds, among them "Long Meadow Park," a gift to the city of Durham "for

the white people of Durham County," and "Hillside Park," "for the colored people of Durham County."

The city council of the city of Durham passed the following ordinance:

"Section 1. That the city of Durham issue its bonds pursuant to the Municipal Finance Act, as amended, in an amount not exceeding $25,000, for the purpose of acquiring lands or rights in lands for public parks and playgrounds, including any buildings thereon at the time of acquisition, and the development and improvement of such lands and other lands now owned by the city of Durham and dedicated for public park purposes, together with the construction or reconstruction of buildings thereon and the furnishing thereof with equipment and apparatus.

"Sec. 2. That a tax sufficient to pay the principal and interest of said bonds shall be annually levied and collected.

"Sec. 3. That a statement of the debt of the city has been filed with the clerk and is open to public inspection.

"Sec. 4. That this ordinance shall take effect 30 days after its first publication, unless in the meantime a petition for its submission to the voters is filed under said act, and that in such event it shall take effect when approved by the voters of the city at an election as provided in said act."

N. C. Code, 1935 (Michie), sec. 2947, in part, is as follows: "Ordinance requiring popular vote.—(1) When Vote Required.—If a bond ordinance provides that it shall take effect thirty days after its first publication, unless a petition for its submission to the voters shall be filed in the meantime, the ordinance shall be inoperative without the approval of the voters of the municipality at an election if a petition shall be filed as provided in this section. (2) Petition Filed.—A petition demanding that a bond ordinance be submitted to the voters may be filed with the clerk within thirty days after the first publication of the ordinance. The petition shall be in writing and signed by voters of the municipality equal in number to at least twenty-five per centum of the total number of registered voters in the municipality, as shown by the registration books for the last preceding election for municipal officers therein," etc.

In *Hill v. Elizabeth City,* 291 Fed., 194 (210), (written by *Judge H. G. Connor,* U. S. District Judge for Eastern District of North Carolina), it is said: "Section 2947, par. 1, provides for the election before bonds are issued, upon a petition to be filed within 30 days after the first publication of the ordinance. No such petition having been filed, the board of aldermen, on 9 October, 1922, adopted an ordinance for directing the issuance of the bonds. I find no valid objection to the proceedings taken by the board of aldermen, entitling plaintiff to enjoin

the issuance of the bonds." This decision is direct authority for denying the restraining order, but we go further.

When this ordinance was passed the city of Durham had a population estimated at 64,000, and 12,470 children enrolled in the public schools—7,580 white and 4,890 colored. There were approximately 12,700 industrial workers. The outlay for parks and playgrounds for 1935 was $20,937.25. The assessed value of real and personal property for the year 1935-1936 is $70,718,558. The defendant city has never defaulted in the payment of interest or bonds. The city tax rate is $1.70 on the $100.00 valuation.

Const. of N. C., Art. VII, sec. 7, is as follows: "No county, city, town, or other municipal corporation shall contract any debt, pledge its faith, or loan its credit, nor shall any tax be levied or collected by any officers of the same, except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein."

N. C. Code, *supra,* sec. 2795, in part, is as follows: "The governing body is hereby given power to make such rules and regulations, not inconsistent with the Constitution and laws of the State, for the preservation of the health of the inhabitants of the city, as to them may seem right and proper."

Section 2776—Art. 11 (A)—Recreation Systems and Playgrounds. (b): "The city council or governing body of any city or town, or the county commissioners or governing body of any county, or the board of trustees or governing body of any school district, may dedicate and set apart for use as playgrounds, recreation centers, and other recreational purposes, any lands or buildings, or both, owned or leased by such municipality and not dedicated or devoted to another and inconsistent public use; and such municipality may, in such manner as may now or hereafter be authorized or provided by law for the acquisition of lands or buildings for public purposes, acquire or lease lands or buildings, or both, for said recreational purposes; or, if there be no law authorizing such acquisition or leasing of such lands or buildings, the governing body of any such municipality is empowered to acquire lands or buildings, or both, for such purposes by gift, purchase, condemnation, or lease."

Section 2787—Art. 15—Powers of Municipal Corporations. (12) "To acquire, lay out, establish, and regulate parks within or without the corporate limits of the city for the use of the inhabitants of the same."

The General Assembly, from the above quoted law, has given the governing body of municipal corporations plenary power to establish parks and playgrounds. The only contention of plaintiffs is that they are not a necessary expense and require a vote of the people under Art. VII, sec. 7, *supra,* of the Constitution of North Carolina.

From the facts on this record, we think the ordinance a valid exercise of its police power under legislative authority, and the bonds were for a necessary expense and did not require a vote of the municipality.

In the case of *Storm v. Town of Wrightsville Beach,* 189 N. C., 679 (681), speaking to the subject, it is said: "The question, what is a necessary expense, which is a judicial one for the courts to determine, is one that cannot be defined generally so as to fit all cases which may arise in the future. As we progress, we look for better moral and material conditions and the governmental machinery to provide them. 'Better access to the good things of life for all people,' safety, health, comfort, convenience in the given locality. Webster defines necessary: 'A thing that is necessary or indispensable to some purpose; something that one cannot do without; a requisite; an essential.' What is a necessary expense for one locality may not be a necessary expense for another. *Fawcett v. Mt. Airy,* 134 N. C., p. 125; *Keith v. Lockhart,* 171 N. C., p. 451. . . . The term in the Constitution, 'necessary expense,' is not confined to expenses incurred for purposes absolutely necessary to the very life and existence of a municipality, but it has a more comprehensive meaning. It has been held in this jurisdiction that streets, waterworks, sewerage, electric lights, fire department and system, municipal building, market house, jail or guard house are necessary expenses," citing numerous authorities.

In *White v. Charlotte,* 209 N. C., 573 (575), is the following: "The facts alleged in the complaint in this action are not sufficient to determine as a matter of law whether or not the defendants, in maintaining a public park in the city of Charlotte, and providing in said park a swing for the use of children and others who use said park for purposes of recreation, were thereby engaged in the performance of a governmental function only. For that reason, there was no error in overruling the demurrer filed by the defendants."

McQuillan, Municipal Corporations (2d Ed.), Vol. 3, sec. 1256 (1154), pp. 773-4, says: "It has been stated 'there is no one feature of city life which more greatly adds to its beauty and attractiveness than a well ordered park and boulevard system.' In densely populated cities, public parks are manifestly essential to the health, comfort, and pleasure of their citizens. Generally, express power is conferred on municipalities to purchase land for a park, or else power to purchase land for public purposes is construed to authorize the purchase of land for such purposes. So, generally, a municipality may lease lands for a public park. Likewise, the acquisition of land for a public park is for a 'public purpose' so as to authorize condemnation proceedings for such purpose," etc.

In the recent case of *Hale v. Comr. of Internal Revenue,* before U. S. Board of Tax Appeals, Docket No. 67105, decided 19 November, 1935 (not yet published in the reports), the Board said: "We think it definitely settled by the great weight of authority that the establishment and maintenance of public parks by a municipality is a public or governmental function. Everett B. Sherman, 27 B. T. A., 1169; Affd., *Commissioner v. Sherman,* 69 Fed. (2d), 755; *Kellar v. City of Los Angeles,* 179 Cal., 605, 178 Pac., 505; *Williams v. City of Birmingham,* 121 S. R., 14; *Epstein v. City of New Haven,* 132 Atl., 467; *Petty v. City of Atlanta,* 148 S. E., 747; *Board of Park Commissioners v. Prinz,* 127 Ky., 460, 105 S. W., 948. So, also, the maintenance of a public bathing beach is held to be a public function. *Gensch v. City of Milwaukee,* 190 N. W., 843; *Nemet v. City of Kenosha,* 172 N. W., 711; *Bolster v. City of Lawrence,* 225 Mass., 387, 114 N. E., 722.

"The general duty of a city to preserve the public health of its citizens is governmental, *City and County of Denver v. Maurer,* 106 Pac., 875, and the right of the municipality to maintain such recreational facilities as public parks, bathing beaches, and playgrounds rests on its duty to maintain public health. *Board of Park Comrs. v. Prinz, supra; Comr. v. Sherman, supra.*

"The care of the public health is, undoubtedly, a subject matter of general concern, and how it shall be accomplished is a public question. When its accomplishment is left to the municipality, it acts as a governmental agency and not in a proprietary capacity. *Scibilia v. Philadelphia,* 279 Pa., 549, 124 Atl., 273." There was no appeal from this decision.

The above so fully sustains defendant's contention, citing a wealth of authorities, that we do not give other cases of like import from different other states.

Mr. Morehead, in his brief as *amicus curiæ,* also cites many authorities sustaining the position of Mr. Chambers, attorney for defendant, that parks and playgrounds were a valid exercise of the police power in the promotion of health, safety, and morals, and were a necessary expense and, therefore, did not impinge Art. VII, sec. 7, *supra,* of the Const. of North Carolina. We quote interesting extracts from his brief: "Turning to the question of the influence of parks and playgrounds upon juvenile delinquency, we submit the following from a report of the National Recreation Association, which shows: '*Vice and Recreation*—Extensive studies and investigation disclosed that 95% of all offenders brought before the courts of the country had no opportunity as children for wholesome recreation, that they had not been reached or influenced by any organized program for boys and girls; and that the first offense in every instance had been due to lack of proper supervision for leisure

time. This condition was especially noticeable in the slums of larger cities, where children were forced to play in the streets, and that these children, as products of the streets, furnished splendid material as recruits for organized gangs and racketeers. *Delinquency and Recreation*—Studies made in several of the larger cities of the United States have shown that juvenile delinquency increases in direct proportion to the distance from organized playgrounds. It is an obvious fact that a normal boy or girl will select an opportunity for wholesome play under wholesome conditions if this opportunity is afforded.' Warden Lawes, in his book, '20,000 Years in Sing Sing,' says: 'In the last analysis, if there is to be any permanent diminution of crime, we shall have to look to our adolescents, . . . educators and social workers know from actual experience that juvenile delinquency gives way before supervised playgrounds and well organized boys and kindred organizations.' "

The record discloses that Durham has a large industrial population. There are 12,470 children enrolled in the public schools. There are 12,700 industrial workers. These industrial workers—bread winners—are no doubt unable to leave the crowded city, for lack of means and perhaps sufficient vacation, to go away with their families for recreation in the pursuit of health. It has been said that "Health is wealth." These parks and playgrounds at all times, and especially in the heat of summer, are a blessing and benediction to them and to the children, and to all the inhabitants of the city. Nothing is more conducive to health and good morals than these recreational places in a thickly settled city. The great weight of authority is to the effect that they are a public necessity.

For the reasons given, the judgment of the court below is

Affirmed.

PRESS SWINK v. CAROLINA ASBESTOS COMPANY, MARYLAND CASUALTY COMPANY, LUMBER MUTUAL CASUALTY COMPANY, AND UNITED STATES CASUALTY COMPANY.

(Filed 15 June, 1936.)

1. Master and Servant F i—

The findings of fact made by the Industrial Commission in a proceeding before it are conclusive on appeal to the Superior Court when the findings are supported by competent evidence.

2. Master and Servant F b—Evidence held to support finding of Commission that claimant's asbestosis was not caused by an accident.

The evidence before the Industrial Commission tended to show that claimant worked in defendant employer's asbestos plant for six or seven

years, that defendant did not install a dust removing system until about a year before claimant's discharge, that dust removing systems were in general and approved use in like plants, and reduced asbestos dust in such plants by as much as 90 per cent, and that claimant was discharged when a medical examination disclosed that he was suffering from asbestosis, caused by breathing air ladened with asbestos dust over a period of years. *Held:* The evidence shows that claimant's injury was the result of an occupational disease not compensable under the Workmen's Compensation Act prior to its amendment by ch. 123, Public Laws of 1935, and the finding of the Industrial Commission that the injury was not the result of an accident was supported by the evidence and was binding on the Superior Court upon appeal.

3. **Appeal and Error J g—**

Where it is determined on appeal that an employee is not entitled to recover under the provisions of the Compensation Act, the contention of the successive insurance carriers as to their respective liabilities need not be decided.

CLARKSON, J., dissents.

APPEAL by defendants Carolina Asbestos Company and Maryland Casualty Company from *Alley, J.,* at September Term, 1935, of MECKLENBURG. Reversed.

This is a proceeding for compensation under the provisions of the North Carolina Workmen's Compensation Act, for an injury suffered by the claimant, Press Swink, while he was employed by the defendant Carolina Asbestos Company, at its plant at Davidson, N. C. The other defendants were insurance carriers for the defendant Carolina Asbestos Company, from time to time, while the claimant was in its employment.

The proceeding was begun before the North Carolina Industrial Commission, and was first heard by Commissioner Dorsett, who, on his finding that the claimant "did not sustain an injury by accident which arose out of and in the course of his employment," denied compensation.

On claimant's appeal from the award of Commissioner Dorsett, the Full Commission heard the proceeding, found the facts, and, in accordance with its conclusions of law, affirmed the award of Commissioner Dorsett denying compensation.

The facts found by the Full Commission, as set out in the record, are as follows:

"1. Both the claimant, Press Swink, as employee, and the defendant Carolina Asbestos Company, as employer, are subject to the provisions of the North Carolina Workmen's Compensation Act, the defendant having in its employment more than five employees who were engaged in the same work as that in which the claimant was engaged, within the State of North Carolina. Both had voluntarily accepted the provisions of said act. The average weekly wage of the claimant was $16.86.

"2. The defendant Maryland Casualty Company was the insurance carrier for the defendant employer from 1 July, 1929, up to and including 9 July, 1934.

"The defendant United States Casualty Company was the insurance carrier for the defendant employer from 10 July, 1934, up to and including 1 August, 1934.

"The defendant Lumber Mutual Casualty Company was the insurance carrier for the defendant employer from 1 August, 1934, up to and including the date of the hearing of this proceeding.

"3. At the instance of the insurance carrier on the risk of the defendant employer at that date, on 23 August, 1934, the defendant employer caused a physical examination of the claimant to be made. As the result of this examination, and because of his physical condition as disclosed thereby, the claimant was discharged from its employment by the defendant employer on 25 October, 1934. The claimant had been in the employment of the defendant employer for six or seven years prior to the date of his discharge. During that time he had worked continuously and had earned and received his wages regularly. He had lost no time or wages on account of the disease with which the examination showed he was suffering at the time of his discharge, except that for one week about a year before his discharge he was unable to work, complaining at that time of the same symptoms as those of which he is now complaining.

"At the time claimant entered the employment of the defendant Carolina Asbestos Company, at its plant at Davidson, N. C., he was in good health. He had been employed prior to that time in a cotton mill at Newton, N. C. At the time of his discharge, he was suffering from a disease which is medically defined as pulmonary asbestosis. He was then about 36 years of age. His condition, as shown by an X-ray examination made on 26 November, 1934, was as follows:

"He was suffering from shortness of breath, weakness and coughing, without raising sputum to a great amount. He complained of weak spells. His weight ten or twelve years ago was 172 pounds; it is now 157 pounds. He first began to notice his condition between one and two years prior to the date of the hearing of the proceeding. He was unable to chop wood, except for a few minutes, without exhaustion.

"The physical examination showed that his chest expansion was poor, but was more limited at both bases. Fine, dry cracklings or rattles were heard throughout both lungs, at both bases. The lower two-thirds showed slight dullness to percussion at both bases, but there were no murmurs. The rate was 94. The heart was slightly enlarged to percussion. He had a rather marked clubbing of his fingers. There was no evidence of tuberculosis. The X-ray examination indicated a fibrosis that

existed throughout both chests. The fibrosis was medically defined as a proliferation of certain tissue in response to irritation or stimulation from chemical irritants or mechanical irritation. The fibrosis found in claimant's chest was diffused, generalized, and on both sides, but most marked at the lower half of the chest, in the right and left lobar area. The lung has three lobes, one on the right side and two on the left side. The shadows indicated on the X-ray were described in the medical testimony as hilum shadows, and were more than normal. The white, hard bodies indicated by the shadows were called calcified lymph nodes. Claimant's chest flared in the lower segment and continued to contract in the areas in the region of the eighth and ninth ribs, and in the axillary ribs. The heart shadows from the X-ray showed a rather marked enlargement of the heart on the right side. It was slightly enlarged on the left side. The diaphragm of the claimant was high in the left dome, and was out of proportion in height as compared with its normal position. The condition found in claimant's lungs, when he was examined in November, 1934, in the opinion of the medical examiners, had existed for more than a year prior to the date of the examination, and such is found to be the fact by the Commission.

"4. Prior to his discharge on 25 October, 1934, the claimant had been employed by the defendant Carolina Asbestos Company, in its plant at Davidson, N. C., for six or seven years. He had worked most of the time in the carding room in the plant. Prior to 19 December, 1933, the defendant had failed to install in its plant a dust removal system, such as was in general use in plants similar to defendant's plant. If defendant had installed and maintained in its plant such a dust removal system, during the time the claimant was in its employment, a very large per cent, but not all, of the dust incident to the operation of the plant would have been removed. On 19 December, 1933, the defendant employer did install in its plant a dust removal system of the type which was in general and approved use and from the time of the installation of said dust removal system up until the date of the discharge of the claimant, the defendant employer continued to use the said dust removal system in the said plant in a manner free from fault upon its part, and in accordance with the methods for which it was designed to be used. After the installation of the dust removal system in defendant's plant on 19 December, 1933, the dust in said plant was reduced as much as 90 per cent.

"5. The condition of pulmonary asbestosis found in claimant's lungs was caused by the inhalation of asbestos dust while he was working in defendant's plant, as its employee. Such condition began at the time the claimant was first employed in said plant, and continued to accumulate gradually during the years of his employment up until the date of the installation of the dust removal system by the defendant on

19 December, 1933. To what extent, if any, the said disease accumulated after 19 December, 1933, it is impossible for the Commission to determine. It is found as a fact by the Commission that in plants in which dust removal systems are in general and approved use, and in which such appliances are properly used, certain employees have become afflicted with asbestosis from the inhalation of asbestos dust in such plants. No dust counts were taken in the plant of the defendant at any time.

"6. On 22 November, 1934, the defendant Carolina Asbestos Company, as an employer, reported to the North Carolina Industrial Commission that one of its employees, Press Swink, had filed a claim with the Commission under date of November, 1934, alleging that his injury was caused by the negligence of the defendant employer, in that it maintained no dust removal system in its plant, such as is approved and in general use in other asbestos plants, said notice being under date of 8 November, 1934.

"On 26 November, 1934, the Industrial Commission received from the defendant, as the employer of the claimant, the report of an accident, on Form No. 19, giving the name of its injured employee as Press Swink. The response to question 28, included in said form, requesting a description of the accident and a statement as to how it occurred, was as follows:

" 'Unknown; the party has filed claim with the North Carolina Industrial Commission under date of November, 1934, alleging that the accident which resulted in his injury was caused by the negligence of the employer in that it maintained no dusting or suction system in its plant, such as is approved and in general use in other asbestos plants.'

"Under date of November, 1934, the claimant filed notice of claim for compensation under the provisions of the North Carolina Workmen's Compensation Act. In this notice the claimant advised defendant employer that within the last twelve months he was injured by accident while in its employment, caused by the negligence of the defendant employer in that it maintained no dust removal or suction system in its plant, such as is approved and in general use in other asbestos plants, and in said notice claimant stated that he was suffering from pulmonary asbestosis. No notice had been filed by the claimant with his employer, or with the Industrial Commission, other than the notice above recited. No report of the accident by the employer to the North Carolina Industrial Commission was made other than that hereinbefore recited.

"7. It is found as a fact by the Commission that claimant's pulmonary asbestosis was caused by the inhalation of fine particles of asbestos while he was at work in the plant of the defendant employer, and that said disease arose out of and in the course of claimant's employment.

"It is further found as a fact that said disease was not caused by an accident which occurred in the past, but was produced by the conditions in the plant, which were continuous therein from the time of claimant's employment until the installation of the dust removal system on 19 December, 1933.

"It is further found as a fact that the failure of the defendant employer to install a dust removal system in approved and general use in said plant prior to 19 December, 1933, was a failure to exercise such reasonable care for the safety of the employees in said plant as should have been exercised by a reasonably prudent man under the same circumstances, and that the failure of the defendant employer to install and operate such dust removal system greatly increased the dust hazard in said plant and the dust content of the air therein during the operation of said plant, and that the dust in said plant would have been eliminated 90 per cent by the use of a proper dust removal system during the said time.

"8. The findings of fact by Commissioner Dorsett, except those that may be inconsistent with these findings, are approved and hereby made the findings of fact of the Full Commission, in addition to the findings of fact herein made."

On the foregoing findings of fact, the Industrial Commission concluded "as a matter of law that the claimant was not injured by accident which arose out of and in the course of his employment, and that the disease of pulmonary asbestosis, from which the claimant was suffering at the time of his discharge by the defendant, did not result naturally and unavoidably from an accident, as required in order to be compensable by section 2 (f) of the North Carolina Workmen's Compensation Act."

In accordance with its findings of fact and its conclusions of law, the North Carolina Industrial Commission made an award denying compensation and dismissing the proceeding.

The claimant appealed from the award of the Industrial Commission to the Superior Court of Mecklenburg County, and on said appeal relied on his exceptions set out in the record as follows:

"1. To that portion of finding of fact No. 4 which is as follows:

" 'On 19 December, 1933, the defendant employer did install in its plant a dust removal system of the type which was in general and approved use, and from the time of the installation of said dust removal system up until the date of the discharge of the claimant, the defendant employer continued to use said dust removal system in its plant in a manner free from fault on its part, and in accordance with the methods for which it was designed to be used.'

"2. To that portion of finding of fact No. 5 which is as follows:

" 'It is found as a fact by the Commission that in plants in which such appliances are properly used certain employees have been afflicted with asbestosis from the inhalation of asbestos dust in such plants.'

"3. To that portion of finding of fact No. 7 which is as follows:

" 'It is further found as a fact that said disease was not caused by an accident which occurred at the plant.'

"4. To so much of the findings of fact made by Commissioner Dorsett as were approved and adopted by the Full Commission, and are subject to exceptions 1, 2, and 3.

"5. To the findings of fact made by Commissioner Dorsett and by the Full Commission, and to the conclusions of law and to the judgment and award of the Full Commission, on the ground that the findings of fact above set out are not supported by competent evidence of sufficient probative force, and are contrary to law and facts.

"The plaintiff particularly excepts upon the ground that said findings of fact and conclusions of law, and the signing of the judgment and award, are in violation of the rights of the plaintiff under the Fifth Amendment, and under section 1 of the Fourteenth Amendment to the Constitution of the United States, and under section 35 of Article I of the Constitution of the State of North Carolina."

At the hearing of said appeal, judgment was rendered as follows:

"This cause coming on to be heard before the undersigned judge holding the regular September Term, 1935, of the Superior Court of Mecklenburg County, upon the exceptions of the plaintiff to the findings and judgment of the North Carolina Industrial Commission, rendered and filed herein, and the same being heard upon said exceptions, findings, and judgment, in consideration thereof;

"It is adjudged that the plaintiff's exception No. 3 be and it is now sustained and allowed; that his exceptions Nos. 1 and 2 be and they are now overruled and denied, and that his exception No. 4, in so far as it relates to the subject matter of his exception No. 3 is sustained and allowed, and the same is overruled and denied in so far as it relates to the subject matter of his exceptions Nos. 1 and 2.

"Thereupon, after considering the arguments and briefs of counsel representing the several parties herein, and upon due and careful consideration of the evidence, record, findings, and judgment of the said North Carolina Industrial Commission, it appearing to the court:

"1. That the plaintiff sustained a personal injury by accident arising out of and in the course of his employment, as the direct and proximate result of the employer's negligence;

"2. That accident occurred and said injury arose prior to the installation by the said employer of its dust removal system on 19 December, 1933;

"3. That as the proximate result of such accident and injury the plaintiff's disability arose and became compensable at the date of his discharge, 24 October, 1934;

"4. That the plaintiff's cause of action accrued when his disability arose, and is, therefore, not barred by the statute of limitations;

"5. That the said accident and injury did not occur, and the said injury was not accelerated subsequent to 19 December, 1933;

"It is, therefore, considered and adjudged by the court:

"(a) That the motions for dismissal filed herein by the United States Casualty Company and Lumber Casualty Company be and the same are now allowed, and this action or proceeding is dismissed as to them;

"(b) That the judgment and award of the North Carolina Industrial Commission rendered and filed herein be and it is now reversed and overruled, and the said Commission is authorized, empowered, and directed to award, in accordance with this judgment, the amount of compensation the plaintiff may be entitled to receive, as provided by statute, in such case made and provided.

"It is further adjudged that the Maryland Casualty Company pay the costs of this action or proceeding, to be taxed by the clerk."

From this judgment the defendants Carolina Asbestos Company and Maryland Casualty Company appealed to the Supreme Court, assigning as error the rulings of the judge of the Superior Court on plaintiff's exceptions on his appeal to said court, and the judgment reversing the award of the North Carolina Industrial Commission in this proceeding.

J. L. DeLaney for plaintiff.

W. C. Ginter and J. F. Flowers for defendants Carolina Asbestos Company and Maryland Casualty Company.

Cansler & Cansler and Walter Hoyle for defendant Lumber Mutual Casualty Company.

Ralph V. Kidd for defendant United States Casualty Company.

CONNOR, J. In *Greer v. Laundry,* 202 N. C., 729, 164 S. E., 116, it is said:

"It is provided in the North Carolina Workmen's Compensation Act that either party to a proceeding begun and prosecuted before the North Carolina Industrial Commission for compensation under the provisions of the act, may appeal from the decision of said Commission to the Superior Court of the county in which the accident happened, for errors of law, under the same terms and conditions as govern appeals in ordinary civil actions. N. C. Code of 1931, sec. 8081 (ppp), sec. 60, ch. 120, Public Laws 1929.

"It is further provided in said act that an award made by the North Carolina Industrial Commission in a proceeding begun and prosecuted before said Commission for compensation shall be conclusive and binding as to all questions of fact. It has accordingly been held by this Court that only questions of law involved in an award made by the Commission in a proceeding of which the Commission has jurisdiction may be considered and passed upon by the judge of the Superior Court on an appeal to said court from an award made by the North Carolina Industrial Commission."

In the instant case, the judge of the Superior Court was bound by the findings of fact made by the Industrial Commission, provided, such findings of fact were supported by competent evidence. *Holmes v. Brown Co.,* 207 N. C., 785, 178 S. E., 569; *Winberry v. Farley Stores,* 204 N. C., 79, 167 S. E., 475; *Webb v. Tomlinson,* 202 N. C., 860, 164 S. E., 860; *Parrish v. Armour & Co.,* 200 N. C., 654, 158 S. E., 188; *Rice v. Panel Co.,* 199 N. C., 154, 154 S. E., 69.

At the hearing of this proceeding there was evidence tending to support the finding of fact made by the North Carolina Industrial Commission that the disease from which the plaintiff was suffering at the date of his discharge by the defendant Carolina Asbestos Company from its employment, was not caused by an accident which occurred at defendant's plant, while the plaintiff was at work in said plant, as an employee of the defendant. For that reason there was error in the ruling of the judge of the Superior Court at the hearing of plaintiff's appeal to said court sustaining plaintiff's exception to the said finding of fact by the Commission.

On said finding of fact, the award of the North Carolina Industrial Commission, denying compensation, should have been affirmed by the judge. There is error in the judgment reversing the award, and remanding the proceeding to the North Carolina Industrial Commission for further action by the Commission in accordance with the judgment of the Superior Court. See *Greer v. Laundry Co., supra.*

On his appeal to this Court, the plaintiff relies on *McNeeley v. Carolina Asbestos Company,* 206 N. C., 568, 174 S. E., 509. An examination of the opinion in that case will show that the instant case is not governed by the decision in that case. In the opinion in that case it is said that the evidence at the trial showed that the plaintiff was not injured by an occupational disease, but was injured by the negligence of the defendant. It was held that the negligence alleged in the complaint, and shown by the evidence at the trial, was an accident within the meaning of the North Carolina Workmen's Compensation Act, and that therefore the plaintiff's injury was compensable under the provi-

sions of the North Carolina Workmen's Compensation Act. For that reason the judgment dismissing the action was affirmed.

In the instant case, the Industrial Commission has found that the plaintiff was not injured by the negligence of the defendant, but that his injury was caused by a disease which he contracted while working in defendant's plant as its employee. All the evidence showed that plaintiff's injury was the result of an occupational disease, and for that reason was not compensable under the provisions of the North Carolina Workmen's Compensation Act. It is otherwise since the amendment to the act by the General Assembly at its session in 1935. See chapter 123, Public Laws of N. C., 1935.

As the plaintiff is not entitled to compensation for his injury resulting from the disease which he contracted while in the employment of the defendant Carolina Asbestos Company, we have not considered the contentions of the insurance carriers for the defendant as to their respective liability for such compensation.

This proceeding is remanded to the Superior Court of Mecklenburg County, that judgment may be entered in said court affirming the award of the North Carolina Industrial Commission, denying compensation.

Reversed.

CLARKSON, J., dissents.

W. C. HANKS, ADMINISTRATOR OF CURTIS HANKS, DECEASED, v. SOUTHERN PUBLIC UTILITIES COMPANY, SELF-INSURER.

(Filed 15 June, 1936.)

1. **Master and Servant F c—Where employer's report is filed as claim within prescribed time, Industrial Commission has jurisdiction.**

It is not required that an injured employee, or the dependents of a deceased employee, file claim with the Industrial Commission, it being incumbent on the employer to file written report of the accident with the Industrial Commission upon notice given by the injured employee, or his representative, secs. 8081 (dd) (vvv), and where the employer has filed such report with the Commission within the prescribed time upon verbal information elicited from the representative of the employee by its claim agent, the representative being unable to read or write, and, the employer admitting liability, the report has been filed with the Industrial Commission as a claim within one year from date of the accident and contains all facts necessary to make an award, the claim is filed within the prescribed time, sec. 8081 (bb), and the Industrial Commission acquires jurisdiction.

2. **Master and Servant F i—**

A finding of fact by the Industrial Commission which is not supported by the evidence is not binding upon appeal.

3. **Master and Servant F c—Institution of suit at common law held not to estop claimant from proceeding under Compensation Act.**

In this case the Industrial Commission acquired jurisdiction under the employer's report of the accident filed as a claim. Claimant thereafter instituted a suit at common law and failed to answer letters of the Commission advising that a hearing was necessary to determine who were the dependents of the deceased employee, the employer admitting liability under the Compensation Act. Prior to final award disposing of the matter by the Industrial Commission, claimant filed formal petition for an award, having taken a voluntary nonsuit in the action at common law. *Held:* The prosecution of the suit at common law and the failure to file application for a hearing when requested did not amount to an abandonment of the claim for compensation, and no final award having been made by the Industrial Commission at the time of the filing of formal petition for an award, the matter was pending at that time before the Commission, and it was error for the Commission, under the facts and circumstances of this case, to deny compensation on the ground that claimant was barred by failure to file claim within one year after the death of the deceased employee. Sec. 8081 (bb).

4. **Master and Servant F a—Industrial Commission is primarily an administrative agency of the State.**

The Industrial Commission is primarily an administrative agency of the State, and it is only when claim has been filed and the parties fail to reach an agreement that the Commission is invested with certain judicial functions as a special or limited tribunal for the purpose of determining the respective rights and liabilities under the Compensation Act.

STACY, C. J., dissenting.

CONNOR, J., concurs in dissent.

APPEAL by defendant from *Hill, J.*, at November Term, 1935, of FORSYTH. Affirmed.

Petition by plaintiff for an award under the Workmen's Compensation Act on account of the death of his intestate arising out of and in the course of his employment by the defendant.

It was admitted that the deceased, Curtis Hanks, was at the time of his injury and death, on 6 December, 1929, in the employ of defendant, and that the provisions of the Workmen's Compensation Act apply. The claim for an award is resisted, however, on the ground that plaintiff elected to pursue his remedy by original action in the Superior Court of Wilkes County (where plaintiff resided), under the Federal Employers' Liability Act, and did not prosecute claim under the Workmen's Compensation Act until the action in the Superior Court had been ended adversely to him and after the lapse of more than five years from the date of the injury.

The Industrial Commission heard the case and rendered decision denying compensation, 16 August, 1935.

The findings of fact of the Industrial Commission were, in brief, substantially as follows:

Curtis E. Hanks, the deceased, was employed by the defendant, and on 6 December, 1929, he died by reason of injuries received by accident arising out of and in the course of his employment, and both plaintiff and defendant are subject to the provisions of the North Carolina Workmen's Compensation Act, defendant being self-insurer. The deceased was unmarried and left surviving him his father, mother, and one brother, none of whom were dependent upon him, and his father, the plaintiff, has duly qualified as administrator of his estate. Plaintiff can neither read nor write.

Under date of 9 December, 1929, defendant employer made report of the accident to the Industrial Commission on Form 19, and this report was received 11 December, 1929. Defendant also made supplemental report on Form 29, received by the Commission on 26 December, 1929.

"From the evidence at the hearing, it was found as a fact that shortly following the death of the deceased the defendant admitted liability for compensation under the Workmen's Compensation Act, and offered to pay the same to the personal representative of deceased."

On 7 January, 1930, the Industrial Commission wrote the plaintiff relative to claim for compensation by reason of the death of Curtis E. Hanks, and advised him that a question had been raised as to dependents, and that it would have to be determined by a hearing, and asked for the names of all persons claiming dependency.

No reply was received to this letter.

On 8 January, 1930, defendant Utilities Company received a letter from W. M. Allen, attorney at law, Elkin, N. C., advising that the matter had been placed in his hands, and that he would proceed under the Federal Employers' Liability Act and not under the State Compensation Act. Copy of this letter was sent to the Industrial Commission, and thereupon the Commission wrote Attorney Allen asking upon what ground he proposed to proceed without taking notice of the Workmen's Compensation Act, and stating, "We are inclined to believe, in view of your plans as expressed to us by the employer, the Industrial Commission should of its own motion set this case for a hearing. This will be done unless we receive from you a satisfactory reply to this letter not later than 20 January, 1930." No reply was received from said attorney.

Under date of 13 February, 1930, the Industrial Commission again wrote Attorney Allen, stating it was understood the defendant had offered to pay the dependents of "Clifton E. Hanks," deceased (evidently

meaning Curtis Hanks), compensation under the Workmen's Compensation Act, but that the dependents had refused to enter into an agreement, and inquiring why compensation was refused.

No reply was received to this letter, and on 18 March, 1930, the Commission again wrote Attorney Allen, saying, "If your clients have abandoned this claim for compensation, so advise me in order that we may retire this file."

No reply was received to this letter.

On 10 August, 1933, the Commission wrote defendant's counsel as follows: "It occurs to us that you might now let us have from the Southern Public Utilities Company a closing report on Form 28-B, as we infer that the Southern Public Utilities Company will not voluntarily offer to pay compensation, having taken the position that claim for compensation was not filed with the Industrial Commission within one year from the date of the accident.

"We note that in your letter of 6 March you suggested that we express an opinion as to whether or not, under the circumstances, the claimant had waived compensation. We should have replied to your letter; nevertheless, we do not feel that we should express an opinion in advance of a hearing which the dependents or personal representative of the deceased may request. We enclose copy of Form 28-B, referred to above."

Thereafter, on 14 August, 1933, the defendant made report showing names of employer and employee, date of death, payment of $50.50 medical expenses, and $198.00 funeral benefits. Under question 11 on this report: "Does this report close the case? (Yes or No)," the defendant wrote as follows: "The father of the employee instituted suit in the Superior Court of Wilkes County under the style W. C. Hanks, Administrator, *v.* Southern Public Utilities Company, for $50,000 damages, caused by the alleged wrongful death of the employee. Southern Public Utilities Company made regular report of this accident to the Industrial Commission, but no claim was ever filed with the Commission on behalf of the employee, and the employee's administrator and attorneys have repudiated the Workmen's Compensation Act and elected to stand upon their common law rights. Suit is still pending in Wilkes County."

It also appeared in evidence that plaintiff administrator instituted suit against the defendant in the Superior Court of Wilkes County on 7 July, 1930, that defendant filed demurrer to the complaint on ground that claim for compensation for death of Curtis Hanks was solely cognizable before the North Carolina Industrial Commission. The demurrer was overruled, as the facts did not sufficiently appear on the face of the complaint, and on appeal to this Court the ruling of the

Superior Court was affirmed (204 N. C., 155). Thereafter, answer was filed and the case remained in the Superior Court of Wilkes County until 8 January, 1935, when voluntary nonsuit was entered. Formal petition for an award and request for a hearing thereon was filed by the plaintiff before the Industrial Commission on 23 March, 1935.

From the decision of the Industrial Commission denying compensation, the plaintiff appealed to the Superior Court of Forsyth County, and from judgment of the Superior Court overruling the Industrial Commission and remanding the case to the Industrial Commission for an award under the act, defendant appealed to this Court.

McNeill & McNeill, George P. Pell, and Whitman & Motsinger for plaintiff.

B. S. Womble and W. P. Sandridge for defendant.

DEVIN, J. The only question presented by this appeal is whether plaintiff's right to compensation on account of the death of his intestate, Curtis E. Hanks, was barred by reason of failure to give notice of the accident to the defendant employer, as required by sec. 22 of the North Carolina Workmen's Compensation Act, and by failure to file claim with the North Carolina Industrial Commission within one year after the death of plaintiff's intestate, as required by sec. 24 of said act.

The North Carolina Workmen's Compensation Act requires that the injured employee, or his representative, shall give or cause to be given written notice of the accident to the employer, and the employer is required to make report in writing of the accident to the North Carolina Industrial Commission within ten days after the occurrence and knowledge thereof, and later to make a supplemental report. C. S., 8081 (dd), and 8081 (vvv).

The act further provides that right to compensation shall be barred unless a claim be filed with the Industrial Commission within one year after the accident. C. S., 8081 (bb).

In *Hardison v. Hampton,* 203 N. C., 187, where more than one year elapsed from the date of injury to the request for hearing by the injured employee, it was held that "there is no provision in the North Carolina Workmen's Compensation Act requiring an injured employee to file claim for compensation for his injury with the North Carolina Industrial Commission," and that "where the employer has filed with the Commission a report of the accident and claim of the injured employee, the Commission has jurisdiction of the matter, and the claim is filed with the Commission within the meaning of section 24."

In the instant case it appeared that the injury and death of Curtis E. Hanks on 6 December, 1929, while in the employ of defendant, was

known to the employer, that funeral and medical expenses were promptly authorized and paid by it, and that within three days it reported the accident to the Industrial Commission on the prescribed Form 19. This report was duly received and filed as a claim under the Workmen's Compensation Act and gives a file or docket No. 17959 which it has continuously retained.

The representative of the deceased employee was unable to read or write, and could not himself make a written report, but he gave all the required information to the employer's claim agent, and this information was incorporated in the report madė by the employer to the Industrial Commission. The employer had full knowledge of the occurrence. The employer's report on the prescribed Form 19 sets out in detail all the facts necessary to make an award.

A question arose, as the result of information given defendant by the plaintiff, as to whether there were dependents as defined by the act, and under date of 21 December, 1929, defendant notified the Industrial Commission (in accordance with sec. 57 of the act): "We have been unable to make an agreement as to settlement in the above case," that the father first claimed the son was not contributing to support of father or mother, but now claimed he was, but refused to give the amount. "Therefore, I have no way of arriving at the amount that should be paid."

Thereupon the Commission wrote the plaintiff, under date of 7 January, 1930, as follows:

"DEAR SIR: *Re:* I. C. File 17959.

"We understand from Southern Public Utilities Company that you and your wife are claiming compensation by reason of the death of your son, C. E. Hanks. We understand, also, that you have claimed partial dependency, and that in view of the fact that there appears to be no one who under the act is conclusively presumed to have been dependent upon your son, this raises a question of fact which can only be determined by means of a hearing. In order that we may know how to proceed, please give us the names and addresses of all persons claiming dependency."

It appears, therefore, that claim for compensation was filed by the employer, and was so understood by the defendant, and so treated by the Industrial Commission. This was done within less than one year after the fatal accident. The defendant employer at all times admitted its liability under the act, and was ready to pay, and only contends now that plaintiff's right to the compensation allowed by law under the ad-

mitted facts has been abandoned or lost by his electing to pursue the common law remedy, or by the lapse of time.

"An acknowledgment or recognition of liability for compensation by the employer constitutes waiver of the requirement for making or filing timely claim, such recognition of liability by the employer eliminating the question of whether a claim for compensation has been made." 71 C. J., 1039, sec. 812.

The finding of fact by the Industrial Commission that plaintiff "expressly refused to file a claim with the North Carolina Industrial Commission within one year after the death of deceased," is not supported by the evidence. The evidence shows that plaintiff failed to answer the letter of the Commission with respect to the character of his claim as to dependents, and that plaintiff's attorney failed to answer letter of the Commission inquiring why he proposed to institute suit at common law.

Defendant's contention that plaintiff, having elected to institute an action at common law, is estopped now to prosecute his claim under the act, cannot be sustained under the facts and circumstances of this case. *Stevedoring Co. v. Pillsbury,* 170 Cal., 321; *McLead v. Sou. Pac. Co.,* 64 Utah, 409. Here the defendant admitted liability under the act and offered to pay, resisted the common law action, and finally brought about its defeat by the plea that the Industrial Commission had exclusive original jurisdiction to hear and determine the plaintiff's claim. The restriction upon proceeding in another forum is that a recovery in the one form of action bars recovery in the other. As was said in *Phifer v. Berry,* 202 N. C., 388: "He may recover by one of the alternate remedies, but not by both."

In *Rowe v. Rowe-Coward Co.,* 208 N. C., 484, the plaintiff there filed claim for compensation under the act for an injury sustained 29 March, 1933. In August, 1933, he notified the Industrial Commission: "For the present I do not desire to press this claim, and therefore withdraw it until further notice to you if I shall conclude later on to renew my claim before your Commission. I have a suit pending in Durham Superior Court, which I shall press, and I do not desire, unless you are otherwise notified, to press my claim before the Commission." Having lost his suit in the Superior Court, the plaintiff in that case, in July, 1934, wrote the Commission he desired to proceed with the prosecution of his claim. Thereafter, a hearing was set and an award in his favor finally determined.

While the plaintiff, under the advice of his counsel then employed, instituted an action in the Superior Court of Wilkes County seeking to recover damages for the wrongful death of his intestate under the Federal Employers' Liability Act, taking the view that the Workmen's Compensation Act violated the constitutional right to trial by jury, that

action would not debar him now from prosecuting his claim under the Workmen's Compensation Act, provided his claim, constituted in substantial compliance with the act, was still pending before the Industrial Commission. The prosecution of an action for damages by the employee does not necessarily constitute an abandonment of his claim for compensation duly filed. 71 C. J., 1002. Nor would his failure to file application for hearing when requested by the Commission amount to abandonment of his claim for compensation. *McLead v. Sou. Pac. Co., supra.*

Was plaintiff's claim pending before the Industrial Commission in 1935, when the petition herein was filed?

It appears that the Industrial Commission treated plaintiff's claim as pending. As above set out, on 7 January, the Commission wrote plaintiff about his claim and suggested that a hearing was necessary. On 20 January, 1930, the Commission notified plaintiff that it was inclined of its own motion to set the case for hearing, though nothing further was done about it. And in 1933 the question of closing the case was taken up with defendant's counsel, though the Commission expressly refrained from "expressing an opinion in advance of a hearing which the dependents or personal representative of the deceased might request." It was at all times open to the defendant to move for a hearing, or to the Commission of its own motion, upon notice, to order a hearing. But this was not done.

The act from which the Industrial Commission derives its authority provides that if employer and representative of deceased employee fail to reach agreement in fourteen days, either party may make application to the Industrial Commission for a hearing in regard to the matters at issue, and that thereupon the Commission shall set the date for a hearing, and shall notify the parties of time and place. The act requires that the Commission, or one of its number, shall hear and determine the matter. "The award, together with a statement of the findings of fact, rulings of law, and other pertinent matter, shall be filed with the record of the proceedings and a copy of the award shall immediately be sent to the parties in dispute."

The Industrial Commission is primarily an administrative agency of the State, charged with the duty of administering the provisions of the North Carolina Workmen's Compensation Act. *In re Hayes,* 200 N. C., 133.

But when a claim for compensation has been filed and the employer and employee have failed to reach an agreement, the statute authorizes the Commission to hear and determine all matters in dispute. Thereupon, the Commission is constituted a special or limited tribunal, and is invested with certain judicial functions, and possesses the powers and

incidents of a court, within the provisions of the act, and necessary to determine the rights and liabilities of employees and employers. 71 C. J., 917-920; *Butts v. Montague Bros.,* 208 N. C., 186; *Heavner v. Lincolnton,* 202 N. C., 400.

The procedure upon the consideration and determination of a matter within the jurisdiction of the Industrial Commission, agreeable to the provisions of the act and the rules and regulations promulgated by the Commission, conforms as near as may be to the procedure in courts generally. By analogy, cases should be disposed of by some award, order, or judgment final in its effect, terminating the litigation. *Employers' Ins. Ass'n. v. Shilling,* 259 S. W., 236; *Todd v. Casualty Co.,* 18 S. W. (2d), 695. A final judgment is the conclusion of the law upon the established facts, pronounced by the court. *Lawrence v. Beck,* 185 N. C., 196; *Swain v. Bonner,* 189 N. C., 185.

The record before us fails to show any final order or adjudication of any kind prior to the one appealed from.

A claim for compensation lawfully constituted and pending before the Commission may not be dismissed without a hearing and without some proper form of final adjudication.

No statute of limitations runs against a litigant while his case is pending in court.

We conclude that the judgment of the court below overruling the opinion of the Industrial Commission and remanding the case to the Commission for proper award in accordance with the facts found and the judgment of the Superior Court must be

Affirmed.

STACY, C. J., dissenting: The plaintiff was injured while in the employ of the defendant. For five years he declined to be bound by the terms of the Workmen's Compensation Act, and refused to accept any benefits thereunder. In the meantime, he brought a common law action against his employer for damages. Thus, his election of remedies was knowingly and deliberately made.

He now returns to assert his claim under the provisions of the Workmen's Compensation Act. The Industrial Commission held that he was too late—that he could not "have his cake and eat it, too."

As against plaintiff's *volte face,* the defendant invokes the bar of the statute. The Court says, "No." The case is *sui generis* in that it penalizes the defendant for complying with the law and rewards the plaintiff for his scorn. The ruling of the Industrial Commission should be upheld.

CONNOR, J., concurs in dissent.

CATHERINE HEYER, GUARDIAN, v. MARY BELL BULLUCK ET AL.

(Filed 15 June, 1936.)

1. Wills E a—Intention of testator governs in construing a will.

In construing a will, the intent of the testator as gathered from the entire instrument and as expressed in the language used, is controlling, unless contrary to some rule of law or at variance with public policy, and when the language used is ambiguous, resort may be had to the situation and circumstances surrounding the testator and his relationship to the beneficiaries, in order that the language may be interpreted from testator's viewpoint, and each expression should be considered in view of the circumstances of its use, and general provisions should prevail over minor and apparently inconsistent expressions, having regard to the dominant purpose of the testator as gathered from the instrument.

2. Wills F a—Legacy held general legacy under terms of this will.

Testatrix bequeathed to her "grand daughter and namesake Mary Bell Heyer 30,000 thirty thousand dollars. I received from her father Henry Heyer. When she becomes 30 years old now invested in Pub. Utilities." It appeared that testatrix had received from life insurance upon the life of her son, the grandchild's father, $30,000. *Held:* The legacy was a general legacy, payable out of the general assets of the estate when the granddaughter should reach the age of thirty years, the other language of the bequest being regarded as explaining what testatrix had done with the insurance money and as explaining her seeming preference to one of her son's children over the children of her daughter, and it being improbable that testatrix would have postponed its enjoyment until the granddaughter reached the age of thirty years if the legacy had been intended as a demonstrative legacy. The distinctions between, and incidents of, general, specific, and demonstrative legacies set forth by STACY, C. J.

3. Wills E d—

A bequest of a sum of money to a named beneficiary "when she becomes thirty years old" is a vested legacy and not subject to be defeated by the death of the legatee, but the legatee is not entitled to interest thereon, the amount not being payable until the date stipulated.

4. Wills E f—Testator's daughter held to take no interest under the will in this case.

The will in this case read, "The balance of my estate to my dear and only child Mary Bell to be held in trust by her during her lifetime," with provision following that her husband should have no part in the management of the estate, with provision for forfeiture if he should take part in the management, and that a specified person should see that testatrix' wish as to the management be carried out. The will provided that the residuum should be equally divided among her son's and daughter's children when the youngest should reach the age of thirty. It appeared that testatrix and her daughter's husband were not on speaking terms,

and that testatrix disliked her son's widow. *Held:* Testatrix' daughter took no interest in the residuum, since the will directed that the residuum should go to the daughter "in trust" to be "managed" rather than "used" with direction that the person named should see to its "management," and since it appeared that testatrix wished to exclude both her son-in-law and daughter-in-law, and that any bequest to her daughter would necessarily beneficially affect her son-in-law, and that testatrix' grandchildren were, under the circumstances, the primary object of testatrix' bounty.

5. **Wills E h—Trustee's management of estate is subject to control of courts.**
Where a will leaves the residuum in trust to be paid to testatrix' grandchildren when the youngest attains thirty years of age, the trustee should manage the residuary estate under orders of the court, with such compensation from time to time as the court shall allow, but the trustee's discretion in the management is not unrestrained, but is subject to the control of the court at all times.

6. **Same—Income from trust estate should be paid to guardians of beneficiaries during their minorities, and then to beneficiaries themselves.**
Where a will leaves the residuum in trust to be paid to testatrix' grandchildren when the youngest attains thirty years of age, the income from the estate should be paid the grandchildren's respective guardians during their minorities, and then to the grandchildren themselves *per stirpes* as they reach their majorities, and the *corpus* equally divided among the grandchildren, as directed, when the youngest attains the age of thirty years.

7. **Wills E h: Trusts E a—Trust in this case held active and not passive.**
Testatrix directed that one of her grandchildren be paid a stipulated sum when the grandchild should attain the age of thirty years, and that the residuum of the estate be held in trust for all her grandchildren and paid to them equally when the youngest should attain the age of thirty. *Held:* The trust is an active and not a passive trust to the end that the stipulated sum should be paid the named grandchild when she should attain the age of thirty and the residuum managed and ultimately divided as directed, but if the named grandchild should anticipate her legacy by taking its present cash value, the chancellor might then terminate the trust and relieve the trustee, if she should so desire.

APPEALS by plaintiff and defendants from *Williams, J.*, at December Term, 1935, of NEW HANOVER.

Civil action for construction of will.

The record discloses that Mary B. Heyer, late of New Hanover County, died 1 January, 1934, leaving a holograph will, which is now the subject of controversy between or among the parties litigant. It was written in pencil, without the aid of counsel, found among her valuable papers, and has been duly probated in common form. Here it is:

"In the name of God, Amen.

"I, Mary B. Heyer, do on this the 15th day of September, 1930, make my last will and testament:

<table>
<tr><td>(On the margin)
* "To my grand daughter and namesake Mary Bell Heyer 30,000 thirty thousand dollars. I received from her father Henry Heyer. When she becomes 30 years old now invested in Pub. Utilities.</td><td>"I give to my brother,
Judge Charles G. Bell........ $2000
"I give to my brother,
William K. Bell........ 2000
"I give to my sister,
Annie V. Buffinger........ 2000
"To my niece
Virginia A. Jardine........ 2000
*
"To my faithful servant
George Baldwin if still
in my employ........ 1000
"To my faithful servant
James Highsmith if still
in my employ........ 1000</td></tr>
</table>

"The balance of my estate to my dear & only child Mary Bell to be held in trust by her during her lifetime. Her husband to have no part in the management of my estate or this will becomes null & void.

"At her decease I desire it to pass to my grandchildren to be divided in two parts, one half to her children and one half to my son's children when the youngest grandchild is 30 years old.

"If any legatee be not living at the reading of this will the legacy reverts to my estate. I appoint my daughter Mary Bell my executor. Mr. Hugh MacCrae overseer to this will that my wish as to the management be carried out. MARY B. HEYER."

Adumbrative of the mind of the testatrix, the following background and setting was made to appear in the court below:

1. In 1913, Matthew J. Heyer died intestate, leaving him surviving his widow, the present testatrix, a son, Henry, and a daughter, Mary Bell. Under the law, these three took equal shares, a third each, in the intestate's estate, which amounted to approximately $300,000.

2. Henry, who was a lawyer, administered on his father's estate, and thereafter managed his mother's distributive share, commingling it with his own, which, after his death, became the subject of litigation between his mother and his widow.

3. Henry died in 1929, leaving him surviving his widow, Catherine Heyer, plaintiff guardian herein, and two children under fourteen years of age, plaintiff guardian's wards herein. At the time of Henry's death

he had in force life insurance aggregating $30,000, payable to his mother as beneficiary. This was duly collected and invested in certain public utility stocks, or rather entrusted to a New York broker for use in what appears to be a trading account.

4. In 1915, the daughter, Mary Bell, married Dr. Ernest S. Bulluck, and to this marriage five children have been born, represented herein, first by guardian *ad litem,* and then by their general guardian, R. D. Bulluck, brother of Dr. E. S. Bulluck.

5. The testatrix, while very fond of her grandchildren, disliked her daughter-in-law, and was not on speaking terms with her son-in-law. The former is not mentioned in her will and the latter is excluded from any part in the management of her estate.

With respect to the "marginal" bequest, the first in controversy, the court held that plaintiff's ward, Mary Bell Heyer, was entitled to $30,000 of the investments held by the testatrix in public utility stocks at the market value as of 1 January, 1934, plus any difference, if any, in cash necessary to make up such deficiency; the same to be held by the executrix, as trustee, until said minor reaches the age of thirty years, the income in the meantime to be paid to plaintiff guardian. Exception by plaintiff and defendants. The court further held "that this legacy is a vested demonstrative legacy not bearing interest." Exception by plaintiff.

Touching the residuary provision in the will, the next in controversy, the court held:

1. That the executrix should hold the same as trustee during her lifetime "in such way or manner as she sees fit in the full, unrestrained exercise of her discretion, with no limitations or restrictions placed thereon, except that her husband is not to participate in its management." Exception by plaintiff and defendants.

2. That the executrix took no personal interest in her mother's estate. Exception by defendants.

3. That the executrix was to manage the residuary estate, together with its accumulations and income, under the orders of the court, with such compensation as the court should allow, and to turn over the *corpus* to the grandchildren of testatrix, in equal proportions, *per stirpes,* "when the youngest grandchild becomes 30 years old." Exception by plaintiff and defendants.

From the judgment thus entered, the plaintiff and defendants appeal, assigning errors.

Marsden Bellamy and Bryan & Campbell for plaintiff.
John D. Bellamy for Mary Bell Bulluck.
Emmett H. Bellamy for R. D. Bulluck, guardian.

STACY, C. J. The cardinal principle in the interpretation of wills is to discover the intent of the testator, looking at the instrument from its four corners, and to give effect to such intent, unless contrary to some rule of law or at variance with public policy. *Jolley v. Humphries,* 204 N. C., 672, 167 S. E., 417; *Ellington v. Trust Co.,* 196 N. C., 755, 147 S. E., 286; *Westfeldt v. Reynolds,* 191 N. C., 802, 133 S. E., 168; *Whitehurst v. Gotwalt,* 189 N. C., 577, 127 S. E., 582; *Witty v. Witty,* 184 N. C., 375, 114 S. E., 482; 28 R. C. L., 211. "The will must be construed, 'taking it by its four corners' and according to the intent of the testator as we conceive it to be upon the face thereof and according to the circumstances attendant. We can derive but little help from adjudicated cases upon facts more or less different from those in this case, for hardly ever can the facts and the language be identical in any two cases. In the construction of a will, therefore, 'Every tub stands upon its own bottom,' except as to the meaning of words and phrases of a settled legal purport. The object is to arrive at, if possible, the intention and meaning of the testator as expressed in the language used by him"—*Clark, C. J.,* in *Patterson v. McCormick,* 181 N. C., 311, 107 S. E., 12. This rule has been so often stated and reiterated that *Brogden, J.,* in *Clement v. Whisnant,* 208 N. C., 167, 179 S. E., 430, laconically remarked: "Of course, it is to be conceded that the intent of the testatrix should be the guide to courts. However, this process of probing the minds of persons long in their graves as to what they meant by words used when they were alive is, at best, no more than guesswork. Courts and text-writers have undertaken in some instances to make it highly scientific and specialized guesswork, but it remains guesswork nevertheless."

The same thought was expressed by *Judge Story* in *Sisson v. Seabury,* 1 Sumn., 235, Fed. Cas., No. 12, 913, in somewhat similar fashion: "The difficulty of construing wills in any satisfactory manner renders this one of the most perplexing branches of the law. The cases almost overwhelm us at every step of our progress; and any attempts even to classify them, much less to harmonize them, is full of the most perilous labor. Lord Eldon has observed that the mind is overpowered by their multitudes, and the subtlety of the distinctions between them. To lay down any positive and definite rules of universal application in the interpretation of wills must continue to be, as it has been, a task, if not utterly hopeless, at least of extraordinary difficulty. The unavoidable imperfections of human language, the obscure, and often inconsistent, expressions of intention, and the utter inability of the human mind to foresee the possible combinations of events, must forever afford an ample field for doubt and discussion, so long as testators are at liberty to frame their wills in their own way, without being tied down to any technical

and formal language. It ought not, therefore, to surprise us, that in this branch of the law the words used should present an infinite variety of combinations, and thus involve an infinite variety of shades of meaning, as well as of decision."

It is likewise established by the authorities that in determining this intent, the court should place itself as near as practicable in the position of the testator, and where the language is ambiguous, or of doubtful meaning, it should take into consideration his situation, how he was circumstanced, and what effect known forces had upon him at the time the will was executed. *Raines v. Osborne,* 184 N. C., 599, 114 S. E., 849; *Ripley v. Armstrong,* 159 N. C., 158, 74 S. E., 961; *Smith v. Lbr. Co.,* 155 N. C., 389, 71 S. E., 445; *Freeman v. Freeman,* 141 N. C., 97, 53 S. E., 620; *Bunting v. Harris,* 62 N. C., 11. The rule was stated in *Herring v. Williams,* 153 N. C., 231, 69 S. E., 140, by *Manning, J.,* as follows: "The primary purpose of the courts, when a will is presented for construction, is to ascertain the intention of the testator from the language used by him. In ascertaining such intention, the entire will must be considered, and it is competent to consider the condition of the testator's family, how he was circumstanced, and his relationship to the objects of his testamentary disposition, so as nearly as possible to get his viewpoint at the time the will is executed."

Every expression, to be correctly understood, ought to be considered with a view to the circumstances of its use. *Cole v. Fibre Co.,* 200 N. C., 484, 157 S. E., 859. "A word is not a crystal, transparent and unchangeable; 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," says *Mr. Justice Holmes* in *Towne v. Eisner,* 245 U. S., 418. General or particular meaning-content, therefore, may be imputed to words and phrases according to the purposes sought to be accomplished. *S. v. Bank,* 193 N. C., 524, 137 S. E., 593. And in order to arrive at the intention of the testator, "the court may reject, supply, or transpose words and phrases." *Washburn v. Biggerstaff,* 195 N. C., 624, 143 S. E., 210.

Again, it is settled that in this quest for the intention of the testator, resort must first and last be had to the language used by him. *Herring v. Williams, supra; Pilley v. Sullivan,* 182 N. C., 493, 109 S. E., 359. General provisions are to prevail over minor and apparently inconsistent expressions (*Raines v. Osborne, supra*), but in the end the intention must appear from the text and context of the will itself. *Williams v. Best,* 195 N. C., 324, 142 S. E., 2; *Carroll v. Herring,* 180 N. C., 369, 104 S. E., 892; *Campbell v. Crater,* 95 N. C., 156. Greater regard is to be given to the dominant purpose of the testator than to the use of any particular words, yet the intent is to be deduced from the will as

written. *Allen v. Cameron,* 181 N. C., 120, 106 S. E., 484; *Ralston v. Telfair,* 17 N. C., 255.

Summing up the law on the subject in *McIver v. McKinney,* 184 N. C., 393, 114 S. E., 399, *Adams, J.,* delivering the opinion of the Court, said: "Nevertheless, it is generally conceded that in the construction of a will the cardinal purpose is to ascertain and give effect to the intention of the testator—not the intention that may have existed in his mind, if at variance with the obvious meaning of the words used, but that which is expressed by the language he has employed. The question is not what the testator intended to express, but what he actually expressed in his will, when all its provisions are considered and construed in their entirety," citing as authorities for the position: *Patterson v. Wilson,* 101 N. C., 586; *Francks v. Whitaker,* 116 N. C., 518; *Chewning v. Mason,* 158 N. C., 579; *Dunn v. Hines,* 164 N. C., 114; *Taylor v. Brown,* 165 N. C., 157; *McCallum v. McCallum,* 167 N. C., 310.

It all comes to this: When a will is presented for construction, the intention of the testator is to govern, and this is to be ascertained from the language used by him. *Trust Co. v. Cowan,* 208 N. C., 236, 180 S. E., 87; *Haywood v. Rigsbee,* 207 N. C., 684, 178 S. E., 102; *Scales v. Barringer,* 192 N. C., 94, 133 S. E., 410; *Gordon v. Ehringhaus,* 190 N. C., 147, 129 S. E., 187; *Holt v. Holt,* 114 N. C., 241, 18 S. E., 967.

Turning then to the will submitted for construction and looking at the first item in dispute, we find written upon the margin, opposite the general legacies, these words: "To my grand daughter and namesake Mary Bell Heyer 30,000 thirty thousand dollars. I received from her father Henry Heyer. When she becomes 30 years old now invested in Pub. Utilities." Marks appearing on the will indicate that this was intended to be inserted between the gifts to Virginia Jardine and George Baldwin. His Honor found, from an inspection of the original will, that it was not clear whether the punctuation after the word "Dollars" is a comma or a period. There is no question as to the validity of the bequest. The will is submitted for construction as probated.

The controversy arises over whether this "marginal" bequest is general, specific, or demonstrative.

A general legacy is one that is payable out of the general assets of the estate, such as a gift of money or other thing in quantity, and not so given as to be distinguishable from other assets of like kind. *Shepard v. Bryan,* 195 N. C., 822, 143 S. E., 835; *Graham v. Graham,* 45 N. C., 297; 28 R. C. L., 291.

A specific legacy is a bequest of a specific article, distinguished from all others of the same kind, pointed out and labeled by the testator, as it were, for delivery to the legatee, such as a particular horse, a piece of silver, or money in a certain purse or chest, or a particular corporate

stock, or a particular bond or other obligation for the payment of money. *Shepard v. Bryan, supra.* "If the thing bequeathed is, by the terms of the will, individuated so that it is distinguishable from all others of the same kind, it is a specific legacy"—*Leaming, V. C.*, in *Kearns v. Kearns,* 77 N. J. Eq., 453, 76 Atl., 1042, 140 Am. St. Rep., 575.

A demonstrative legacy is a bequest of money or other fungible goods, payable out of or charged upon a particular fund in such a way as not to amount to a gift of the *corpus* of the fund, or to evince an intent to relieve the general estate from liability in case the fund fail, and so described as to be indistinguishable from other things of the same kind. *Shepard v. Bryan, supra;* 28 R. C. L., 292.

It is clear that the bequest in question is not specific. *Smith v. Smith,* 192 N. C., 687, 135 S. E., 855. This may be put aside.

Is it general or demonstrative?

It is inserted along with the general legacies in the will. Also it is observed the gift is "To my grand daughter and namesake Mary Bell Heyer 30,000 thirty thousand dollars . . . when she becomes 30 years old." The remaining expressions, we apprehend, were used merely to indicate the reason for the seeming preference or partiality on the part of the testatrix, and to explain what she had done with the insurance money. Having shared equally with her son and daughter in their father's estate, the testatrix no doubt thought it but meet, before dividing her own property, to return to Henry's daughter a sum equal to the insurance funds which she had received from him upon his death. It is not material that she preferred Henry's daughter over his son. There may be a reason for this, but whether there is or not, it is the testatrix' will we are interpreting. In any view of the matter, her "namesake" was unmistakably the special object of her bounty. Moreover, had the testatrix here intended a demonstrative legacy, it is highly improbable that she would have postponed its enjoyment until the legatee reaches the age of thirty years. She had seen great fluctuations in the value of utility stocks. The bequest is regarded as general rather than demonstrative.

The general rule in respect of interest on such legacies, when immediately payable and not promptly paid, is that they bear interest from the end of one year after the testator's death. *Shepard v. Bryan, supra; Moore v. Pullen,* 116 N. C., 284, 21 S. E., 195; *Hart v. Williams,* 77 N. C., 426; 28 R. C. L., 353. And in *Swann v. Swann,* 58 N. C., 297, it was said this general rule applies to pecuniary legacies to grandchildren, when it does not appear the testator stood towards them in the relation of parent or *in loco parentis.* Compare *McWilliams v. Falcon,* 59 N. C., 235.

However, this rule would not apply to the instant legacy because it is not required to be paid until the legatee "becomes 30 years old." The amount bequeathed, thirty thousand dollars, will be due and payable at that time, and it bears no interest in the interim. *Croom v. Whitfield,* 45 N. C., 143; *Ballantyne v. Turner,* 59 N. C., 225.

Speaking to the identical question in *Holt v. Hogan,* 58 N. C., 82, it was said that while such a legacy is vested and will not be defeated by the death of the legatee prior to reaching the designated age, still the bequest would not bear interest except from the time it becomes due and should be paid.

We come next to the residuary clause, the second item in difference.

The judgment below is correct in decreeing that Mrs. Bulluck, the executrix, takes no personal interest in the residuum. Not only is the balance of the estate to be held by her "in trust," but her husband is to have no part in its "management." The testatrix knew that a trust estate would need to be managed rather than used, and she expressed the hope that Mr. Hugh MacCrae would see to it that her wish "as to the management" was carried out.

The primary purpose of the testatrix was to leave her property to her grandchildren, but not without some intervening active "management." She was not on friendly terms with either her daughter-in-law or her son-in-law. Both were excluded from any share in the estate. Knowledge that her daughter's financial interests were interlinked with those of her husband, together with her disdain for the latter, doubtless caused the testatrix to forego leaving any personal bequest to her "dear & only child." Her son was dead. She could leave nothing to his widow. Her son-in-law was likewise *non grata persona.* He, too, was eschewed. The grandchildren thus became the primary objects of her bounty. To them, and to them alone, she intended to leave the residuum of her estate.

The argument on behalf of the executrix that she takes a life estate in the residuum was pressed before us with much learning and great earnestness. Several expressions lend color to this view, as well as the rule against disinheritance. *Dunn v. Hines,* 164 N. C., 113, 80 S. E., 410; *Whitfield v. Garris,* 134 N. C., 24, 45 S. E., 904; *Clark v. Hyman,* 12 N. C., 382; 28 R. C. L., 229. The overshadowing purpose of the will, however, seems to forbid such construction. Had the testatrix intended to give her daughter a life estate in the residuum, she would hardly have designated Mr. MacCrae "overseer to this will that my wish as to management be carried out." And the provision in respect of forfeiture, in case her son-in-law participate in its management, is likewise subversive of an intent to bequeath her daughter any individual interest therein. It would be necessary to write these expressions out of the will in order

to give the daughter a life estate in the residuum. *Thompson v. Newlin,* 43 N. C., 32; 1 Page on Wills, sec. 814. While they may contain a *modicum* of distrust and prejudice, nevertheless they point unerringly to the testatrix' intent. The motive is not material so long as the purpose is clear (*Hilliard v. Kearney,* 45 N. C., 221), and the end is lawful. Thompson on Wills (2d Ed.), sec. 219.

The judgment below is also correct in holding that Mrs. Bulluck is to manage the residuary estate, under orders of the court, with such compensation from time to time as the court shall allow. That portion of the judgment, however, which gives the trustee *carte blanche* authority to do "as she sees fit in the full, unrestrained exercise of her discretion" is unwarranted and will be stricken out. Mrs. Bulluck's trusteeship is not unlike others of similar kind. It is subject to the control of the court at all times. *Woody v. Christian,* 205 N. C., 610, 172 S. E., 210; *Bank v. Edwards,* 193 N. C., 118, 136 S. E., 342; *Carter v. Young,* 193 N. C., 678, 137 S. E., 875; *Bank v. Alexander,* 188 N. C., 667, 125 S. E., 385; *Fisher v. Fisher,* 170 N. C., 378, 87 S. E., 113; *Albright v. Albright,* 91 N. C., 220; *Jordan v. Jordan,* 4 N. C., 292.

The income, as it accrues, is to be paid in equal proportions, first, to the respective guardians, parties hereto, then to the beneficiaries themselves, *per stirpes,* as they reach their majorities, and, when the youngest grandchild "is 30 years old," the *corpus* of the residuum is to be divided into two equal parts—one part delivered to the trustee's children and the other part turned over to her brother's children.

The trust is not a passive one, such as in *McKenzie v. Sumner,* 114 N. C., 425, 19 S. E., 375, and must be kept active, to the end that the "marginal" legacy of $30,000 to Mary Bell Heyer may be paid "when she becomes 30 years old"; and further, that "the balance" may be "intrusted," managed and ultimately divided as the will directs. If for any reason the payment of the bequest to testatrix' "namesake" should be anticipated (in which event the plaintiff would receive only the present worth or present cash value of such legacy), or when it is paid, a situation may then arise which would justify the chancellor in closing the trust and relieving Mrs. Bulluck of the further duties of her trusteeship, if she so desire.

The cause will be remanded for judgment accordant herewith, the costs to be paid out of the trust estate.

Error and remanded.

J. R. MARSHBURN AND J. STUART JAMES v. J. T. BROWN, SHERIFF OF PENDER COUNTY, AND C. F. DAVIS, R. L. BATTS, AND A. D. WARD, MEMBERS OF AND CONSTITUTING THE BOARD OF COUNTY COMMISSIONERS OF PENDER COUNTY.

(Filed 15 June, 1936.)

1. **Counties E b—Question of whether bonds of school district were necessary to maintenance of constitutional school term is for courts.**

   Plaintiffs brought this action to enjoin the collection of taxes by the county which were levied to pay principal and interest on bonds of certain school districts of the county which the county had assumed. Plaintiffs alleged that the issuance of the school district bonds was not necessary to the maintenance of the constitutional school term in the respective districts of the county which had issued the bonds. Defendants denied this allegation in their answer, and introduced resolutions of the county board of education and the board of county commissioners which contained findings that the district bonds, when issued, were necessary to the maintenance of the constitutional school term. *Held:* Plaintiffs' motion for judgment on the pleadings was correctly denied, since the pleadings raised an issue of fact as to whether the issuance of the bonds was necessary to the maintenance of the constitutional school term, and *held further,* the resolution of the county boards on this aspect is not conclusive on the courts, but the issue was properly submitted to the jury.

2. **Schools and School Districts A a—The Constitution contemplates that the General Assembly shall provide a State system of public schools.**

   The State Constitution contemplates that the General Assembly shall provide a State system of public schools to the end that every child between the ages of six and twenty-one years, without regard to the county in which such child resides, shall have an opportunity to attend a school in which standards set up by the State are maintained and wherein tuition shall be free of charge, and it is the duty of the commissioners of each county, when such State system has been provided, to maintain in each district of the county one or more schools for the constitutional school term.

3. **Counties E b—County may assume indebtedness of its school districts which was contracted by them to maintain constitutional school term.**

   Since it is the duty of the county commissioners of each county to provide for the construction and equipment of schools in each district necessary to the maintenance of the constitutional school term, where some of the school districts of the county provide the necessary buildings and equipment upon failure of the county to do so, by issuing school bonds or otherwise, the county may assume such indebtedness upon the request of its board of education. N. C. Code, 5599.

APPEAL by plaintiffs from *Williams, J.,* at November Term, 1935, of PENDER. No error.

This is an action to enjoin the defendant J. T. Brown, sheriff of Pender County, from selling lands owned by the plaintiffs and located in

Maple Hill School District, Holly Township, Pender County, in accordance with notices posted by him, as required by statute, for the collection of taxes levied on said lands by the defendant board of county commissioners of Pender County for the year 1933, on the ground that said taxes were levied for the purpose of raising money to pay the obligations, evidenced by bonds and otherwise of certain school districts in Pender County other than Maple Hill School District, and for that reason were levied on the lands of the plaintiffs without lawful authority, and are therefore illegal, and also to enjoin the defendant board of county commissioners of Pender County from levying taxes on said lands for the year 1934, and for succeeding years, for said purpose.

Prior to 3 July, 1933, the board of county commissioners of Pender County, at the request of the board of education of said county, and with the approval of a majority of the qualified voters in each of said school districts, as required by law, for and in behalf of certain school districts in said county, had issued bonds in the name of Pender County, and had otherwise contracted indebtedness for the purpose of constructing and equipping schoolhouses in said district. The said bonds at the time they were issued, and the said indebtedness at the time it was contracted, were and are now the valid obligations of the said school districts. By statutory authority, taxes had been levied by the board of county commissioners of Pender County, from year to year, on property, real and personal, located in said school districts, for the purpose of raising money to pay said bonds and said indebtedness.

On 3 July, 1933, the board of county commissioners of Pender County, at a meeting held on said day, made and caused to be entered in its minutes an order as follows:

"It is ordered that the county assume the debt service obligations of the various school districts in the county."

Pursuant to said order, and in accordance with the budget requirements of the board of education of Pender County, the board of county commissioners of said county, for the year 1933, levied a tax of 43 cents on the $100.00 valuation on all the property, real and personal, in said county subject to taxation, for the purpose of raising money to pay the indebtedness, evidenced by bonds or otherwise, of said county for school purposes, including the indebtedness of the various school districts in the county contracted for the construction and equipment of schoolhouses in said districts. No bonds had been issued or indebtedness contracted by Maple Hill School District, or in its behalf. The plaintiffs have failed and refused to pay the taxes levied on their lands located in Maple Hill School District, and the defendant J. T. Brown, sheriff of Pender County, has advertised the said lands for sale for the purpose of collecting said taxes, and will sell the same unless enjoined from so doing by judgment in this action.

The defendant board of county commissioners of Pender County has approved the budget of the board of education of said county for the year 1934, which will require that a tax be levied on all the property, real and personal, in Pender County, for the purpose of raising money to pay the indebtedness of the various school districts of said county incurred for the construction and equipment of schoolhouses in said districts. Unless enjoined in this action, the defendant board of county commissioners of Pender County will levy said tax for the year 1934, and for succeeding years.

In their complaint, the plaintiffs allege that the schoolhouses constructed in the various school districts in Pender County and paid for with the proceeds of the bonds issued by or in behalf of said school districts, or with money borrowed for that purpose, were not essential or necessary for the operation in said districts of schools for the minimum school term of six months in each year, as required by the Constitution of this State. This allegation is denied by the defendants. In their answer the defendants allege that said schoolhouses were and are essential and necessary for the operation of schools in said district, in accordance with the mandate of the Constitution of the State of North Carolina.

At a meeting held after the commencement of this action, to wit: On 4 February, 1935, the board of county commissioners of Pender County adopted and caused to be entered in its minutes a resolution as follows:

"Whereas, the board of education of Pender County, on 3 July, 1933, adopted a resolution providing that the debt service obligations of the special taxing districts and other school districts of Pender County should be taken over for payment by the county as a whole and the local districts relieved of their payment, said obligations being included in the debt service fund in the six months budget; and

"Whereas, the same was certified to the board of county commissioners of Pender County and approved by said board, and said board, pursuant to said approval, adopted the following resolution:

" 'It is ordered that the county assume the debt service obligations of the various taxing school districts in the county'; and

"Whereas, it has been discovered that essential facts were inadvertently omitted from the drafts of the resolutions adopted by the board of education and by the board of county commissioners, which facts were true at the time the resolutions were adopted, and still are true; and

"Whereas, on this 4 February, 1935, the said board has decided to amend said resolutions so that they will speak the truth, and will include such essential facts as were omitted, and the board of education has adopted the following resolution, as an amendment to its resolution adopted 3 July, 1933, to wit:

"'Whereas, under authority of law certain local school districts of Pender County, by a majority vote of the qualified voters of each district, and in accordance with law, have issued and caused to be sold certain bonds, or have lawfully borrowed money from the State, the names of said districts being as follows, the amount of the bonds and State loans outstanding on 3 July, 1933, being placed opposite the name of each district listed below, to wit:

District Bonds	*Date of Sale*	*Amt. of Issue*	*Amt. outstanding 7-3-33*
Atkinson Special School Taxing District	7-1-25	$25,000	$18,000
Burgaw Special School District	11-15-26	50,000	44,000
Long Creek Grady Special School Taxing District	7-1-25	25,000	18,000
Rocky Point Special School Taxing District	7-1-25	30,000	23,000
Topsail Special School Taxing District	11-1-24	60,000	44,000
Total District Bonds		$190,000	
Total Outstanding Bonds, 7-3-33			$147,000

State Loans, Literary Fund	*Date of Loan*	*Amount*	*July 3, 1933 Amt. outstanding*
Atkinson Special School Taxing District	2-11-24	$5,000	$ 500.00
Atkinson Special School Taxing District	2-10-26	1,500	450.00
Long Creek Grady Special School Taxing District	2-11-24	5,000	500.00
Long Creek Grady Special School Taxing District	2-10-26	1,500	450.00
Long Creek Grady Special School Taxing District	9-1-28	3,000	1,800.00
Rocky Point Special School Taxing District	2-17-26	2,000	600.00

Special Building Fund.

Atkinson and Long Creek Grady (this was a joint loan of $68,000.00, one-half County obligation and one-half District obligation), 3-10-24	$34,000.00	$18,700.00
Total State Loans for District	$52,000.00	

Total Outstanding		$23,000.00
Total Bonds and State Loans for Districts	$242,000.00	
Amount Outstanding July 3, 1933		$170,000.00

"Whereas, the proceeds of the sale of the above mentioned bonds were in each instance used in the erection and equipment of school buildings in their respective districts, thus relieving the board of education and the board of county commissioners, in whole or in part, of their legal responsibility; and

"Whereas, it is the sense of the board of education that all indebtedness of school districts lawfully incurred in erecting and equipping school buildings necessary for the six months school term should be taken over for payment by the county as a whole, and the local districts relieved of their annual payments; and

"Whereas, the above listed bonds and loans were issued or made, and the proceeds thereof used for the erection and equipment of school buildings necessary for the six months school term, and the said buildings and equipment are and were on 3 July, 1933, necessary for the maintenance of the six months school term in Pender County, and the said bonds or loans, when added to any other debt service obligations of Pender County for school purposes, do not, and did not on 3 July, 1933, exceed five per cent of the valuation of the property subject to taxation in Pender County:

"Now, therefore, be it resolved:

"1. That the county board of education, with the approval of the county board of commissioners, take over the indebtedness of all school districts lawfully incurred in erecting and equipping school buildings as set forth in the preamble of this resolution, beginning with the school year 1933-1934, and relieve the local districts of their annual payments in accordance with Article 13, section 179, of the Public School Law Codification, 1923, and amendments thereto, and that the resolution of 3 July, 1933, be and the same is hereby amended so as to include this resolution and the preamble thereto;

"2. That the board of county commissioners of Pender County be furnished with a certified copy of these resolutions, and that the said board of county commissioners be and it is hereby asked to approve the action on the part of the county board of education as set forth in these resolutions.

"3. That these resolutions be in full force and effect from and after the approval of the county board of commissioners.

"Members present and voting 'Aye' are:

"D. J. Farrior, Jr., T. J. Henry, George F. DeVane. Those voting 'No': J. R. Marshburn.

"Done in regular session, this 4 February, 1935.

D. J. FARRIOR, JR.,
Chairman Board of Education.

"Attest:

T. T. MURPHY,
Secretary Board of Education.

"And whereas, the taking over and assumption of the districts' obligations as set forth by said board of education is adjudged to be legally just and equitable.

"Now, therefore, be it resolved:

"1. That the action of the board of education, as set forth in its resolution and the preambles thereto recited above, be and the same is hereby approved and the said districts are hereby forever hereafter relieved of their annual payments, or any parts thereof.

"2. That the board of education be and it is hereby directed to include in the debt service fund in the six months budget the annual installments and interest on the indebtedness of all districts listed in the preamble to their resolution recited herein.

"3. That the resolution adopted 3 July, 1933, be and the same is hereby amended so as to include and embrace this resolution and its preambles.

"4. That a certified copy of this resolution be furnished to the board of education for its information, and to govern its action in this behalf.

"Those members present and voting 'Aye' are:

"C. F. Davis, R. L. Batts, A. D. Ward. Those voting 'No': None.

"Done in regular session on this 4 February, 1935.

C. F. DAVIS,
Chairman Board of County Commissioners.

"Attest:

GEO. F. LUCAS, *Clerk.*"

At the trial an issue was submitted to the jury and answered as follows:

"Was the indebtedness of the special taxing districts of Pender County, which was assumed by the county as a county-wide obligation on 3 July, 1933, incurred for the construction of school buildings and for school equipment essential and necessary for the operation in said county of a six months school term? Answer: 'Yes.' "

From judgment dissolving the temporary restraining order issued in the action and continued to the final hearing, adjudging that the taxes levied by the board of county commissioners of Pender County for the year 1933, on all property, real and personal, in said county for school debt service, were lawfully levied, and are legal, and taxing the plaintiffs with the costs of the action, the plaintiffs appealed to the Supreme Court, assigning numerous errors in the trial.

Carr, James & LeGrand for plaintiffs.
McCullen & McCullen and Clifton L. Moore for defendants.

CONNOR, J. We have examined the numerous assignments of error made by the plaintiffs on this appeal. None of them can be sustained.

The motion of the plaintiffs for judgment on the pleadings was properly denied by the trial court. The allegation in the complaint that the indebtedness of the various school districts in Pender County, which was assumed by the county on 3 July, 1933, pursuant to the resolution of the board of education, and with the approval of the board of county commissioners (N. C. Code of 1935, sec. 5599), was incurred for the construction and equipment of schoolhouses in said districts, which were not necessary or essential for the operation of a school or of schools in each of said districts for a term of six months in each year, was denied in the answer. The issue thus raised by the pleadings was properly submitted to the jury. The affirmative answer of the jury to this issue was determinative of the action. See *Hickory v. Catawba County,* 206 N. C., 165, 173 S. E., 56, and *Greensboro v. Guilford County,* 209 N. C., 655, 184 S. E., 473.

The order of the defendant, the board of county commissioners of Pender County, as amended by the resolution of said board adopted on 4 February, 1935, pursuant to the resolution of the board of education of said county, was predicated on the finding by both said boards that the indebtedness of certain school districts in Pender County was incurred for the construction and equipment of schoolhouses in said districts which were and are necessary and essential for the operation of a school or of schools in each of said districts for a term of six months in each year. This finding was not conclusive on this action. In *Hickory v. Catawba County, supra,* it is said: "This is not a problem to be solved by the defendants in the exercise of their discretion, or one in the solution of which the courts are shorn of jurisdiction. The exercise of jurisdiction implies the right to hear evidence on the question whether the buildings and equipment of certain types are essential to the operation of the schools, and as the witnesses who testified as to these things were qualified to speak, the exceptions addressed to the admissibility of their testimony cannot be sustained."

On the facts admitted by the parties in their pleadings, and found by the jury at the trial, the judgment is affirmed on the authority of *Reeves v. Board of Education,* 204 N. C., 74, 167 S. E., 454.

It is the mandate of the Constitution of this State that the General Assembly shall provide by taxation and otherwise for a general and uniform system of public schools wherein tuition shall be free of charge to all the children of the State between the ages of six and twenty-one years. This constitutional mandate contemplates that the system of public schools which it is the duty of the General Assembly to provide for all the children of the State, shall be a State system, to the end that every child in the State between the ages of six and twenty-one years, without regard to the county in which such child shall reside, shall have an opportunity at least to attend a school in which standards set up by the State are maintained. When provision has been made by the General Assembly for a State system of public schools, as contemplated by the Constitution, it is the duty of the board of county commissioners of each county in the State to maintain in each school district in its county one or more schools for a term of at least six months in each year. Adequate buildings and equipment are manifestly required for the maintenance and operation of these schools. N. C. Code of 1935, sec. 5467. It is therefore the duty of the board of county commissioners of each county in the State to provide for the construction and equipment of adequate school buildings in each district of its county. When for any reason the board of county commissioners of a county has failed to perform this duty, and the buildings and equipment necessary for the maintenance and operation of schools for the minimum term required by the Constitution have been provided by the district by the issuance of bonds or otherwise by statutory authority, the board of county commissioners, at the request of the board of education of the county, may assume the indebtedness of the district, and thereby relieve the district of the burden of such indebtedness. In such case, the board of county commissioners is performing the duty which the Constitution imposes upon said board in the first instance. In *Reeves v. Board of Education, supra,* it is said: "There is no sound reason why a school district should have to pay out of its own taxable property a debt which the Constitution and the laws of the State impose upon the county. The authority for the assumption by the county of the bonded debt of the various school districts is contained in sec. 6, ch. 180, Public Laws 1925, as amended by ch. 239, secs. 4 and 5, Public Laws 1927, Michie's Code, 1931, sec. 5599."

We find no error in the trial of this action. The judgment is affirmed.

No error.

WACHOVIA BANK AND TRUST COMPANY, TRUSTEE, v. MRS. BESSIE ERWIN JONES, MRS. SARAH ERWIN BELLAMY, MRS. MARGARET ERWIN GLENN, AND WILLIAM A. ERWIN, III, WILLIAM ERWIN JONES, ELIZABETH SMEDES JONES, ALICE McADEN JONES, SARAH LYELL GLENN, LOCKE ERWIN GLENN AND ROBERT RANKIN BELLAMY, MINORS, S. C. BRAWLEY, JR., GUARDIAN AD LITEM OF WILLIAM A. ERWIN, III, AND ALLSTON STUBBS, GUARDIAN AD LITEM FOR WILLIAM E. JONES, ELIZABETH S. JONES, ALICE McADEN JONES, SARAH LYELL GLENN, LOCKE ERWIN GLENN, ROBERT RANKIN BELLAMY, AND ALL PERSONS NOT IN BEING WHOSE NAMES AND RESIDENCES ARE NOT KNOWN, OR WHO MAY IN ANY CONTINGENCY BECOME INTERESTED IN SAID TRUST.

(Filed 15 June, 1936.)

1. **Trusts E b—**

   Where the disposition of part of a trust fund created by will is left in doubt under its language, the trustee may apply to the courts, in their equitable jurisdiction, to construe the instrument.

2. **Wills E a—**

   A will and its codicils must be construed together to ascertain and effect the testator's intent.

3. **Wills E f—Income from property subsequently used to pay specific legacies and costs should be paid income beneficiaries of trust estate.**

   After providing for specific legacies, testator directed that the residuum of the estate should be held in trust for the benefit of testator's children, and directed that the income therefrom be periodically divided among them, with issue of deceased children representing their ancestor, with further provision for the distribution of the *corpus* of the trust estate after the death of testator's children and grandchildren. The trustee brought this action to obtain direction of the court in disposing of income derived from property used in paying debts, costs of administration, and specific legacies. *Held:* The residue of the estate is formed at the time of testator's death, and the income in question should not be added to the *corpus* of the trust estate, but should be paid the income beneficiaries of the trust estate under the provision of the will that the net income on hand be divided among them, it being apparent that testator's children were the primary objects of testator's bounty, and the will being construed to effectuate his intent. The Massachusetts and English Rule defined and discussed by CLARKSON, J.

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

STACY, C. J., dissenting.

APPEAL by defendants Bessie Erwin Jones, Sarah Erwin Bellamy, Margaret Erwin Glenn, and S. C. Brawley, Jr., guardian *ad litem* for William A. Erwin, III, from *Spears, J.,* at Chambers, 29 April, 1936. From DURHAM. Reversed.

This is a civil action, instituted by the plaintiff Wachovia Bank and Trust Company against the defendants as beneficiaries under the will of the late W. A. Erwin for the purpose of having the court determine certain questions relative to the disposition of certain of the property.

On 2 March, 1936, S. C. Brawley, Jr., was duly appointed as guardian *ad litem* for William A. Erwin, III, and Allston Stubbs was duly appointed as guardian *ad litem* for William E. Jones, Elizabeth S. Jones, Alice McAden Jones, Sarah Lyell Glenn, Locke Erwin Glenn, Robert Rankin Bellamy, and all persons not in being whose names and residences are not known or who may in any contingency become interested in said trust, and both of said guardians *ad litem* were duly and regularly served with summons and filed answers.

On 28 February, 1932, the testator, William A. Erwin, died leaving a will and four codicils attached thereto, as set out in the record. The Wachovia Bank and Trust Company and Kemp P. Lewis were named as executors. After providing for certain specific legacies, the testator in Item 8 of said will devised and bequeathed all the rest and residue of his property to the Wachovia Bank and Trust Company as trustee, to be held in trust, the income from said property to be used for the benefit of his following children: Bessie Erwin Jones, Sarah Erwin Bellamy, Margaret Erwin Glenn, all daughters of the testator, and William A. Erwin, son of the testator, and their issue. Subsequent to the signing of this will, William A. Erwin, Jr., died and William A. Erwin, III, son of William A. Erwin, Jr., now stands in the position of his father as one of the life beneficiaries.

The total income from the estate during the entire period of administration amounted to $71,544.55. The expense of administration deductive from the income amounted to $11,898.87, leaving a net income of $59,645.68. Of this amount, $11,946.13 was income derived from that portion of the estate used in the payment of specific legacies, debts, and costs of administration. The remainder, to wit: $47,699.55, was derived from that portion of the estate which went into the *corpus* of the residuum and was distributed to the life beneficiaries of the trust as income. The question arises whether the income of $11,946.13 on that portion of the estate used in the payment of specific legacies (these amounted to $40,000—$20,000 to the trustees of Saint Mary's School at Raleigh, and $20,000 to the Wachovia Bank and Trust Company, trustee, to hold in trust for the trustees of the Diocese of the Episcopal Church of North Carolina), debts and costs of administration should be paid as income to the life beneficiaries of the trust, or whether its character should be changed from income to that of *corpus* and added to the *corpus* of the residuum of the estate.

The material part of the will to be construed is Item 8, which is as follows: "I give, devise, and bequeath all the rest and residue of my property and estate *of whatever nature* and wheresoever the same may be to said Wachovia Bank and Trust Company, as trustee, to be by it held, used, and disposed of in trust for the benefit of my four (4) children, to wit: My daughter, Mrs. Bessie Erwin Jones, of Charlotte, N. C. My daughter, Mrs. Margaret Erwin Glenn, of Winston-Salem, N. C. My daughter, Mrs. Sarah Erwin Bellamy, of Wilmington, N. C. My son, William A. Erwin, Jr., of West Durham, N. C., and their issue as follows: . . . Until the death of the last survivor of my said children named above and of all the issue alive at my death of all of my said four children and until the expiration of twenty (20) years after the death of such last survivor, or until the sooner death of all of my said four children and all their issue, *to divide quarterly the net income then on hand from said trust estate* into as many equal shares as there shall be then living child of mine named above and child of mine named above who has died but with issue alive at the time of such quarterly division, and to pay one of said shares of net income to each of my said four children alive at the time of such quarterly division and distribution and one of said shares to the issue (*per stirpes*) alive at that time of each of my said four children who may have died before such quarterly division and distribution."

The court below held that that portion of the income earned by or accruing to the assets of the estate used in connection with payment of debts, legacies, and other expenses "is properly a part of the *corpus* of the residuary trust, and should so be set up and held by petitioner as residuary trustee of said trust."

To this judgment, defendants Bessie Erwin Jones, Sarah Erwin Bellamy, Margaret Erwin Glenn, and S. C. Brawley, Jr., guardian *ad litem* of Wm. A. Erwin, III, excepted, assigned error, and appealed to the Supreme Court. Allston Stubbs, guardian *ad litem* for Wm. Erwin Jones *et al.*, agrees that the conclusion of the court is correct and joins with plaintiff as appellee.

J. M. Broughton for Wachovia Bank and Trust Company, trustee.
Allston Stubbs, guardian ad litem for Wm. Erwin Jones et al.
Bryant & Jones and Hamilton C. Jones for defendants, the daughters.
Sumter C. Brawley, Jr., guardian ad litem for W. A. Erwin, III.

CLARKSON, J. This is an equitable action, brought by plaintiff against the defendants, petitioning the court to determine certain questions relative to the disposition of certain property. This is admissible. *Bank v. Alexander,* 188 N. C., 668; *Finley v. Finley,* 201 N. C., 1 (14); *Spencer v. McCleneghan,* 202 N. C., 662 (669).

The contention of defendants, appellants, is "that a careful reading of the will will show that while there is no expressed provision in the will determinative of this question, a fair inference is that there was an implied direction that this $11,946.13 should be treated as income and paid to the life beneficiaries. That the $11,946.13, which is income that accrued on that portion of the estate used in the payment of specific legacies, debts, and costs of administration, should be paid to the life beneficiaries as income and not added to the *corpus* of the estate."

The contention of appellees is: "That the sum of $11,946.13 should be added to the *corpus* of the estate for the benefit of the remaindermen."

The well settled rule in the construction of wills is set forth in *Morris v. Waggoner,* 209 N. C., 183 (186): "That the primary purpose in construing a will is to ascertain the intention of the testator from the language used in the will, and that in ascertaining such intention consideration should be given to the condition of the testator and his family and to all of the attendant circumstances surrounding the execution of the will."

We must construe the will and codicils to the will together so as to ascertain the intention of the testator. It goes without saying that when the testator made his will, his four children were the primary objects of his bounty. As to them he said, "I give, devise, and bequeath *all the rest and residue* of my property and estate *of whatsoever nature* and wheresoever the same may be to said Wachovia Bank and Trust Company, as trustee, to be by it held, used, and disposed of in trust for the benefit of my four children" (naming them). "To divide quarterly the net income then on hand from said trust estate into as many equal shares as there shall be then living child of mine named above," etc. No particular provision was made for the fund in controversy, yet the will says "the net income then on hand"—that is, at his death. Would it not be reasonable to conclude that the fund in controversy is net income and not *corpus?*

From a careful search we can find no direct authority on this question in North Carolina. There are two lines of authorities, one known as the Massachusetts Rule and one known as the English Rule. The appellants contend that the Massachusetts Rule should be followed in this case and the income accruing on that portion of the estate used to pay specific legacies, debts, and costs of administration should be distributed among the life tenants as income. And contends that the Massachusetts Rule is based upon the following theories: (1) That the residuum of the estate is formed at the death of the testator and is subject to the payment of any specific legacies, debts, and expenses of administration. (2) That the testator has the interest of those closest to him more at heart, and if he could contemplate a situation of this

kind, that he would wish for those closest to him to receive the amount in question—that is, that he would want his children and their children to receive the total income accruing on the entire estate from the time of his death.

We think the Massachusetts Rule preferable to the English Rule, and we believe more consonant with justice and reason. The residue of the estate is formed at the time of the testator's death and is subject to the payment of debts and legacies, and that the income from that should be paid to the beneficiaries, and is not *corpus.*

The matter is so thoroughly discussed by *Rugg, C. J.,* in *Old Colony Trust Co. v. Smith* (266 Mass., 500), 165 N. E., 657, that we quote copiously from that opinion, as follows: "The testamentary words 'rest, residue, and remainder' comprehend the whole of the estate of every description left by the testator subject to all deductions required by operation of law or by direction of the testator. They signify a complete disposition of all property of the testator (citing authorities). In the absence of controlling words to the contrary, 'this residue must be considered as formed at the time of the decease of the testator.' Where the gift of the residue is after the payment of debts and similar charges and nondeferred legacies, the residue is to be formed subject to such payments, even though actually made at a later time. *Treadwell v. Cordis,* 5 Gray, 341, 348, 352, 358. It was expressly stated by *Chief Justice Shaw* in *Minot v. Amory,* 2 Cush., 377, 386, that trustees in making up their accounts should credit to income 'all sums received as income, either through the executors or by themselves, after receiving the capital'; and again in *Lovering v. Minot,* 9 Cush., 151, 157, that where the words of the will are 'the income,' 'with nothing to restrain them,' they include nothing less than 'the whole income.' In each of these decisions the learned *Chief Justice* reviewed the English cases, including *Angerstein v. Martin,* Turn. & Russ, 232, which is the foundation of the English Rule; *Allhusen v. Whittell,* L. R., 4 Eq., 295, 303; *In re McEuen* (1913), 2 Ch., 704, and examined *Williamson v. Williamson,* 6 Paige Ch. (N. Y.), 298, which is the foundation of the New York Rule; *Matter of Accounting of Benson,* 96 N. Y., 499, 48 Am. Rep., 646; *Lawrence v. Littlefield,* 215 N. Y., 561, 577, 109 N. E., 611, and declined to follow the rule established by those cases. That rule, in substance, is that income from money paid for debts and legacies is not income from the residue, but income from property which never becomes a part of the residue because given to other uses, and hence that it is itself a part of the residue. That was the rule followed by the accountant. But it is not the rule established in this Commonwealth by the leading case of *Treadwell v. Cordis,* 5 Gray, 341, 348, 352, 358, which rests upon strong adumbrations if not express adjudications of earlier

decisions. It was said by *Gray, J.*, in *Sargent v. Sargent,* 103 Mass., 297, 299: 'In this Court, the general rule is established, that the tenant for life is entitled to the income of a residue given in trust, from the time of the testator's death; because any other rule would take away the income from the tenant for life, and apply it to the increase of the capital for the benefit of the remaindermen. *Lamb v. Lamb,* 11 Pick., 371; *Minot v. Amory,* 2 Cush., 377, 388, 389; *Lovering v. Minot,* 9 Cush., 151, 157.' In *McDonough v. Montague,* 259 Mass., 612, 157 N. E., 159, the question presented was as to the proper disposition of substantial 'income earned by the moneys used to pay debts and expenses of administration.' It there was said: 'There is nothing in the will which indicates an intention to make a change from the accepted rule that a tenant for life is entitled to the income from the time of the testator's death.' "

The Massachusetts Rule was followed by Rhode Island in 1933—*City Bank Farmers Trust Co. et al. v. Taylor,* 53 R. I., 126, 163 Atl., 734. New York followed the English Rule, and this was recently changed by statute. N. Y. L., 1931, c. 706, added sec. 17 (b), to the Personal Property Law (Consol. Laws, c. 41), which reads as follows: "Unless otherwise expressly provided by the will of a person dying after this act takes place, all income from real and personal property earned during the period of administration of the estate of such testator, and not payable to others or otherwise disposed of by the will, shall be distributed *pro rata* as income among the beneficiaries of any trusts created out of the residuary estate of such testator and the other persons entitled to such residuary estate. None of such income shall, after such distribution, be added to the capital of the residuary estate, the whole or any part of which is devised or bequeathed in trust or for life or for a term of years, but shall be paid ratably to the life beneficiary of a trust, or to the life tenant, or to the absolute residuary legatee as the case may be. Unless otherwise directed in the will, income shall be payable to the life beneficiaries of trusts, or to life tenants from the date of the testator's death. Nothing contained in this act shall affect the right of any person to income on any portion of the estate not part of the residuary estate of such testator."

The above quoted statute, in effect, makes the New York law identical with the law which has been followed in Massachusetts and several other jurisdictions, including Rhode Island, for many years.

We follow the Massachusetts Rule. The judgment of the court below is

Reversed.

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

STACY, C. J., dissenting: The better expression, it seems to me, is to be found in "The Restatement of the Law of Trusts," section 234 (g), published by The American Law Institute, which reads as follows:

"Income on Property Used in Paying Legacies, Debts, and Expenses: To the extent to which the income received by the executors during the period of administration is derived from property which is subsequently used in paying legacies and discharging debts and expenses of administration, and has not been applied to the payment of interest on such legacies, debts, and expenses, the trustee is entitled to receive the same, but it should be added to the principal and not paid to the beneficiary entitled to the income."

This statement, which was prepared by noted scholars, judges, and lawyers, after an exhaustive study of the subject, has the merit of being supported by the English common law rule and is supposed to be the law of this jurisdiction, unless or until changed by statute. C. S., 970. Moreover, it seems to accord more nearly with the intention of the testator as expressed in the will before us. This was the view of the court below, and my vote is for affirmance.

EDNA M. COOK v. J. PORTER STEDMAN.

(Filed 15 June, 1936.)

Automobiles E a—

In order for the owner of an automobile to be held liable for injury inflicted by a person to whom he had loaned the car, the injured person must show, in addition to the fact of ownership, that the person to whom the car was loaned was reckless and incompetent, and that the owner had knowledge of this fact.

APPEAL by plaintiff from *Clement, J.,* at February Term, 1936, of FORSYTH. Affirmed.

Action for damages for personal injury, alleged to have been caused by the negligence of the defendant in the operation of his automobile by an incompetent driver to whom it had been loaned.

At the conclusion of the plaintiff's evidence, motion for judgment of nonsuit was sustained, and from judgment in accordance with this ruling, plaintiff appealed.

E. E. Risner, John C. Wallace, and Parrish & Deal for plaintiff.
Hutchins & Parker for defendant.

PER CURIAM. The only ground upon which plaintiff seeks to impose liability upon the defendant, the owner of the automobile, is the incompetency of the driver to whom it was loaned.

It is well settled that liability does not arise from mere ownership of an automobile, nor can it be based solely on the danger of the machine. The burden was on the plaintiff to show, in addition to the fact of ownership, that the car was loaned to a reckless and incompetent driver, and that the incompetency of the driver was known to the owner. Huddy on Automobiles, 795-797, 838; *Taylor v. Caudle, ante,* 60; *Linville v. Nissen,* 162 N. C., 95.

The only pertinent evidence offered by the plaintiff on this point was: (1) The admission in the answer that the automobile "had been loaned to Lybrook" (the driver); (2) the statement by the defendant that "he had asked his wife not to let the boy have the car. He didn't say why"; (3) the testimony of witness Orrell, a resident of Davie County: "His general reputation as driver of automobiles is reckless, careless, and dangerous. . . . He had the general reputation I stated, ever since he has been in Davie County, ever since 1927, since his father moved over there to Davie County." The defendant and his wife live in Forsyth County, in the city of Winston-Salem. There was no evidence of any instance of recklessness or incompetency on the part of Lybrook.

We conclude that the evidence offered is insufficient to impose liability on the defendant, the owner of the automobile, for the negligence of the driver in its operation on the occasion alleged.

Judgment of nonsuit is
Affirmed.

GURNEY P. HOOD, COMMISSIONER OF BANKS OF THE STATE OF NORTH CAROLINA, ON RELATION OF NORTH CAROLINA BANK AND TRUST COMPANY, v. NORTH CAROLINA THEATRES, INC.

(Filed 15 June, 1936.)

Wills E h—

A deed in fee simple, with full covenants of warranty, is sufficient to convey the fee in property by a devisee of the defeasible fee with full power of disposition, since the devisee's deed manifests the intent to exercise the power, even though it does not specifically refer thereto.

APPEAL by defendant from *Barnhill, J.,* at May Term, 1936, of WAKE. Affirmed.

Controversy without action to determine the question of title to certain real estate in the city of Raleigh, involving the construction of the will of Malvina K. Walters.

The plaintiff claims title by *mesne* conveyances under Mrs. Vera Newton Walters Tomlinson, devisee and daughter of the testatrix, and has contracted to convey the described land to the defendant, and has tendered deed sufficient in form. The defendant contends the title is defective by reason of the provisions of the will of said Malvina K. Walters.

From judgment that plaintiff has good and indefeasible title and right to convey in fee simple, defendant appealed.

Beverly C. Moore for plaintiff.
Kenneth M. Brim and Murray Allen for defendant.

PER CURIAM. Mrs. Malvina K. Walters died testate, 7 June, 1927, survived by her two daughters, Mrs. Vera Newton Walters Tomlinson and Mrs. Edna Earl Walters Jones.

The portions of her will pertinent to the question involved are as follows:

"Item 3: I give, devise, and bequeath my property, real and personal, to my daughters and their children as follows: To my daughter, Vera Newton Walters Tomlinson, for the period of her life, remainder to her natural children, the following described real estate in the city of Raleigh: (1) The store and Lot No. 115 Fayetteville Street, running back to Wilmington Street, together with all my right and title to the improvements thereon." . . .

"Item 5: If my daughter, Mrs. Tomlinson, shall die without children, or having children, they shall all die without issue, I will and devise the property herein devised to her to her sister, Mrs. Edna Earl Walters Jones, for life, remainder to her natural children."

Codicil Item 1: "I hereby declare it to be my will that the property, both personal and real, devised and bequeathed in the foregoing will, dated 1 January, 1910, shall pass at my death to my daughters, Vera and Edna, absolutely and in fee simple, in the division as set out in said will, provided only that upon the death of either daughter, the property devised to such daughter shall descend to her children, or, having no children, to the remaining daughter absolutely. This provision shall not prevent either daughter during her lifetime from improving, selling, conveying, and converting the property devised or bequeathed to her, but said daughters shall have full control of their respective shares of my estate, subject only to said provision."

Codicil Item 3: "I wish the property herein devised and bequeathed to descend as provided in Item Fifth of my will, but I hereby declare that this wish is absolutely subject to my will that my said daughters shall have full and absolute control of the property devised by me to

them to do with as they wish, subject to the provision in Item 1 of this codicil; and this wish is expressed only for the purpose of indicating the disposition to be made of my property in the event that my daughters die without natural children and without having disposed of their said shares."

On 22 September, 1928, Mrs. Vera Newton Walters Tomlinson and her husband conveyed the described property to Powell & Powell, Inc., by deed in fee simple with usual covenants, and the plaintiff herein claims title by *mesne* conveyances under said deed.

The defendant contends the will of Mrs. Walters did not vest in Mrs. Tomlinson power to convey the property in fee simple, and that if power of disposition was given, the deed to Powell & Powell, Inc., is insufficient to convey the fee "because it does not contain express reference to said power."

It is manifest from an examination of the provisions of the will, hereinbefore set out, that the devise to Mrs. Tomlinson is coupled with full and express power to convey, and that it was the intention of the testatrix that the limitation over should apply only to property not disposed of by the first taker.

The defendant contends, however, that conceding the power of disposition, the deed of Mrs. Tomlinson is insufficient because it contains no specific reference to this power, and was not made in the exercise of the power. This contention cannot be sustained.

It was held in *Matthews v. Griffin,* 187 N. C., 599: "While some of the earlier decisions were more strict in their requirements that in order to the validity of instruments executed by persons having a power of appointment, express reference to the power should be made, a more liberal rule prevails in the later and authoritative cases on the subject, and it is now very generally accepted that the question is largely one of intent, and the instrument will be upheld as a valid execution of the power where, on its entire perusal, the intent to exercise the power can be plainly inferred. . . . If a conveyance is made which cannot have full effect except by referring it to an execution of the power, though some estate would pass by reason of the ownership, the conveyance will be referred to the power."

The intent to convey in exercise of the power is manifest from the execution of a deed in fee simple with full covenants of warranty.

In 91 A. L. R., 472, will be found collected numerous cases from other jurisdictions in accord with the ruling in *Matthews v. Griffin, supra.*

The judgment of the court below is

Affirmed.

FRED M. NIVENS v. ELLIS R. JUSTICE, TRADING AS JUSTICE SILVER DIME.

(Filed 15 June, 1936.)

Gaming A a—

Where the agreed statement of facts in an action to recover the penalty under C. S., 4434, states that defendant kept a slot machine in his store, without a finding that the machine was illegal, the findings are insufficient to support a judgment against defendant.

APPEAL by defendant from *Harding, J.*, at February Term, 1936, of MECKLENBURG. Reversed.

Action to recover of defendant the penalty of $200.00 prescribed by C. S., 4434, for keeping in his store and place of business an illegal slot machine, heard by the court below on an agreed statement of facts.

From judgment in favor of plaintiff, defendant appealed.

Hiram P. Whitacre and H. C. Williams for plaintiff.
Kirkpatrick & Kirkpatrick for defendant.

PER CURIAM. The statute, C. S., 4434, provides: "If any person shall knowingly suffer to be opened, left, or used in his house or on any part of the premises occupied therewith, any of the gaming tables by this article prohibited, or any illegal punchboard or illegal slot machine, he shall forfeit and pay to anyone who will sue therefor two hundred dollars."

The facts material to the decision of the controversy as set out in the agreed statement of facts are as follows:

"2. That the defendant is in the business of owning and operating a store wherein various soft drinks, beer, and food are sold, and a hotel on the floor above wherein he lives.

"3. That on 6 May, 1935, a slot machine was located and being operated in the defendant's place of business."

The facts agreed are insufficient to warrant the judgment. The statute authorizes penalty suit for keeping an illegal slot machine. In the agreed statement of facts the offending article is defined merely as a "slot machine." There is no description of its method of operation nor finding that it is illegal.

The judgment must be

Reversed.

STATE v. MRS. EDDIE WEBB.

(Filed 15 June, 1936.)

1. Criminal Law I f—

Indictments charging defendant with reckless driving and with passing a standing school bus on the highway may be consolidated for trial. C. S., 4622.

2. Automobiles C g—

N. C. Code, 2618 (b), requiring motor vehicles to stop before passing a school bus standing on the highway applies to passing a school bus from either direction, from the rear or from the front.

APPEAL by the defendant from *Hill, J.*, at May Term, 1935, of FORSYTH.

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

H. O. Woltz and Wilson Barber for defendant, appellant.

PER CURIAM. The defendant was charged in two bills of indictment with having violated section 2621 (45), N. C. Code of 1935 (Michie), relative to reckless driving, and section 2618 (b) of said Code requiring motor vehicles to stop before passing a school bus standing on the public road taking on or putting off school children.

The defendant excepted to the consolidation of the two cases for trial. This exception is untenable. C. S., 4622.

Section 2618 (b) reads: "No person operating any motor vehicle on the public roads shall pass, or attempt to pass, any public school bus while the same is standing on the said public road taking on or putting off school children, without first bringing said motor vehicle to a full stop at a distance of not less than fifty feet from said school bus."

The court charged the jury: "Now, the defendant contends that the logical meaning of the statute is that it shall apply only to an automobile approaching the school bus from the rear and attempting to pass the rear of the school bus, and that it does not apply to traffic approaching the school bus from the opposite direction and passing or attempting to pass the school bus from that direction. The State contends, through the solicitor, that it means passing a school bus, regardless of whether from the rear of the school bus or from the front of the school bus. The court construes this statute to mean, and you are instructed that it is the law, that it applies both to passing or attempting to pass the school bus from the rear and passing or attempting to pass the school bus from the

front of the school bus." The defendant excepted to the foregoing portion of the charge, contending, as stated by the court, that the statute is limited to only those motor vehicles passing a school bus from the rear. We agree with the construction placed upon the statute by the court. There is nothing in the statute limiting the provisions thereof as contended by the defendant.

We have examined the other exceptions taken by the appellant and find no reversible error. While the evidence, as it related to the charge of violating section 2621 (45), was conflicting, it justified the verdict of the jury.

No error.

ROBERT TERRY v. MONTGOMERY WARD COMPANY AND TOM TERRY

and

ELSIE LYNN TERRY v. MONTGOMERY WARD COMPANY AND TOM TERRY.

(Filed 15 June, 1936.)

Automobiles E b—

In order to hold an employer liable for the negligent driving of his employee, plaintiff must establish not only the fact of employment, but also that the employee, at the time of the collision, was engaged in the performance of some duty incident to his employment.

APPEAL by plaintiffs from *Grady, J.*, at September Term, 1935, of DURHAM. Affirmed.

The above entitled actions to recover damages for injuries suffered by the plaintiff in each action, and resulting from a collision between a truck driven by the defendant Tom Terry and an automobile in which the plaintiffs were riding, were consolidated, by consent, for trial.

It is alleged in the complaint in each action that the collision which resulted in injury to the plaintiff therein was caused by the negligence of the defendant Tom Terry, while driving the truck as an employee of his codefendant, Montgomery Ward Company. This allegation is denied in the answer of the defendants.

From judgment dismissing both actions as to the defendant Montgomery Ward Company, the plaintiffs appealed to the Supreme Court, assigning errors in the trial and in the judgment.

Henry Bane and Harvey Harward for plaintiff.
Bryant & Jones for defendant.

PER CURIAM. Conceding without deciding that there was evidence at the trial of these actions tending to show that at the time the plaintiffs were injured, the defendant Tom Terry was an employee of his codefendant, Montgomery Ward Company, and was not an independent contractor as contended by the defendants, we are of opinion that there was no evidence tending to show that the defendant Tom Terry was at the time of the collision engaged in the performance of any duty incident to his employment.

For this reason, there is no error in the judgment dismissing the action as to the defendant Montgomery Ward Company at the close of the evidence. See *Wilkie v. Stancil,* 196 N. C., 794, 147 S. E., 296; *Peters v. Tea Company,* 194 N. C., 172, 138 S. E., 595; *Grier v. Grier,* 192 N. C., 760, 135 S. E., 852.

The judgment is

Affirmed.

L. J. LAWRENCE, GUARDIAN OF HARRY NEWSOME, INCOMPETENT, v. JOHN A. SHAW AND OTHERS, MEMBERS OF AND CONSTITUTING THE BOARD OF COMMISSIONERS OF HERTFORD COUNTY, AND JOHN A. NORTHCOTT, COUNTY ACCOUNTANT OF HERTFORD COUNTY.

(Filed 30 June, 1936.)

1. **Taxation B d—Neither cash nor investments derived from payments of veteran's compensation and insurance are exempt from taxation.**

   Plaintiff was guardian for an incompetent World War veteran. Plaintiff had on hand for five years prior to the institution of this action cash in banks and solvent bonds and notes belonging to his ward, all of which were derived from warrants of the Federal Government issued in payment of compensation and insurance to plaintiff's ward. Defendant county commissioners listed and assessed said property for taxation for the prior five years, and plaintiff, after paying the tax demanded under protest, instituted this action to recover same. *Held:* Neither the cash on hand nor the bonds and notes are exempt from taxation under the provisions of secs. 454 and 618 of Title 38, U. S. C. A., there being no distinction in law, for the purposes of taxation, between bonds and notes and cash in banks, all of which solvent credits are subject to taxation. C. S., 7971 (18), Constitution of North Carolina, Art. V, sec. 3. The Act of Congress of 12 August, 1935, *is held* inapplicable, and also not at variance with the decision in this case.

2. **Attorney-General B b: Taxation C a—Ruling, in accordance with opinion of Attorney-General, that certain property is nontaxable held not authoritative.**

   An opinion of the Attorney-General, given in the performance of his statutory duty, C. S., 7694 (5), is advisory only, and a ruling by county commissioners in accordance with such opinion holding that certain prop-

erty is nontaxable, is not authoritative, and the commissioners may thereafter, without notice, list and assess such property for taxation in accordance with their statutory duty.

3. **Same—Commissioners may list property for taxation notwithstanding prior ruling that such property was nontaxable.**

Plaintiff, guardian of a World War veteran, paid taxes on property of his ward, and thereafter, in accordance with a ruling of the Attorney-General to the effect that the property of his ward was nontaxable. obtained a refund of the tax from the county commissioners. Plaintiff did not list the property for taxation for the succeeding four years. The property of the ward was not exempt from taxation, but was properly subject to taxation by the State. *Held:* The prior ruling of the county commissioners to the effect that the property was nontaxable does not prevent them from listing the property for taxation for the prior five years, including the year for which the tax was refunded, C. S., 7971 (50), and the action of the commissioners in listing the property without notice will not be disturbed, plaintiff agreeing that the property was properly listed and assessed for taxation unless it was exempt from taxation under the laws of the United States.

APPEAL by plaintiff from *Cranmer, J.*, at April Term, 1936, of HERTFORD. Affirmed.

This is a controversy without action. C. S., 626.

It is agreed: "1. That the plaintiff was duly appointed by and qualified before the clerk of the Superior Court of Hertford County, on or about 16 May, 1929, as guardian of Harry Newsome, incompetent veteran of the World War, and has ever since been and is now the duly appointed and acting guardian of said veteran.

"2. That John A. Shaw, W. C. Ferguson, C. T. Whitley, B. N. Sykes, J. M. Eley, and T. W. Sears are members of and constitute the board of commissioners of Hertford County, North Carolina.

"3. That John A. Northcott is the duly appointed, elected, and acting county accountant and fiscal agent of Hertford County, and is charged by law, by virtue of his office, with the duties of setting up and keeping records of all tax levies made by said board of commissioners, of all obligations due to and by said county, keeping books and records of all receipts and disbursements of public moneys of said county, and of receiving, accounting for, and paying out, upon orders of said board, all tax and public moneys belonging to said Hertford County; and that the said John A. Northcott is also register of deeds of Hertford County and *ex officio* clerk to the defendant board of commissioners, and was such register and clerk at the times hereinafter mentioned.

"4. That at the time of the appointment and qualification of the plaintiff as guardian aforesaid, the said Harry Newsome, incompetent veteran as aforesaid, owned no property or estate, other than claims against the United States Government for unpaid compensation and insurance due said veteran for services rendered said Government.

"5. That on the first day of April, 1931, the plaintiff had to his credit, as deposits in banks, the amount of $5,787.72, in his name as guardian aforesaid; all of which represented and in fact were the proceeds of collections made from deposits by said guardian of the original warrants or checks issued by said Government in payment to said veteran of compensation and insurance due the said veteran by the said Government; and on the said first day of April, 1931, said guardian also was in possession of certain interest bearing notes and bonds, payable to said guardian, and containing definite dates of maturity and repayment, not exceeding twelve months from the date of the execution of each respective note or bond, secured by conveyances of real estate, in trust, for the purposes aforesaid, in the aggregate amount of $13,390.28; the whole of which notes, bonds, and conveyances were executed by the makers thereof as evidence of and security for loans made by the said guardian from proceeds collected as aforesaid from said United States Government in payment of compensation and insurance due said veteran.

"6. That on the first day of April, 1932, the said guardian had to his credit, as deposits in banks, the amount of $3,868.42, in his name as guardian aforesaid; all of which represented and in fact were the proceeds of collections from deposits made by said guardian of the original warrants or checks issued by the said Government in payment to said veteran of compensation and insurance due the said veteran by the said Government; and on the said first day of April, 1932, said guardian was also in possession of certain interest bearing notes and bonds, payable to said guardian, containing definite and fixed dates of maturity and repayment, as stated in paragraph 5 hereof, which were secured by conveyances of real estate, in trust for the purposes aforesaid, in the aggregate amount of $17,157.58; the whole of which notes and bonds and conveyances were executed by the makers thereof as evidences of and security for loans made by the said guardian from proceeds collected from said U. S. Government in payment of compensation and insurance due the said veteran.

"7. That on the first day of April, 1933, the said guardian had to his credit, as deposits in banks, the amount of $3,704.76, in his name as guardian aforesaid; all of which represented, and in fact were, the proceeds of collections made from deposits by said guardian of the original warrants or checks issued by said Government in payment to said veteran of compensation and insurance due the said veteran by the said Government; and on the said first day of April, 1933, said guardian was also in possession of certain interest bearing notes and bonds, payable to said guardian, and containing fixed and definite dates of maturity and repayment, as aforesaid, secured by conveyances of real estate, in trust, for the purposes aforesaid, in the aggregate amount of $18,528.24; the whole of which notes and bonds and conveyances were executed by the

makers thereof as evidences of and security for loans made by said guardian from the proceeds collected from said U. S. Government in payment of compensation and insurance due the said veteran.

"8. That on the first day of April, 1934, the said guardian had to his credit, as deposits in banks, the amount of $987.48, in his name as guardian aforesaid; all of which represented and in fact were the proceeds of collections from deposits made by said guardian of the original warrants or checks issued by said Government in payment to said veteran of compensation and insurance due the said veteran by the said Government; and on the said first day of April, 1934, said guardian was also in possession of certain interest bearing notes and bonds, payable to said guardian, containing definite and fixed dates of maturity and repayment, as aforesaid, which were secured by conveyances of real estate, in trust, for the purposes aforesaid, in the aggregate amount of $18,217.52; the whole of which notes, bonds, and conveyances were executed by the makers thereof as evidences of and security for loans made by the said guardian from proceeds collected from said U. S. Government in payment of compensation and insurance due the said veteran.

"9. That on the first day of April, 1935, the said guardian had to his credit, as deposits in banks, the amount of $2,730.93, in his name as guardian aforesaid; all of which represented and in fact were the proceeds of collections from deposits made by said guardian of the original warrants or checks issued by said Government in payment to said veteran of compensation and insurance due the said veteran by the said Government; and on the said first day of April, 1935, said guardian was also in possession of certain interest bearing notes and bonds, payable to said guardian, containing definite and fixed dates of maturity and repayment, as aforesaid, and secured by conveyances of real estate, in trust, for the purpose aforesaid, in the aggregate amount of $13,636.07; the whole of which notes, bonds, and conveyances were executed by the makers thereof as evidences of and security for loans made by said guardian from proceeds collected from said U. S. Government in payment of compensation and insurance due the said veteran.

"10. That on the said first days of April, 1931, 1932, 1933, 1934, and 1935, neither the said veteran nor the plaintiff, as guardian aforesaid, owned any real estate in Hertford County.

"11. That prior thereto, to wit: During the year 1930, the said veteran became the owner of an automobile, and certain other personal property, the whole of which has been regularly and yearly listed for taxation, and that the taxes due thereon have been duly and regularly paid.

"12. That in the said year 1930, the said guardian listed for taxation in said Hertford County the total property in his possession as guardian aforesaid owned by his said ward, in the aggregate amount of $20,380.92, made up of and including money in banks, solvent credits, and loans

secured by real estate conveyances as aforesaid, and in said year paid the taxes thereon.

"13. That thereafter, and during the year 1931, the plaintiff being informed that a ruling had been made and an opinion given by the Attorney-General of North Carolina that funds received by a guardian of a World War veteran as payments of adjusted compensation or insurance from the Federal Government and invested by the guardian in either a home or in real estate notes, were not subject to taxation, appeared before the defendant board of commissioners and made known to said defendant the ruling and opinion aforesaid, and requested the said board to reimburse and refund to the plaintiff the full amount of said 1930 taxes, and to relieve and discharge the plaintiff from the whole of said taxes.

"14. That said board of commissioners, pursuant to said information and request, made an order, at the time aforesaid, directing repayment and refund to the plaintiff of the whole of said taxes, and thereafter paid to the plaintiff the whole thereof.

"15. That in consequence of the opinion and ruling aforesaid, and in consequence of the order made by the said board of commissioners, the plaintiff in neither of the years 1931, 1932, 1933, 1934, nor 1935, further listed any property of said veteran in possession of the plaintiff for taxation in said Hertford County, and has for neither of said years, except as hereinafter set out, paid to said Hertford County any taxes thereon.

"16. That during the year 1935, to wit, on or about .... October of said year, the defendant board of county commissioners, acting by and through its county accountant, under due authority from said board of county commissioners, caused to be set up, listed, and assessed as taxable property of the said Harry Newsome all moneys received by the plaintiff from said U. S. Government as compensation and insurance due the said veteran, and all notes and bonds held and possessed by said guardian, as loans made by him from said compensation and insurance payments; and for each of the said years 1931, 1932, 1933, 1934, and 1935 assessed the said property and made levies thereon of taxes in favor of said county, according to the regular rates theretofore determined for each of said years, as follows, to wit:

Property	*1931 Assessed Value*	*Tax rate*	*Taxes*
Deposits in Banks	$ 5,787.72	$1.43	$ 82.90
Solvent Credits—Real Estate Loans	13,390.28	1.43	191.47
Totals for 1931	$19,188.00	$1.43	$274.37

Property	1932 Assessed Value	Tax rate	Taxes
Deposits in Banks	$ 3,868.42	$1.59	$ 61.51
Solvent Credits—Real Estate Loans	17,157.58	1.59	272.79
Totals for 1932	$21,026.00	$1.59	$334.30
	1933		
Deposits in Banks	$ 3,704.76	$1.52	$ 56.31
Solvent Credits—Real Estate Loans	18,528.24	1.52	281.62
Totals for 1933	$22,233.00	$1.52	$337.93
	1934		
Deposits in Banks	$ 987.48	$1.44	$ 14.22
Solvent Credits—Real Estate Loans	18,217.52	1.44	262.54
Totals for 1934	$19,205.00	$1.44	$276.54
	1935		
Deposits in Banks	$ 2,730.93	$1.54	$ 41.95
Solvent Credits—Real Estate Loans	13,636.07	1.54	210.10
Totals for 1935	$16,367.00	$1.54	$252.05

"17. That the said taxes so assessed and levied by the said commissioners, for the years aforesaid, amounted in the aggregate to the sum total of $1,475.19, the payment of which was demanded by the said defendants, by notice in writing, addressed to the plaintiff. A copy of said notice and demand is hereto attached and made a part of this case agreed.

"18. That each of the items set out and shown in paragraph 16 as 'Deposits in Banks,' for each of said years, represented and in fact were the collections from warrants or checks drawn and issued by the United States Government in payment of compensation and insurance due by it to plaintiff's ward, which said warrants or checks were deposited by plaintiff in such depositories and credited by them to the plaintiff's account as guardian aforesaid; and the amounts of said assessments and levies made up by said defendants on the items aforesaid and shown in said paragraph, represented and were in fact the unexpended and uninvested balances in the hands of the said guardian or payments aforesaid

by the U. S. Government of warrants or checks issued by it for compensation and insurance due by it to the said veteran.

"And the said items set out and shown in said paragraph 16 as 'Solvent Credits and Real Estate Loans,' represented and were in fact the assessed value of notes and bonds secured by conveyances of real estate, executed and delivered and made payable to said guardian, as evidences of and security for loans made by said guardian to the makers thereof, out of the proceeds derived from said compensation and insurance warrants or checks.

"19. That the said assessments and levies of taxes for each of the said years 1931, 1932, 1933, 1934, and 1935, set out and shown in said paragraph 16, as 'Deposits in Banks,' and as 'Solvent Credits and Real Estate Loans,' were made up by said defendants in the year 1935, subsequent to the general levy of taxes for said year 1935, and subsequent to the month of July of said year upon admissions made by the plaintiff in a private conversation with the attorney for said defendants and the said John A. Northcott; that the same were correct sums total of money on deposit in banks and of real estate loans due to and in favor of plaintiff on the first day of April of each of said years; but the said assessments and levies were made in the absence of the plaintiff, without his consent, and without notice to show cause, if any he had, why the order made by said defendants as aforesaid in 1931 should not be revoked, or why the said property should not be assessed for taxation.

"20. That on 9 October, 1935, pursuant to the said written demand of the defendants for the payment by the plaintiff of the taxes aforesaid, the plaintiff, although protesting in writing the payment thereof, paid to the defendants the full amount of taxes so assessed and levied for each of said years, aggregating the sum total of $1,475.19, and obtained from defendants a receipt in writing showing both the payment thereof and the protest aforesaid.

"21. That thereafter, to wit: On 10 October, 1935, the plaintiff made demand on defendants in writing for the reimbursement, repayment, and return of the full amount of said sum of $1,475.19, so paid by the plaintiff to the defendants, upon the ground and for the reason that the taxes aforesaid were unlawfully and wrongfully exacted of the plaintiff, and that the said assessments under which the said levies were made were without warrant of law, illegal, and void; which demand the defendants refused, and that defendants have failed and refused to reimburse, repay, or refund to plaintiff the said sum, or any part thereof, and still refuse reimbursement or repayment of the whole or any part of said sum.

"The questions submitted upon the facts agreed are as follows, viz.:

"1. Where a guardian of a World War veteran receives from the Veterans' Bureau of the United States Government warrants or checks

issued by said Government in payment of adjusted compensation or insurance due the guardian's ward, and said warrants or checks are deposited by the guardian in a depository, collected by it, and the proceeds are credited in the guardian's account carried in such depository, are such deposits subject to taxation by county and municipal authorities?

"2. When such guardian carries in bank an account in his name as guardian of a World War veteran, consisting and made up of deposits therein of compensation or insurance warrants or checks issued and delivered by the U. S. Government; and such guardian thereafter draws upon his said account in making loans on real estate security, accepts notes and bonds as evidences of the loans, and deeds of trust as security therefor, and all such notes and bonds are made payable to the guardian, containing maturities of twelve months or less, and each and all of such notes and bonds are held and retained by the guardian as assets due his ward, are such notes and bonds the subject of taxation by county and municipal authorities?

"3. Where a board of county commissioners, pursuant to a ruling and opinion made and given by the Attorney-General of the State, holding as nontaxable all proceeds from compensation and insurance warrants or checks issued by the U. S. Government to veterans of the World War, releases and relieves a guardian of a World War veteran from payment of taxes assessed on money carried in banks and real estate loans, the whole of which being derived from compensation and insurance payments, can such board of commissioners thereafter and subsequent to this order aforesaid cause assessment and levy of taxes to be made on the same character of property discharged and released by its former order, without notice to or the consent of such guardian?

"4. Where a board of county commissioners, pursuant to and in accordance with a ruling of the Attorney-General of the State, made an order in 1931, releasing and discharging the plaintiff from payment of 1930 taxes on certain property held by such ruling to be exempt from taxation, can such board, in the year 1935, subsequent to the general tax levy made in said year, and subsequent to the month of July in said year, without notice to, consent of, or waiver by the taxpayer, set up, assess, and levy taxes on the property aforesaid for the year 1935, and for the four years next preceding such year?"

After due consideration of the questions presented in this controversy, on the facts agreed, the court was of opinion that plaintiff was not entitled to recover of the defendants the sum of $1,475.19, the amount paid by him as taxes for the years 1931, 1932, 1933, 1934, and 1935, and accordingly adjudged that plaintiff recover nothing of the defendant, and that he pay the costs of the proceeding. The plaintiff appealed to the Supreme Court.

Lloyd J. Lawrence for plaintiff.
W. D. Boone for defendants.

CONNOR, J. The judgment in this case was predicated upon the affirmative answer to each of the questions presented to the Court on the facts agreed. If these answers were correct, the judgment must be affirmed; otherwise, the judgment must be reversed, or modified.

Affirmative answers to the first and second questions are in accord with the decision of this Court in *Martin v. Guilford County,* 201 N. C., 63, 158 S. E., 847, 76 L. R. A., 978, and with the decision of the Supreme Court of the United States in *Trotter v. State of Tennessee,* 290 U. S., 354, 78 L. Ed., 368.

The question presented in *Martin v. Guilford County, supra,* was whether property, real or personal, located in this State, and otherwise subject to taxation under its laws, is exempt from taxation because said property is owned by a veteran of the World War, who purchased and paid for the same with money which was paid to him by the Government of the United States under provisions of the Act of Congress for the relief of veterans of the World War. Answering this question, which involved primarily a construction of sections 454 and 618 of Title 38, U. S. C. A., it was said, "We think it clear that by the enactment of sections 454 and 618 of Title 38, U. S. C. A., Congress has not undertaken to exercise any control over the property now owned by the plaintiff, and that said property is not exempt from taxation by Guilford County, under the laws of this State, applicable to said property as well as to all other property in said county." The property owned by the plaintiff in that case was a lot of land and an automobile, both of which had been purchased by the plaintiff with money paid to him by the Government of the United States as compensation and insurance under the Act of Congress. The plaintiff was a veteran of the World War, and had paid the taxes levied on his property by Guilford County. It was held that plaintiff was not entitled to recover of the defendant the amount of said taxes, on the ground that his property was exempt from taxation by Guilford County under the provisions of sections 454 and 618 of Title 38, U. S. C. A.

Martin v. Guilford County, supra, is cited with approval by *Justice Cardozo* in *Trotter v. State of Tennessee, supra.* In his opinion in that case, he says: "Exemptions from taxation are not to be enlarged by implication if doubts are nicely balanced, *Chicago Theological Seminary v. Illinois,* 188 U. S., 662, 46 L. Ed., 641. On the other hand, they are not to be read so grudgingly as to thwart the purpose of the lawmakers. The moneys payable to this soldier were unquestionably exempt till they came into his hands, or the hands of his guardian. *McIn-*

tosh v. Aubrey, 185 U. S., 122, 46 L. Ed., 834. We leave the question open whether the exemption remained in force while they continued in those hands or on deposit in a bank. Cf. *McIntosh v. Aubrey, supra; State ex rel. Smith v. Shawnee County,* 132 Kan., 233, 294 Pac., 915; *Wilson v. Sawyer,* 177 Ark., 492, 6 S. W. (2d), 825, and *Surrance v. Donna,* 248 N. Y., 18, 161 N. E., 315. Be that as it may, we think it very clear that there was an end to the exemption when they lost the quality of moneys and were converted into land and buildings. The statute speaks of 'compensation, insurance, and maintenance and support allowance payable' to the veteran, and declares that these shall be exempt. We see no token of a purpose to extend a like immunity to permanent investments or the fruits of business enterprises. Veterans who choose to trade in land or in merchandise, in bonds or in shares of stock, must pay their tribute to the State. If immunity is to be theirs, the statute conceding it must speak in clearer terms than the one before us here."

We can see no distinction in law, for purposes of taxation, between stocks and bonds, and notes and bank deposits and other solvent credits. No such distinction is made by the laws of this State. It is provided by statute that personal property shall include: "All notes, bonds, accounts receivable, money on deposit, postal savings, securities and other credits of every kind belonging to citizens of the State over and above the amounts respectively owed by them, whether such indebtedness is due them from individuals or from corporations, public or private, and whether such debtors reside within or without the State." C. S., 7971 (18). This statute was enacted by the General Assembly of this State in obedience to the mandate of the Constitution of North Carolina, sec. 3 of Article V.

An affirmative answer to the third question was manifestly correct. If, as the plaintiff was informed, the Attorney-General of this State made a ruling and gave an opinion as set out in the facts agreed, such opinion was advisory only. It was given by the Attorney-General in the performance of his duty as prescribed by statute. C. S., 7694 (5). The ruling in accordance with the opinion was not authoritative. At most, it could be invoked by the defendants in support of their action in refunding to the plaintiff the amount paid by him as taxes for the year 1930. The defendants were under no legal duty to inform the plaintiff that they had been subsequently advised that the property belonging to his ward, and in his hands as guardian, was not exempt from taxation by Hertford County.

An affirmative answer to the fourth question was also correct. On the facts agreed the defendants were authorized by statute to list for taxation by Hertford County, for the years 1935, 1934, 1933, 1932, and

1931—five years—the property belonging to the estate of his ward, which the plaintiff had failed to list for said years. C. S., 7971 (50). It is true that defendants did not comply strictly with the provisions of the statute relative to procedure, but there was a substantial compliance with these provisions. It is not contended by the plaintiff that he has been prejudiced by the failure of the defendants to comply with the letter of the statute. On the contrary, the plaintiff agrees that the property was properly listed and was properly assessed for taxation, unless it was exempt from taxation under the laws of the United States.

The Act of Congress of 12 August, 1935, is not applicable to this case. However, it is provided in said act that provisions with respect to exemption from taxation of payments due under the Act of Congress for the relief of veterans of the World War "shall not extend to any property purchased in part or wholly out of such payments." This is a legislative recognition of the construction by this Court and by the Supreme Court of the United States of sections 454 and 618 of Title 38, U. S. C. A., and supports the decision in the instant case.

There is no error in the judgment. It is

Affirmed.

STATE v. C. C. STEWART AND OLLIE PARISH.

(Filed 30 June, 1936.)

1. Homicide G c—

Whether testimony is competent as being of a dying declaration is a question of law for the court, and, on appeal, the Supreme Court may determine only whether there was evidence tending to show the facts necessary to support the decision of the trial court.

2. Same—Evidence held insufficient to support decision that testimony was competent as being of dying declaration.

The evidence tended to show that deceased had been in the hospital for nine days before making the statements to the State's witness, and it did not appear that during this period deceased was advised by physicians or nurses that her illness would probably be fatal, or that deceased expressed to nurses or friends and relatives visiting her that she apprehended she was going to die. Before making the statements to the State's witness, deceased answered in the affirmative a question asked her by the witness as to whether deceased thought she was going to die. Deceased died thirteen days after making the statements. *Held:* The statements were not competent as dying declarations made by deceased, since the evidence fails to show that, at the time of making the statements, deceased was *in extremis* or in danger of death from her illness, or that she was apprehensive of her approaching death, and the testimony was incompetent as hearsay, and its admission over defendants' objection entitles defendants to a new trial.

APPEAL by defendants from *Sink, J.,* at February Term, 1936, of GUILFORD. New trial.

The defendants in this action were tried on an indictment in which they were both charged with the murder of Ethel Smith.

When the action was called for trial, the solicitor for the State announced that on the evidence which he would offer, the State would not contend that the defendants are guilty of murder in the first degree, but would contend that they are each guilty of murder in the second degree, or of manslaughter, as the jury should find the facts to be from all the evidence.

Each of the defendants entered a plea of not guilty.

The evidence for the State tended to show that Ethel Smith, the daughter of W. A. Smith, left the home of her father, in Guilford County, about six miles north of the city of Greensboro, about 6:30 o'clock p.m., on Monday, 5 November, 1934, in an automobile driven by the defendant Ollie Parish. They arrived at the home of her sister, Mrs. Eli R. Brewer, in the city of Greensboro, about 8:30 that evening. At the time she arrived at the home of her sister, Ethel Smith was apparently in her usual condition, both physical and mental. The defendant Ollie Parish, after remaining with her about fifteen minutes, during which time they talked together as usual, left her at her sister's home, where she remained Monday night, all day Tuesday and Tuesday night. During this time she did not leave her sister's home, or have any visitors there. At about 6 o'clock a.m., on Wednesday, 7 November, 1934, she called her sister, Mrs. Brewer, who went to her room, and found her suffering severe pain. Mrs. Brewer immediately called Dr. W. P. Knight, a physician practicing in the city of Greensboro, who arrived at her home about 7 o'clock a.m. Upon examining Ethel Smith, Dr. Knight discovered that she was pregnant, and was having a miscarriage, which he testified was the result of an abortion caused by the use of instruments. Upon the advice of Dr. Knight, Ethel Smith was removed from the home of her sister to St. Leo's Hospital, in the city of Greensboro, where she remained, under the treatment and care of physicians and nurses, until 29 November, 1934, when she died. Her death was the result of an abortion committed on her by the use of instruments prior to 7 November, 1934. At the date of her death, Ethel Smith was about 20 years of age, and was unmarried.

The defendant Ollie Parish is about 35 years of age. His home is about three-tenths of a mile from the home of W. A. Smith, the father of Ethel Smith. He had been "going with her" about two and a half years before her death. During this time he had visited her at her father's home only two or three times. He was, however, with her frequently—almost every week—elsewhere. When he called for her on

Monday evening, 5 November, 1934, he blew the horn on his automobile, and waited for her. After putting on her cloak and hat, she went out and joined him. They left her father's home, driving in the direction of the city of Greensboro. It usually takes about 15 minutes to drive an automobile from the home of W. A. Smith, the father of Ethel Smith, to the home of her sister, Mrs. Brewer, in the city of Greensboro, a distance of about six miles. When the defendant Ollie Parish left Ethel Smith at her sister's home, he told her that he would call there to see her the next day. He did not call on her or see her after he left her sister's home on Monday evening. He was arrested after Ethel Smith was removed from her sister's home to St. Leo's Hospital. After his arrest, and while he was in jail, he said to Mr. Brewer, the brother-in-law of Ethel Smith, who had called at the jail to see him: "I was going to marry her; I intend to marry her."

The defendant C. C. Stewart is a Negro. He is a physician, and has an office in the Stewart Building, on East Market Street in the city of Greensboro.

Mrs. Minnie D. Hinton, a witness for the State, testified as follows:

"I am employed by the county board of public welfare of Guilford County as the case supervisor. On Thursday, 8 November, 1934, I was directed by the superintendent of public welfare to investigate the case of Ethel Smith. Accordingly, on Friday, 9 November, 1934, I went to St. Leo's Hospital in the city of Greensboro, where I found Ethel Smith. She was in bed and was apparently quite sick. After my first visit, I saw her in the hospital about five times before her death. Her condition did not improve.

"On 16 November, 1934, in consequence of information which I had received, I went to the hospital and saw Ethel Smith there. I had two conversations with her, the first about supper time. I do not remember what she said then as to whether she thought she would get well. She said she was quite sick, and was afraid that she would not get well. She appeared very weak and I had to get close to her to hear what she said. I knelt down by her bed. She told me that she was pregnant, and that Ollie Parish was responsible for her condition; that he had taken her to a Negro doctor to get rid of the 'youngun,' as she expressed it. She said she did not want to do it, but that Ollie Parish told her it would do her no harm. She said the Negro doctor was Doctor Stewart, whose office was on East Market Street, beyond the underpass. She said that he put her on a table and used an instrument, and that she went to the doctor three times, the last time being Monday night, 5 November, 1934. He then put her on a table and placed a tube in her. He told her to leave the tube in her until Tuesday night, and that if anyone asked her what had happened to her, to say that she had taken quinine. She said

that she became very sick Tuesday night, and was taken to the hospital the next morning by Doctor Knight. She said that Ollie Parish took her from Dr. Stewart's office on Monday night to the home of her sister, where she became very sick.

"After this conversation I went home. After I had retired, a call came for me to return to the hospital. This was several hours—four or five—after my first conversation with Ethel Smith, at supper time. I went back to the hospital and found that Ethel Smith was still very, very sick. Mrs. Long, a stenographer, her husband, Mr. Long, and Mr. Ballinger accompanied me. Mrs. Long was with me to take down in shorthand any statement Ethel Smith might make. She took down a statement made by Ethel Smith in my presence. I asked the questions and Mrs. Long took down the answers of Ethel Smith. These questions and answers, as transcribed by Mrs. Long, are as follows:

"Q. Ethel, do you think you are going to die?

"A. I do.

"Q. Tell me what caused your condition?

"A. I was pregnant.

"Q. By whom?

"A. Ollie Parish. Ollie said I would have to get rid of the youngun. He said it would be no harm. I did not want to do it. He said I would have to.

"Q. Where did he take you?

"A. To a Negro doctor.

"Q. What Negro doctor?

"A. Dr. Stewart.

"Q. What did he take you to Dr. Stewart for?

"A. To get rid of the kid.

"Q. What did Dr. Stewart do to you?

"A. He put me on the table and used an instrument to open me up.

"Q. What did he open you up for?

"A. To get rid of the child.

"Q. What did Dr. Stewart say to you?

"A. He said not to say anything about it. If anybody asked me what was the matter to tell them I had taken quinine. He said he would open me up that night, and for me to come back on Saturday night, and he would do the rest.

"Q. When was the first time Ollie Parish took you to Dr. Stewart?

"A. He took me about the first of October, at night every time.

"Q. When did Ollie Parish take you again to Dr. Stewart?

"A. About two or three weeks later.

"Q. When was the last time Ollie Parish took you to Dr. Stewart?

"A. Monday night a week ago. Went three times in all.

"Q. What did he do the last time?

"A. He put me on the table and used some kind of instrument.

"Q. What else did Dr. Stewart do?

"A. The last time he put a tube in me. He told me to take it out the next night at the same time. I did so, and that was when I was taken so sick.

"Q. Where did you go after leaving Dr. Stewart's office?

"A. Ollie took me to my sister's and left me there. He said he would call me the next night.

"Q. Did he ever call?

"A. No.

"Q. Then what happened?

"A. I got sick Tuesday night and had my sister to call the doctor (Knight) about daylight Wednesday morning. He came and told me he would send an ambulance for me. The ambulance came and took me to the hospital."

The defendants in apt time objected to all the testimony of Mrs. Minnie D. Hinton with respect to any statements made to her by Ethel Smith, and with respect to any answers made by Ethel Smith to questions addressed to her by the witness. These objections were overruled by the court, upon its holding that the testimony was competent as tending to show dying declarations of Ethel Smith, the deceased. The defendants duly excepted to the rulings of the court as to the competency of the testimony and to its admission as evidence against the defendants.

The defendant Ollie Parish, as a witness in his own behalf, testified that he had known Ethel Smith since she was a child. He said: "I have never had sexual intercourse with Ethel Smith. I was in love with her. I think she was fond of me. We were not particularly engaged. I did not have a job sufficient to marry. We never discussed marriage. I saw Ethel Smith on Monday, 5 November, 1934, at about 6:30 p.m. I took her in an automobile, which I had borrowed for that purpose, from her father's home to her sister's home in the city of Greensboro. I left her at her sister's home about 7 o'clock. She had asked me on Friday night to take her to her sister's home on Monday night. I did not know that she was pregnant. I did not take her to Dr. C. C. Stewart's office that night, or at any other time. I did not advise her to see Dr. Stewart or any other doctor. I was arrested and put in jail a few days after Ethel Smith was taken to the hospital. I did not say to Mr. Brewer, the brother-in-law of Ethel Smith, that I intended to marry her. He was in the jail on Sunday morning after I was put there on Saturday night."

The defendant C. C. Stewart, as a witness in his own behalf, testified that he is a physician and surgeon, and is duly licensed to practice his

profession in North Carolina. He said: "I had an office at 803½ East Market Street in the city of Greensboro during the months of October and November, 1934. I did not, during October or November, 1934, or at any other time, insert any instrument or tube, prescribe any medicine, or give any advice to a white woman named Ethel Smith for the purpose of causing her to have an abortion. I did not attend her in any capacity, nor did I have any conversation with her about quinine. I did not know the defendant Ollie Parish prior to the preliminary trial of this action. Some time between the hours of 7 and 8 o'clock, during the evening of 15 October, 1934, while I was in my office, alone, a white woman came into the office. She seemed to be excited. I asked her what I could do for her. She said that she was pregnant and asked me if I could do something for her. I told her, no. She said somebody must do something for her. I said, I am sorry. She then left the office, and I have not seen her since. The photograph shown to me and identified as a photograph of Ethel Smith appears to be a photograph of the woman who came to my office during the evening of 15 October, 1934."

There was evidence tending to corroborate the testimony of the defendant C. C. Stewart. There was also evidence tending to show that his reputation in the city of Greensboro, both as a man and as a physician, is good.

At the conclusion of all the evidence, and after the charge of the court to the jury, the jury returned a verdict as to each defendant, that he is guilty of manslaughter.

From judgment that the defendants be confined in the State's Prison at Raleigh, the defendant C. C. Stewart for a term of not less than seven or more than twelve years, and the defendant Ollie Parish for a term of not less than twelve or more than fifteen years, the defendants appealed to the Supreme Court, assigning errors in the trial.

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

Hines & Boren and Allen Adams for defendant C. C. Stewart.

Henderson & Henderson for defendant Ollie Parish.

CONNOR, J. On their appeal to this Court, each of the defendants relies chiefly on his contention that there was error in the trial of this action, in the admission as evidence against him of the testimony of Mrs. Minnie D. Hinton, with respect to statements made to her or in her presence by Ethel Smith, and with respect to answers made by Ethel Smith to questions addressed to her by the witness. These contentions must be sustained.

The testimony of Mrs. Minnie D. Hinton, which was admitted as evidence subject to the exceptions of the defendants, if competent for any purpose, was competent as evidence tending to show dying declarations by Ethel Smith, the deceased, with respect to the facts and circumstances which resulted in her death. If the statements made by Ethel Smith, and her answers to the questions addressed to her, were not admissible as dying declarations, the testimony should have been excluded as hearsay.

In *S. v. Shelton,* 47 N. C., 360, it was said by *Pearson, J.:* "According to the general rule, no testimony is admissible unless it is subjected to two tests of truth, an oath and a cross-examination. A sense of impending death is as strong a guaranty of truth as the solemnity of an oath; but dying declarations cannot be subjected to the other test; there is no opportunity for cross-examination, and there is nothing to meet this objection and answer as an equivalent for the want of cross-examination; hence, the exception in respect to dying declarations rests solely upon the ground of public policy and the principle of necessity."

In *S. v. Williams,* 67 N. C., 13, it was said by *Rodman, J.:* "The admission of dying declarations is an exception to the general rule of evidence, which requires that the witness shall be sworn and subject to cross-examination. The solemnity of the occasion may reasonably be held to supply the place of an oath. But nothing can fully supply the absence of a cross-examination. In consequence of this absence, such declarations are often defective and obscure. Hence, eminent judges have felt it their duty to say that they should be received with much caution, and that the rule which authorizes their admission should not be extended beyond the reasons which justify it. And this is the more important as such declarations, when received, have great and sometimes undue weight with juries."

In *S. v. Jefferson,* 125 N. C., 712, 34 S. E., 648, it was said by *Montgomery, J.:* "The general rule is that testimony before it is received as evidence shall be on the oath of the witness and subject to the right of cross-examination. The nearness and certainty of death are just as strong an incentive to the telling of the truth as the solemnity of an oath, but you cannot subject the deceased, and what he said as a dying declaration, to the test of cross-examination. The exception to the general rule of evidence, therefore, in regard to dying declarations rests upon the ground of public policy and the necessity of the thing, and as the exception can only be sustained on the grounds above mentioned, such evidence is restricted by the law to the act of killing and the facts and circumstances directly attending the act and forming a part of the *res gestæ.* All of this is clearly decided in *S. v. Shelton,* 47 N. C., 360."

In *S. v. Collins,* 189 N. C., 15, 126 S. E., 98, it was said by *Adams, J.:* "The rule for the admission of dying declarations is thus stated: (1) At the time they were made, the declarant should have been in actual danger of death; (2) he should have had full apprehension of his danger; (3) death should have ensued. *S. v. Mills,* 91 N. C., 581."

In *S. v. Beal,* 199 N. C., 278, 154 S. E., 604, it was said by *Stacy, C. J.:* "The general rule is that in prosecutions for homicide, declarations of the deceased, made while sane, when *in extremis* or *in articulo mortis,* and under the solemn conviction of approaching dissolution, concerning the killing or facts and circumstances which go to make up the *res gestæ* of the act, are admissible in evidence, provided the deceased, if living and offered as a witness in the case, would be competent to testify to the matters contained in the declarations. *S. v. Shelton,* 47 N. C., 360; *S. v. Williams,* 67 N. C., 12; *S. v. Mills,* 91 N. C., 594; *S. v. Behrman,* 114 N. C., 797, 19 S. E., 220; *S. v. Jefferson,* 125 N. C., 712, 34 S. E., 648; *S. v. Laughter,* 159 N. C., 488, 74 S. E., 913. We have a number of decisions to the effect that dying declarations are admissible in cases of homicide when they relate to the act of killing or to the circumstances so immediately attendant thereon as to constitute a part of the *res gestæ,* and appear to have been made by the victim in the present anticipation of death, which ensues. *S. v. Laughter, supra.* It is not always necessary that the deceased should express a belief in his impending demise; it is sufficient if the circumstances and surroundings in which he is placed indicate that he is fully under the influence of the solemnity of such a belief, and so near the point of death as to 'lose the use of all deceit'—in Shakespeare's phrase. *S. v. Bagley,* 158 N. C., 608, 73 S. E., 995. In *S. v. Tilghman,* 33 N. C., 513, the Court said: 'It is not necessary that the person should be *in articulo mortis* (the very act of dying); it is sufficient if he be under the apprehension of impending dissolution, when all motive for concealment or falsehood is presumed to be absent and the party in a position as solemn as if the oath had been administered."

In *S. v. Wallace,* 203 N. C., 284, 165 S. E., 716, it was said by *Adams, J.:* "Dying declarations are an exception to the rule which rejects hearsay evidence, but the conditions under which they are admitted by the courts have often been defined. At the time they are made, the declarant must be in actual danger of death and must have full apprehension of his danger; and when the proof is offered, death must have ensued. *S. v. Mills,* 91 N. C., 581. These declarations are received on the general principle that they are made in extremity—'When,' as was said by *Eyre, C. B.,* 'the party is at the point of death and when every hope of this world is gone; when every motive of falsehood is silenced and the mind is induced by the most powerful considerations to speak the truth.

A situation so solemn and so awful is considered by the law as creating an obligation equal to that which is imposed by an oath administered in a court of justice.' *Rex v. Woodcock,* 168 Eng. Reports, 352."

Whether or not a statement made by the deceased is admissible as a dying declaration is a question for the trial court to decide. It is a question of law, and if the decision results in the admission of the statement as evidence against the defendant, it is reviewable by this Court, on defendant's appeal from a judgment against him. If there was evidence at the trial tending to show the requisite facts to support the decision, it cannot be disturbed by this Court; but in the absence of such evidence, the decision must be reversed.

A careful examination of the record in this appeal fails to disclose any evidence at the trial which tended to show that at the time she made the statement or answered the questions, as testified by Mrs. Minnie D. Hinton, Ethel Smith, the deceased, was *in extremis,* or *in articulo mortis,* or in danger of death from her present illness; or that she was under apprehension of her approaching dissolution. All the evidence is to the contrary. The statements were made and the questions answered by Ethel Smith on 16 November, 1934. She had then been in the hospital since 7 November, 1934—a period of nine days. During this time she had been under the constant care of nurses and under the daily treatment of physicians. It does not appear that she was at any time, on or prior to 16 November, 1934, advised by a nurse or by a physician that her illness would probably be fatal. Nor does it appear that at any time on or prior to 16 November, 1934, she expressed to any nurse or to any physician or to any of her relatives or friends who visited her at the hospital, apprehension that she would die of her present illness. It is true that she said to Mrs. Hinton that she was afraid she would not get well, and that in response to Mrs. Hinton's question, "Ethel, do you think you are going to die?" she whispered, "I do."

This evidence is not sufficient to support a finding of fact that Ethel Smith was fully apprehensive on 16 November, 1934, of her approaching dissolution. She did not die until 29 November, 1934—thirteen days after she made the statement and answered the questions, which were admitted as her dying declaration.

For error in the admission of the testimony of Mrs. Minnie D. Hinton as evidence tending to show dying declarations of the deceased, the defendants are entitled to a new trial. They have been convicted upon testimony which under well settled principle of the law of evidence should not have been admitted as evidence against them. Under the judgment in this conviction they will be deprived of their liberty contrary to the law of the land. The judgment is reversed to the end that they may have a

New trial.

STATE v. WILLIAM ABRAHAM HODGIN.

(Filed 30 June, 1936.)

1. **Homicide G d—Testimony of immoral character of deceased held properly excluded in this prosecution for murder.**

Testimony of the character of the deceased is competent upon the plea of self-defense only when such testimony tends to show that deceased had the general reputation of being ferocious, violent, and dangerous, while testimony that deceased was immoral is irrelevant and incompetent, and in this prosecution for homicide, defendant's exception to the exclusion of testimony that deceased had the reputation of being homosexual cannot be sustained, it appearing that defendant was given the full benefit of his contention that he killed deceased in a fight resulting from deceased's indecent attack upon him, and it further appearing that the question addressed to the witness was too limited in its scope in that it asked deceased's reputation in the police force and not deceased's general reputation.

2. **Homicide H c—Instruction in this prosecution for homicide held to sufficiently charge the jury upon the question of manslaughter.**

The charge of the court in this prosecution for homicide, when taken conjunctively, as a whole, *is held* not subject to exception for failure to define manslaughter, it appearing that the charge covered every aspect of the controversy, defined murder in the first degree and second degree, manslaughter, self-defense, malice, and reasonable doubt, applied the presumption of innocence, and gave the contentions of both sides fairly and recapitulated the evidence in the case.

APPEAL by defendant from *Clement, J.,* at 6 January Term, 1936. From FORSYTH. No error.

The defendant was tried under bill of indictment for homicide, N. C. Code, 1935 (Michie), sec. 4614, and convicted of "Guilty of murder in the first degree."

The testimony of Sam Clement, a witness for the State, was to the effect that the deceased, Herbert Searcy, was his wife's uncle, weighed about 200 to 230 pounds, and was a very active and strong man, about 70 years old. A single man, living alone, on the corner of Patterson Avenue and 7th Street in Winston-Salem, N. C. On 23 December, 1935, the witness went to the home of the deceased, about 7 o'clock in the evening, and later to get some eggs, as his wife always baked him a cake for Christmas. No one answered and he went home. On 24 December he went back about 12:30 o'clock and knocked on the door and no one answered, and he went home and ate his dinner. About 7:00 o'clock he went with the officers and broke in the house. Defendant came out from the back of the house and asked who they were looking for and was told that they were looking for Herbert Searcy, and defend-

ant told them that Searcy had gone to Reidsville—had gone night before last. The witness knew that the deceased had a sister in Reidsville. The officers left and the witness called defendant back and told him he wanted to go in the house. The defendant said, "All right," and they went in the back door, which was cracked open, and defendant said "Come in." Another fellow went in with them. He struck a match—it was all "ramshackled." "There were papers on the floor, drawers pulled out of bureaus, and things like that. He said Herb was cleaning up for Christmas and these people came for him and he got in a hurry and left everything in a mess. I told him to clean the house up and he said he would. I picked up the lamp in the middle room and went back in Herb's bedroom. When I went in, I looked under the bed. I saw two big suitcases. There are four rooms there. I asked whose suitcases those were. He said they were Herb's. . . . I told him I would be back again the next morning. . . . I didn't go over there until around about one o'clock on Christmas day. I went over on Christmas day and knocked and knocked and nobody showed up. I says, 'I guess Herb is off spending Christmas.' I passed that over until Thursday, the day after Christmas. Around four o'clock Thursday evening, as near as I could guess at it. . . . I called up Reidsville, where his sister lived. Then I stood around a while. It was about night, and then I went down to police headquarters and told them Herb was missing somewhere. I got in the car with three of them and we went over to Herb's house. We went in the house and searched it over, from bottom to top. We looked under the beds and everywhere. We didn't find anything at all. I did not go back over there until Sunday evening. I went in the house and looked around. My nephew from Reidsville was with me. We looked and couldn't find anything at all. We went back home and Monday evening about five o'clock I got off the job and went up Patterson Avenue and went on to the house and unlocked the door. When I opened the door and looked over in the corner, I saw the trunk sitting over there. I reckon it had been there all the time. I hadn't noticed it. When I stopped right still was when I saw the trunk. I said, 'I am going to see what's in that trunk.' I kicked it, and it kicked heavy. I moved the trunk back and forth two or three times and said, 'I'm going to look in that trunk.' When I took hold of it, it felt heavy. I called another fellow. I told John I was going to look in the trunk. It had a rope around it and two straps fastened. I pulled it over in the floor. I told John to cut the rope off, and he did. I unbuckled the straps and raised up the lid and John pulled out this big pillow, a long bolster. It was packed in over Herb. The bolster was just as bloody as it could be. I reached in and pulled an old box he had crammed down on him, and when I did I said, 'John, there he

is.' He was there, right in that trunk, dead. He was folded over and crammed down in the trunk. He was beat up and in the head and cut across his head with a hatchet. He had two wounds on his right temple and they were crushed in. He was cut on his upper lip and it looked to me like it was cut plumb in to the bone. . . . I am sure he is the man. I am most satisfied he is the one in the house that night. He looks like the same boy that was in there that night."

T. M. Mackie testified, in part, that he was a police officer and made an investigation and was passing deceased's home and was asked by Sam Clement to come in "that there was something wrong in a trunk. We went in and found Herbert Searcy pressed down in a trunk on his shoulders. His legs were pressed right back up over him. His right cheek was knocked plumb in, about where his nose should have been. Across his chin was cut plumb loose. There was a big place knocked in on his forehead. It was knocked in to the hollow. There was some blood behind this trunk, to the edge of the wall. We found this hatchet there that had two or three drops of blood splotches on it at that time. The hatchet you hand me is the hatchet that we found there, and you can see the blood on it. There was blood on the mattress of the bed on the right-hand side. The bed clothes were like it was made up. We turned them down and found the blood. We found the blood on the mattress and there were sheets, blankets and quilts on the bed. We found no blood except on the mattress, immediately behind the trunk, and on the hatchet. . . . There were moth balls scattered over the bed and the floor. The room was permeated with the odor of moth balls. Hodgin was in jail, but I do not know who apprehended him. . . . I talked to the prisoner on the night of the 30th in jail. I offered him no inducements to make any statement and made no threats. I apprised him of the fact that any statement he might make would be used against him. He made a statement under those conditions. The paper you hand me is the statement he made and signed."

In the statement of the defendant is the following: "I came here on 14 or 15 December. The murder was on Monday night, 23 December. When I came to Winston I went to the home of Herbert Searcy, 703 Patterson Avenue, to live with him. When I came I had some money. I give him $28. On Monday night we started arguing about 7 or 8 o'clock. I had asked him for my money and so he did not want to give it to me and said he was not going to give it to me, for me to stay there, and my intention was to leave because I could get no work to do, and so he got up two or three times to fight me with his fist and we had a tussel two or three times, but people kept coming in and going out and we never did finish the argument. No one saw us fighting. People coming in for drinks, and going out, only stayed a few minutes, and

when they came we would stop fussing, and would not open the door until it quieted down. When I got ready to go to bed, he got after me to make me go to bed, and after I went to bed a couple came in and went to bed in the back room. We started arguing again in the front room, and I hit him with a hatchet about his temple. I hit him three or four times with the hatchet, every time about the head, and when he fell on the bed, I hit him another time, and when I threw him on the bed I thought the people in the other room heard the noise, and I covered him up and he was making a noise trying to holler. The first lick I hit him I addled him. He told me to quit and not hit him any more. I had done hit him two or three times then, and I hit him again about the chin after I knocked him down on the bed and he was getting up when I hit him on the chin. After that he didn't say nothing I could understand. So I covered him up and went in the middle room and sat down where the stove was. The room Herb and I were in was the front room, and the stove was in the middle room and the couple in the back room. The man left about 3 or 4 o'clock and the girl left about 6:30. There was a door in the middle room and they went out that way and didn't go through the front room. After they left I went and covered him up and put him in the trunk. I went in and looked at him three times when he was on the bed. He died after the man left and before the woman left. After the woman left I put him in the trunk. Then I got the rope that was around my trunk and tied it around the trunk he was in. The couple didn't know anything about it. Then it was Tuesday morning. I had pawned the old man's overcoat and suit on Monday morning and it was Monday night I killed him. I told him I had pawned his clothes because he wouldn't give me my money, and he didn't like it, and all that was in the fuss. . . . It was not my intention to do anything like this. He had hit me with something about three hours before, the thing he puts flowers in. At the time I hit him with the hatchet there was a poker by the stove, but he didn't have anything in his hand."

The defendant testified, in part: "I roomed up at 704 Patterson Avenue, where Searcy lived, the home of the deceased, and was living there the week of 22 December. On the night of 23 December I was staying there in that house, living and sleeping there. I went to bed on that night around about twelve o'clock. I was pretty sound asleep and I was awakened by Herb. He was on top of me. . . . I got up and when we got straight, we started fighting on the bed and we fought all in this front room where we were back into the middle room where the fire was. While we were fighting in the middle room, he struck me and I fell on the stove and burned my hand. I came out from behind the stove and we started fighting. I fell over on the stove sideways and

fell around the stove. My hand touched the stove and was burned across here. It has healed up now. Then when I came out and got up on my feet, we tied up. He was trying to choke me. I broke loose from him and he grabbed a poker. I backed back and as I stepped up to go in the front room, he was on top of me. This hatchet was down beside the bed. I had stumbled and fell backwards into the other room. The hatchet was located about two feet from where I stumbled. When I came up, I picked up the hatchet, which was right beside my hand side of the bed. I picked the hatchet up and came up on my feet. He was almost standing over me. I told him to get back. After he backed me back in the corner, I got excited and started hitting him all at once with this hatchet. I beat him on the head, about half of him fell on the bed. He had the poker like that (indicating) when I got out of the middle room. As to my reaction when I regained complete consciousness and realized what was going on, I was mad and all excited. That was the first time I ever had anything happen like that to me, a man trying to take advantage of me. I felt he was trying to take advantage of me. (The court): Do you know how many times you hit him with the hatchet? Ans.: Three or four times. I was hitting him all at once. I don't know how many times I was hitting him. . . . As we fought backwards and forth, he was trying to choke me, trying to get to me to choke me. We got into the other room. I couldn't find anything to hit him with. Herbert Searcy was about six feet tall and would weigh about 190 or 195 pounds. I am five and a half feet tall and weigh around 135 or 136. He was an active man. He was a physically man. . . . I couldn't make the statement down at headquarters I wanted to make. I didn't mention anything about him being on top of me. (The court): Why didn't you tell them down there at the police station? Ans.: They said I could tell it at the trial. (The court): Was a woman down there when you made the statement? Ans.: Yes. (The court): You didn't make that statement before her? Ans.: No, sir."

H. C. Whiteheart, a witness for defendant, testified: "I knew the deceased, Herbert Searcy. I do not remember seeing Searcy in the past two years. At that time Herb was a man around six feet tall and weighed around 160 pounds, I guess. I never had occasion to arrest Searcy. Q. Did you ever hear tell of or was it the general reputation throughout the police force that Searcy was homo-sexual? (Objection sustained, defendant excepted—if permitted to testify in the hearing of the jury, the witness would have answered: Yes, sir. I have heard it. People talked it he was.) I am a member of the police force of the city of Winston-Salem and I knew the deceased for about twenty-two or twenty-three years."

The two material exceptions and assignments of error made by defendant will be considered in the opinion.

Attorney-General Seawell and Assistant Attorney-General McMullan for the State.
Robert V. Brawley and John S. Graham for defendant.

CLARKSON, J. *First.* Defendant made exception and assignment of error to the exclusion of the testimony of H. C. Whiteheart above set forth. We do not think that this exception and assignment of error can be sustained.

In *S. v. Turpin,* 77 N. C., 473 (476-7), we find: "The general rule prevailing in most of the American states is, that such evidence is not admissible, and in this State such a general rule is well established. *S. v. Barfield,* 8 Ire., 344; *Bottoms v. Kent,* 3 Jones, 154; *S. v. Floyd,* 6 Jones, 392; *S. v. Hogue,* 6 Jones, 381. But these cases which are cited as establishing a general rule excluding such evidence admit that there may be exceptions to it, depending upon the peculiar circumstances of each case. And these exceptions themselves are now so well defined and established by the current of the more recent decisions that they have assumed a *formula* and have become a general rule subordinate to the principle rule. It is this: *Evidence of the general character of the deceased as a violent and dangerous man is admissible where there is evidence tending to show that the killing may have been from a principle of self-preservation, and also where the evidence is wholly circumstantial and the character of the transaction is in doubt,* as in *Tackett's case,* 1 Hawks, 210; Horrigan & Thompson's cases of Self-Defense, 695, and Index, under the head of 'Character of the deceased for violence,' for reference to the cases at large." (Italics ours.) *S. v. Baldwin,* 155 N. C., 494, 71 S. E., 212; *S. v. Dickey,* 206 N. C., 417 (420).

The rule is thus stated in 30 C. J., 174: "The inquiry as to the character of deceased must relate solely to his general character for violence, ferocity, vindictiveness, or bloodthirstiness. Thus, it is not admissible to prove decedent's general bad conduct or immorality."

And in Chamberlayne, Modern Law of Evidence, latter part of sec. 3295, it is said: "That the deceased in a case of homicide was a violent, turbulent man, may, on the other hand, be shown by the accused under a plea of self-defense, but not the fact that he was engaged in selling whiskey, was unchaste, or that he was a drinking man where there was no evidence that he had been drinking on the occasion in question."

Furthermore, the question propounded was too limited in its scope. It was not in respect of general reputation in the community, but "throughout the police force."

On the aspect of indecent conduct, the court below gave defendant the full benefit of his defense: "He contends from this evidence that you should not be satisfied beyond a reasonable doubt of his guilt of murder in the first degree and you should acquit him. He contends he was living there; that Searcy attacked him there in the room; that Searcy was sex-perverted; that he found him on top of him; that when he tried to get him off, he fought; that you should find Searcy was a much larger and stronger man than he was, and that Searcy fought around over the room, and Searcy finally got the poker and Searcy knocked him down on the stove; that he got up and Searcy pursued him with the poker and he backed him into the other room; that he stumbled and that he fell near the hatchet; that he got the hatchet and got up and that he struck Searcy with the hatchet while Searcy was coming on him with a poker, and that in doing so he was fighting in self-defense; that he hit Searcy in the head but he didn't know how many times he hit him; that he didn't hit him after he fell and after he killed him he put him in the trunk. He contends, gentlemen, he was justified in what he was doing; that he is not guilty of an unlawful killing at all, but you should find he is not guilty of anything, but that it is excusable homicide."

The court further charged: "The law provides that we do not weigh in golden scales equally balanced just how much force a person may use in fighting under those circumstances, because it is an abnormal condition and he is not his normal self; he is confronted with an emergency and he would not act with the same deliberation and cool judgment that he would if he were not so situated. So the law provides that you take into consideration the situation and the circumstances confronting the defendant in deciding whether it was necessary to use the force he did use or whether it reasonably appeared to him to be necessary."

N. C. Code, 1935 (Michie), sec. 564, is as follows: "No judge, in giving a charge to the petit jury, either in a civil or criminal action, shall give an opinion whether a fact is fully or sufficiently proven, that being the true office and province of the jury; but he shall state in a plain and correct manner the evidence given in the case and declare and explain the law arising thereon."

The *second* exception and assignment of error is to the effect that the charge impinged the above section, in not defining manslaughter. We think not. The charge must be taken as a whole, not disjunctively, but conjunctively. In the charge of the court below, in regard to manslaughter (in different parts of the charge), is the following: "Section 4200 of the Consolidated Statutes reads as follows: 'A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration or

attempt to perpetrate any arson, rape, robbery, burglary, or other felony, shall be deemed to be murder in the first degree (and shall be punished with death). All other kinds of murder shall be deemed murder in the second degree (and shall be punished with imprisonment of not less than two nor more than thirty years in the State's Prison).' . . . Then there is another statute which provides for manslaughter and the punishment therefor. . . . There are three types of unlawful homicide: Murder in the first degree, murder in the second degree, and manslaughter. Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation. . . . Then you would consider whether he is guilty of manslaughter, which is the unlawful killing of a human being without malice. If he has satisfied you from the evidence he is not guilty of the unlawful killing of the deceased, then you would not convict him of anything; you would find him not guilty. . . . If the State has satisfied you beyond a reasonable doubt that the defendant is guilty of murder in the first degree, it is your duty to convict the defendant of murder in the first degree. If the State has not done so, then consider murder in the second degree. Is the defendant guilty of murder in the second degree? The burden is not on the State on murder in the second degree, because the defendant admits that he slew the deceased with a deadly weapon. Then the law requires, in order for him not to be convicted of murder in the second degree, that he come forward with evidence and satisfy you by that evidence that he is not guilty of murder in the second degree, and if he has done so, then you would not convict him of murder in the second degree. If he has satisfied you by the evidence that he is not guilty of murder in the second degree, then consider whether he is guilty of manslaughter, which is the unlawful killing of a human being. He says he is not guilty of that. It is incumbent on him to come forward with evidence and satisfy you that the killing wasn't unlawful before you would fail to convict him of that offense. He contends he has done that."

In *S. v. Lance,* 149 N. C., 551 (556), speaking to the subject as to manslaughter, *Walker, J.,* says: "Which is the unlawful killing of one person by another, but without malice. This instruction is fully supported by the authorities."

In *S. v. Baldwin,* 152 N. C., 822 (829), *Hoke, J.,* defines manslaughter as follows: "Manslaughter is the unlawful killing of another without malice."

In Wharton Criminal Law, Vol. 1 (12 Ed.), part sec. 422, p. 637, it is said: "Manslaughter is defined to be the unlawful and felonious killing of another, without malice aforethought, either express or implied."

From a careful review of the charge we find that it covered every aspect of the controversy and gave the law applicable to the facts. The

court below defined murder in the first degree and second degree, manslaughter, and self-defense. It gave the contentions fairly on both sides and recapitulated the evidence. Malice and reasonable doubt were defined and the presumption of innocence applied and the burden of proof properly defined and applied.

The briefs and arguments of defendant's counsel were able and persuasive, but on this record not convincing. On the entire record we see no prejudicial or reversible error.

No error.

RICHARD BRAAK AND WIFE, ALIDA BRAAK, v. GRAHAM K. HOBBS, COMMISSIONER OF THE WORLD WAR VETERAN'S LOAN FUND OF THE STATE OF NORTH CAROLINA.

(Filed 30 June, 1936.)

1. **Corporations J a: Banks and Banking J a—Transaction held to constitute consolidation rather than a merger of constituent banks.**

   A national bank, in order to effectuate its agreement with certain State banks for a consolidation, transferred all its assets, with the approval of the Comptroller of the Currency, to a State bank incorporated for that purpose, and thereafter the national bank was duly dissolved. The State banks involved in the agreement, with the approval of the Commissioner of Banks, transferred all their assets to one new State bank, and each of the constituent State banks was dissolved and ceased to exist as a corporation. *Held:* The new State bank was created as a result of a consolidation rather than a merger, since none of the constituent banks remained in existence, but each was dissolved to form a new corporation.

2. **Banks and Banking J b—**

   A bank created as a result of the consolidation of constituent banks succeeds to all the rights, powers, duties, and liabilities of its constituent banks. N. C. Code, 217 (p).

3. **Mortgages C f—Consolidated bank may exercise power of sale contained in deed of trust in which constituent bank was named trustee.**

   A bank, created as a result of a consolidation of several State banks, may properly exercise the power of sale contained in a deed of trust in which one of its constituent banks was named trustee, upon default by the trustor, since under N. C. Code, 217 (p), the consolidated bank succeeds to such power, even though the deed of trust was executed prior to the enactment of the statute, since the statute is merely an amendment of a former statute, ch. 77, Public Laws of 1925.

APPEAL by defendant from *Parker, J.,* at April Term, 1936, of NEW HANOVER. Reversed.

This is a controversy without action. C. S., 626.

It is agreed: "1. That the plaintiffs are residents of the county of New Hanover, in the State of North Carolina; and that the defendant is a resident of the county of Wake, in the State of North Carolina.

"2. That by deed dated 26 November, 1927, and recorded on 30 November, 1927, in Book No. 184, at page 564, in the office of the register of deeds of New Hanover County, John W. Guthrie and his wife, Laura May Guthrie, conveyed to F. C. Black and his wife, Annie Black, the fee simple title to the lands and premises described in a deed of trust hereinafter referred to, which is attached hereto and marked 'Exhibit A.'

"3. That on 20 June, 1928, to secure an indebtedness due the Treasurer of the State of North Carolina, arising out of a loan from the World War Veteran's Loan Fund, made pursuant to chapter 155, Public Laws of North Carolina, 1925, Frank C. Black and his wife, Annie Black, executed and delivered to the Citizens National Bank of Raleigh, N. C., as trustee, with the Treasurer of the State of North Carolina as *cestui que trust,* a deed of trust in the amount of $3,000.00, upon the property therein described, a copy of which said deed of trust is attached hereto and marked 'Exhibit A.' The said deed of trust was recorded on 27 June, 1928, in Book No. 183, at page 557, in the office of the register of deeds of New Hanover County.

"4. That on 24 August, 1929, a charter was issued by the Secretary of State to the Citizens Bank of Raleigh, and that immediately thereafter, in pursuance to resolutions duly adopted by the stockholders and/or directors of the Citizens National Bank of Raleigh, N. C., and/or the Citizens Bank of Raleigh, the said Citizens National Bank of Raleigh, N. C., with the approval of the Corporation Commission of North Carolina, consolidated with or transferred its assets and business to the said Citizens Bank of Raleigh, all as will appear from the minutes of said banks, excerpts from which said minutes are attached hereto and marked 'Exhibit B,' and made a part hereof as fully as if the same were incorporated herein.

"5. That on 26 September, 1929, the Citizens Bank of Raleigh consolidated with the North Carolina Bank and Trust Company, and on 26 September, 1929, a certified copy of the agreement of consolidation or transfer was filed with the Secretary of State of North Carolina, together with a certified copy of the approval of the Commissioner of Banks of the State of North Carolina, to such consolidation or transfer. That upon the filing of said agreement the North Carolina Bank and Trust Company succeeded to and became the owner of the rights, privileges, powers, and franchises, and all other property and rights of every kind of the Citizens Bank of Raleigh.

"6. That no action, except as may arise from the sale, reorganization, merger, and/or consolidation of said banks, has ever been taken on the

part of the Treasurer of the State of North Carolina, or Graham K. Hobbs, commissioner, or any one acting on his or their behalf, to appoint any person, firm, or corporation successor trustee in the place of the Citizens National Bank of Raleigh, N. C., as trustee in the deed of trust hereinbefore referred to.

"7. That by deed dated 14 March, 1933, and recorded on 27 March, 1933, in Book No. 234, at page 299, in the office of the register of deeds of New Hanover County, the 'North Carolina Bank and Trust Company, successor to Citizens National Bank of Raleigh, N. C., trustee,' conveyed or attempted to convey the fee simple title to the lands and premises described in the aforesaid deed of trust to the State of North Carolina, a copy of which said deed is attached hereto and marked 'Exhibit C,' and made a part hereof as fully as if the same was incorporated herein.

"8. That no foreclosure account relative to the foreclosure referred to in the 7th paragraph hereof has ever been filed in the office of the clerk of the Superior Court of New Hanover County.

"9. That pursuant to chapter 438, Public Laws of North Carolina, session 1935, the Governor of North Carolina has conveyed the aforesaid lands and premises to Graham K. Hobbs, commissioner of the World War Veteran's Loan Fund.

"10. That on 9 November, 1935, Graham K. Hobbs, commissioner as aforesaid, offered in writing, signed by him, to lease or sell said lands and premises to the plaintiffs for the sum of $3,000.00; and thereafter, to wit: On 26 December, 1935, the plaintiffs accepted, in writing signed by them, said offer, subject to their attorney's approval of title to the said lands and premises, and as evidence of their good faith, paid to the said Graham K. Hobbs, commissioner, the sum of $500.00, and moved into the temporary possession of the same.

"11. That on 1 January, 1936, the defendant tendered to the plaintiffs a lease-option contract, which is attached hereto and marked 'Exhibit D,' and demanded that plaintiffs accept said contract.

"12. That the plaintiffs refused to accept said contract, or to execute the same, for that they were advised by counsel that the defendant was not possessed of an indefeasible fee in and to said lands and premises, for that, and for no other reason, the foreclosure of the deed of trust hereinbefore referred to by the North Carolina Bank and Trust Company was null and void.

"13. That the plaintiffs demanded that the defendant return to them the sum of $500.00, theretofore paid by them, together with interest thereon at the rate of six per cent per annum, less any reasonable rent due to said defendant by the plaintiffs, and that said demand was not complied with.

"14. That it is agreed that if the deed of trust from F. C. Black and wife to the Citizens National Bank of Raleigh, N. C., was duly and legally foreclosed, the defendant is the owner in fee simple of the land described and referred to herein, and that the same is free and clear of any and all encumbrances, and that the plaintiffs are legally bound to accept the lease and contract to convey the said land, as tendered to them by the defendant.

"That it is further agreed that if the said foreclosure was illegal and invalid, the plaintiffs are not bound to accept the lease and contract to convey tendered to the plaintiffs by the defendant, and that the plaintiffs are entitled to recover of the defendant the sum of $500.00, paid by the plaintiffs to the defendant, with interest from 9 November, 1935, less reasonable rent for the premises occupied by the plaintiffs during the term of their occupancy of the same.

"The amount of the rent may be determined by a referee to be appointed by the court, the parties hereto agreeing that said referee may be appointed as in a consent reference, each hereby waiving a trial by jury of the question as to the amount of said rent."

The court was of opinion that on the facts agreed the defendant is not the owner of an indefeasible title to the lands and premises described in his contract with the plaintiffs, for that the deed of trust executed by F. C. Black and his wife to the Citizens National Bank of Raleigh, N. C., was not legally foreclosed by the sale of said land and premises by the North Carolina Bank and Trust Company, as successor to the Citizens National Bank of Raleigh, N. C., trustee, and by the conveyance of the same to the State of North Carolina, as the purchaser at said sale.

It was accordingly adjudged that plaintiffs are not legally bound to accept the lease and contract tendered to them by the defendant, and that plaintiffs recover of the defendant the sum of $500.00, with interest from 9 November, 1935, and the costs of the proceeding.

From the judgment, the defendant appealed to the Supreme Court, assigning error in the judgment.

Kellum & Humphrey for plaintiffs.

Attorney-General Seawell and Assistant Attorneys-General McMullan and Bruton for defendant.

CONNOR, J. There is error in the judgment of the Superior Court of New Hanover in the instant case.

The judgment is predicated upon the opinion of the court that on the facts agreed the deed of trust under which the defendant claims title to the land and premises described in the contract between the plaintiffs

and the defendant was not legally foreclosed by the sale and conveyance of said land and premises by the North Carolina Bank and Trust Company, as successor to the Citizens National Bank of Raleigh, N. C., trustee in said deed of trust, to the purchaser at the sale. On the facts agreed, the power of sale in the deed of trust which was conferred upon the Citizens National Bank of Raleigh, N. C., subsequently vested in and was properly exercised by the North Carolina Bank and Trust Company, as successor to the Citizens National Bank of Raleigh, N. C., trustee. The equity of redemption which remained in the grantors in the deed of trust, has been legally foreclosed, and the defendant is now the owner in fee simple, under an indefeasible title, of the land and premises described in the contract between the plaintiffs and the defendant.

On 20 June, 1928, Frank C. Black and his wife, Annie Black, by a deed of trust which was duly executed by them, conveyed the land and premises described in the contract between the plaintiffs and the defendant to the Citizens National Bank of Raleigh, N. C., trustee, for the purpose, as recited in the deed of trust, of securing the payment of their note for the sum of $3,000.00, payable to the order of the Treasurer of the State of North Carolina. The consideration for the note secured by the deed of trust was a loan of money made to Frank Black by the Treasurer of the State of North Carolina, out of the World War Veteran's Loan Fund, which was created by the sale of bonds issued and sold by the State of North Carolina, under the provisions of chapter 155, Public Laws of North Carolina, 1925. The validity of these bonds was upheld by this Court in an opinion filed by *Clarkson, J.*, in *Hinton v. Lacy, Treasurer,* 193 N. C., 496, 137 S. E., 669.

It is provided in the deed of trust that upon default in the payment of the note secured thereby, according to its tenor, the deed of trust may be foreclosed by the sale and conveyance of the land and premises described therein, upon the application of the holder of said note at the date of the default, by the Citizens National Bank of Raleigh, N. C., trustee, named in the deed of trust. There was a default in the payment of said note according to its tenor, and the right to a foreclosure of said deed of trust thereupon became absolute.

Prior to such default, the Citizens National Bank of Raleigh, N. C., for the purpose of a consolidation in accordance with its agreement with other banks, created by the laws of this State, with the approval of the Comptroller of the Currency of the United States, had transferred and conveyed all its assets to the Citizens Bank of Raleigh, a banking corporation created under the laws of this State. Thereafter, the Citizens National Bank of Raleigh, N. C., was duly dissolved, and the Citizens Bank of Raleigh, with the approval of the Commissioner of

Banks of North Carolina, as required by statute, consolidated with the other banks which had entered into the agreement with the Citizens National Bank of Raleigh. The result of this consolidation was the North Carolina Bank and Trust Company, which came into existence under the laws of this State. All the banks which had entered into the agreement for the consolidation were duly dissolved. They have ceased to exist as corporations. The North Carolina Bank and Trust Company thus acquired all the assets and assumed all the liabilities of the constituent banks, and thereafter engaged in business as a banking corporation, under the laws of this State.

In *Coach Company v. Hartness, Secretary of State,* 198 N. C., 524, 153 S. E., 489, it was said by *Adams, J.:* "There is, of course, a technical distinction between consolidation and merger. Merger has been defined as the absorption of a thing of lesser importance by a greater, whereby the lesser ceases to exist, but the greater is not increased. It is the unity of the two or more corporations by the transfer of property to one of them, which continues in existence, the others being merged therein. But, ordinarily, the legal effect of consolidation is to extinguish the constituent companies and create a new corporation. Bouvier's Law Dict., Civil Ed., 799, 801; Black's Law Dict., 774; 12 C. J., 530; 40 C. J., 649. The distinction is clearly stated by Fletcher in 7 Cyclopedia, sec. 4062: 'A merger, using the word in its strict legal sense, exists only where one of the constituent companies remains in being, absorbing or merging into itself all the other companies, while in case of a consolidation a new corporation is created, and generally all the consolidating companies surrender their existence.'"

On the facts agreed in the instant case, the North Carolina Bank and Trust Company came into existence as the result of the consolidation, and not of a merger, of the consolidating banks. It thereby succeeded to all the rights, powers, duties, and liabilities of its constituent banks, including the Citizens Bank of Raleigh, which was created only as a means of effecting, under statutory authority, the consolidation of the Citizens National Bank of Raleigh, N. C., with the other banks, which had entered into the agreement to consolidate. Chapter 207, Public Laws of North Carolina, 1931, N. C. Code of 1935, sec. 217 (p). This statute, although in form an independent statute, is in reality an amendment of chapter 77, Public Laws of North Carolina, 1925, and is therefore applicable in the instant case, although the deed of trust involved was executed prior to its enactment. See *Bateman v. Sterrett,* 201 N. C., 59, 159 S. E., 14.

The judgment is reversed, and the proceeding remanded to the Superior Court of New Hanover County in order that judgment in accordance with this opinion may be entered in said court.

Reversed.

IN THE MATTER OF WACHOVIA BANK AND TRUST COMPANY, EXECUTOR OF GEORGE T. BROWN, DECEASED.

(Filed 30 June, 1936.)

1. **Executors and Administrators G a—Where will does not appoint trustee but directs executor to manage trust estate, executor may not be required to file final account prior to discharge of duties under the trust.**

Where a will creates a trust estate, without appointing a trustee, and directs that the executor named therein shall hold the assets of the trust estate and imposes active duties upon the executor in regard to the management and disposition of the assets of the estate, which duties include the payment of annuities for the lives of several beneficiaries and require a number of years for their performance, the clerk is without power to appoint a trustee for the estate, and the executor is not required to apply to the clerk for such appointment, and the executor may perform the duties incident to the management of the trust, and it is error for the clerk to refuse to accept an annual account tendered by the executor for a year more than two years after the executor's qualification but during the life of the trust estate, C. S., 105, and to direct that the executor file a final account and pay over to itself as trustee the assets of the estate, since C. S., 109, authorizing the clerk, at the instance of any interested person, to require an executor to file final account and settlement at any time after two years from date of qualification, does not apply where the will imposes duties upon the executor which cannot be fully performed within two years, C. S., 178, it appearing that the executor was faithfully and fully performing the duties imposed upon it by the will.

2. **Same—**

Where the clerk orders an executor to file final account and turn over the assets of the trust estate to itself as trustee, which order is made as a matter of law upon the facts found and not as a matter of discretion, the order is reviewable by the Superior Court upon appeal.

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

APPEAL by respondent from *Hill, Special Judge,* at March Term, 1936, of FORSYTH. Reversed.

George T. Brown died in Forsyth County, North Carolina, on 27 November, 1913, having first made and published his last will and testament, which was duly probated and recorded in the office of the clerk of the Superior Court of Forsyth County, on 2 January, 1914.

The said last will and testament, with a codicil thereto, is as follows:

"STATE OF NORTH CAROLINA—FORSYTH COUNTY.

"I, Geo. T. Brown, of Winston-Salem, N. C., being of sound mind, and knowing the uncertainty of human existence do hereby make and publish this my last will and testament, to-wit:

"Viz:—I give and bequeath to my wife Elsie Thompson Brown my Entire Estate, both real and personal, as long as she lives. After her death I instruct my Executors herein after named to pay to my brother-in-law, Peter A. Thompson, Three Thousand Dollars per year as long as he lives, and to also pay the following persons Three Thousand Dollars each per year as long as they live, viz.: My sister Lillie Brown Hodson, $3,000.00, my brother, Rufus D. Brown, $3,000.00, my brother-in-law, Robert L. Williamson, $3,000.00. The above amounts are to be paid by my Executors to the above named persons on the first day of each month, $250.00 per month each. After the payment of Twelve Thousand Dollars per year as mentioned above, I desire the balance of the income derived from my Estate to be held in 'Trust' by my Executors, by investing the same in North Carolina State 4% bonds, as soon as funds are received from my Estate by my Executors. When the fund reaches $100,000.00 (One Hundred Thousand Dollars) I instruct my Executors to build a modern substantial brick hospital to be used exclusively by the negroes of North Carolina. Forsyth County and Davie County negroes can have the use of the Hospital free and are to receive absolutely free board and free treatment while patients in the Hospital. Negroes from other counties of North Carolina are to pay a reasonable amount for treatment and the use of the Hospital while patients there.

"I desire the Hospital to be called 'The George T. Brown Hospital for Negroes,' and I desire that my photo in life size be placed in the front hall of the building with a white marble slab in the wall under the photo of myself with the following wording:—

" 'This Hospital was given to the Negroes of North Carolina by a true friend of their race, George T. Brown, the President of Brown and Williamson Tobacco Company, Winston-Salem, North Carolina, and son of Rufus D. Brown of the old firm of Brown and Brother, merchants and Tobacco Mfgrs. of Mocksville, Davie County and Winston, N. C.'

"I also desire and request my Executors to place on the wall in the Front Hall of the Hospital a life size photo of my father, Rufus D. Brown, that grand old man and a true friend to all poor negroes.

"I desire for the remaining income be used to pay the running expenses and any excess to be used as an endowment for the Hospital.

"The reason I desire this Hospital for the negroes is because a majority of them are poor and when they get sick, receive no attention and die from want of proper food, clothing, and medical attention.

"I desire my Executors to invest sufficient funds of my estate in North Carolina State 4% Bonds as a Special Trust Fund to pay for the care and keeping clean and green the grave yard lots of R. D. Brown and V. O. Thompson in the Winston-Salem Cemetery, the present cost of this work is $10.00 per year for both lots ($5.00) each.

"I will and bequeath to Henry Transon (col.) my 'boy' at my residence One Hundred Dollars per year as long as he lives.

"I will and bequeath to George Brown Hatcher son of the manager of my farm Two Hundred Dollars per year as long as he lives.

"All previous wills or codicils made by me are this day void and I declare this to be my last Will and Testament.

"I appoint the Wachovia Bank & Trust Company as Executors of my Estate and to serve and administer my Estate as per a special agreement I made with them a written copy of which is in my private lock Box at the above named Bank.

"I hereby instruct my Executors to never sell my stock in the Winston-Salem Masonic Temple Co., as I desire for my Estate to forever own this Building and stock.

"I trust the Great and Good God for my future salvation and believe implicitly in Him and I thank Him and Praise His Great and Holy name forever for His loving kindness and Goodness to me a poor sinner.

"My advice to every one is to live up to the Golden Rule—'Do unto others as you would like them to do to you.'

"Be honest and tell the truth and ask God to keep and guide you every day.

"Witness my hand and seal this the 9th day of October, 1913.

GEORGE T. BROWN (seal).

"CODICIL. After the death of my wife Elsie T. Brown, if from any cause the net income of my estate should not amount to enough to pay yearly the bequests I have made, I do not wish my Executors to pay any of the amount from the principal of My Estate as I do not desire for the principal amount of my estate to be used or touched, but only use the income of my estate to pay the bequests and in case the net income of my estate should not amount to $12,300.00, Twelve Thousand Three Hundred Dollars per year, the bequests I have made must be reduced proportionately in keeping with the net income derived from my Estate. Should my Executors ever sell my stock in the Brown & Williamson Tob. Company, I desire for the entire amount of money received for this stock or any other monies from my estate to be invested by my Executors in North Carolina 4% State Bonds.

"Witness my hand and seal this the 17th day of October, 1913.

GEO. T. BROWN (seal)."

After the probate of said last will and testament and of the codicil thereto, the Wachovia Bank and Trust Company duly qualified as executor of the estate of George T. Brown, deceased, on 2 January, 1914.

After the probate of said last will and testament and of the codicil thereto, Elsie Thompson Brown, wife of George T. Brown, duly dissented therefrom. Full settlement has been made with the said Elsie Thompson Brown, of all her interest as the widow of Geo. T. Brown, deceased, in and to his estate. She now has no interest in said estate.

The Wachovia Bank and Trust Company immediately upon its qualification as executor of the estate of George T. Brown, deceased, entered upon the performance of its duties as such executor. It has paid all the debts of the testator, and has also paid all the annuities provided for in his last will and testament, as the same have become due. It now has in hand all the property, real and personal, and all the investments made by it pursuant to his said last will and testament, belonging to the estate of George T. Brown, deceased.

On or about 5 January, 1936, the Wachovia Bank and Trust Company tendered to the clerk of the Superior Court of Forsyth County its annual account for the preceding year, and prayed the said clerk to accept, audit, and approve said annual account. The said clerk declined to accept, audit, or approve said annual account, and thereupon ordered the Wachovia Bank and Trust Company, executor of the estate of George T. Brown, to show cause why it should not file its final account as such executor, and apply for appointment by said clerk as trustee under the last will and testament of George T. Brown, deceased, to the end that it be discharged as executor of the estate of the said George T. Brown, deceased, and pay over to itself as trustee the sum now in its hands as executor. In due time the Wachovia Bank and Trust Company filed its answer to the order of the clerk, and on the facts stated therein renewed its prayer that its annual account as executor of the estate of George T. Brown be accepted, audited, and approved, and that the order to show cause made by the clerk be discharged.

After duly considering said answer, on the facts found by him, and in accordance with his conclusions of law, it was ordered by the clerk that "the petition of the Wachovia Bank and Trust Company, executor of George T. Brown, deceased, for an extension of one year in which to make settlement of said estate as provided by section 150 of the Consolidated Statutes, be and the same is hereby denied, and that the annual account tendered by the Wachovia Bank and Trust Company, executor, is hereby rejected."

It was further ordered by said clerk that the Wachovia Bank and Trust Company be and it was directed "to file application for letters as trustee, give the necessary bond, take the requisite oath, and pay over to itself as such trustee all moneys and to deliver all securities and other properties held by it as executor to itself as trustee, to be administered in said trust as provided in said last will and testament and codicil, and

in accordance with law; and that the Wachovia Bank and Trust Company as executor file its final report and close the administration of the estate of George T. Brown, deceased, by it as executor; and the said Wachovia Bank and Trust Company is further ordered to file an inventory and annual accounts as trustee as provided by section 51 of the Consolidated Statutes."

The respondent Wachovia Bank and Trust Company, executor of George T. Brown, deceased, appealed from said order to the judge of the Superior Court of Forsyth County, who, after hearing said appeal, affirmed the order of the clerk. The respondent thereupon appealed to the Supreme Court, assigning errors in the judgment affirming the order of the clerk.

Manly, Hendren & Womble and I. E. Carlyle for respondent.
Attorney-General Seawell and Assistant Attorney-General McMullan, amici curiæ.

CONNOR, J. There is error in the judgment in this case affirming the order of the clerk of the Superior Court of Forsyth County. The judgment must be reversed to the end that the order of the clerk may be set aside and vacated.

The order of the clerk, which was affirmed by the judge on the appeal of the respondent, Wachovia Bank and Trust Company, executor of George T. Brown, deceased, was not made by the clerk in the exercise of any discretion vested in him by law, or on any facts found by the clerk which would support the order. It was not suggested on the record, or found by the clerk, that as executor of George T. Brown, deceased, the Wachovia Bank and Trust Company has failed to exercise good faith or to use sound judgment in the administration of the estate of its testator. On the contrary, it is shown by the record, and was found by the clerk, that the Wachovia Bank and Trust Company has faithfully and fully performed all its duties as executor of George T. Brown, deceased, in accordance with the provisions of his will, and in accordance with the laws of this State. The order was made by the clerk in accordance with his opinion as to the law applicable to the facts found by him, and was therefore reviewable by the judge of the Superior Court of Forsyth County, on respondent's appeal.

It is manifest from the language of his last will and testament and of the codicil thereto, that it was the intention of George T. Brown that the Wachovia Bank and Trust Company, as his executor, should not only administer his estate, but should also hold the principal amount of said estate, after the payment of his debts, in accordance with the provisions of his will. He knew that under the law of this State his

executor would be required to file an account annually with the clerk of the Superior Court of Forsyth County, and that said account would not be accepted and filed by said clerk until it had been audited and approved by him. C. S., 105. He also knew that while ordinarily an executor, at the instance of any interested person, may be required by the clerk to file a final account for the settlement of the estate which has come into his hands under a will, at any time after two years from his qualification (C. S., 109), this statutory requirement is not applicable where the duties imposed upon the executor by the will cannot be fully performed within two years from his qualification. C. S., 178. It is apparent that the testator did not contemplate that his executor would or could be required to file a final account until it had fully performed all the duties imposed by him upon his executor. It was doubtless for these reasons, among others, that George T. Brown did not appoint a trustee, *eo nominee,* but was content that his executor should carry out his wishes with respect to the disposition of the property belonging to his estate. Where property, real or personal, is devised or bequeathed by a will, upon certain trusts set out in the will, and the testator does not appoint a trustee, it is the duty of the executor, who has duly qualified as required by statute, to carry out the provisions of the will. In such case, the clerk of the Superior Court has no power to appoint a trustee, and the executor is not required to apply to the clerk for such appointment.

We find no statute in this State which supports the order of the clerk in the instant case.

It was the duty of the clerk of the Superior Court of Forsyth County, when the Wachovia Bank and Trust Company, as executor of George T. Brown, deceased, tendered its annual account for the year preceding 2 January, 1936, to accept said account for his audit and approval. C. S., 105.

There was error in the order of the clerk rejecting the annual account tendered by the respondent for his audit and approval, and directing the respondent to apply for appointment as trustee under the will. The order should be set aside and vacated. It was not authorized by the law of this State, statutory or otherwise.

The judgment affirming the order is
Reversed.

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

FRANK P. THERRELL ET AL. v. W. S. CLANTON ET AL.

(Filed 30 June, 1936.)

Deeds C c—Deed in this case held to create right of reversion in grantor and not contingent remainder in grantor's heirs.

The deed in this case conveyed the land to a husband and wife by entirety, with remainder to their children in fee, with further provision that in the event the husband and wife had no children, "then the estate in fee simple forever to the right heirs" of the grantor. Thereafter the husband and wife conveyed the land and their grantor joined with them in executing the deed. The husband and wife died without children, and the heirs of the original grantor instituted this action for the land. *Held:* The deed did not create a contingent limitation in favor of the heirs of the grantor, but created the right of reversion in her upon the happening of the contingency, and her heirs have no interest in the land, their claim being by way of inheritance and not by purchase, and their ancestor having previously conveyed her right of reversion by joining in the deed executed by the husband and wife.

APPEAL by plaintiffs from *Small, J.*, at July Special Term, 1935, of MECKLENBURG. No error.

This is an action to recover possession of a lot or parcel of land situate within the corporate limits of the city of Charlotte, in Mecklenburg County, North Carolina, and described in the complaint by reference to a deed recorded in the office of the register of deeds of Mecklenburg County, in Book No. 60, at page 378.

It is alleged in the complaint that plaintiffs are the owners in fee and are entitled to the immediate possession of the land described in the complaint, and that the defendants are in the wrongful and unlawful possession of said land. These allegations are denied in the answer.

The facts shown by the evidence at the trial are as follows:

On 9 June, 1888, by deed duly executed by her, Mary E. Parker conveyed the land described in the complaint to W. H. Gilmore and Frances E. Gilmore, as follows: "To W. H. Gilmore and Frances E. Gilmore an estate for their joint lives and for the life of the survivor of them, with remainder after the determination of the life estate herein granted to the children of Frances E. Gilmore upon her body begotten by the said W. H. Gilmore, in fee simple, forever, and in the event that Frances E. Gilmore should have no children of her body by the said W. H. Gilmore, then the estate in fee simple forever to the right heirs of Mary E. Parker."

This deed was duly recorded in the office of the register of deeds of Mecklenburg County, on 16 June, 1888, in Book No. 60, at page 378.

On 1 September, 1904, by deed duly executed by them, W. H. Gilmore and his wife, Frances E. Gilmore, and Mary E. Parker conveyed the land described in the complaint to W. C. Maxwell in fee simple, and in said deed covenanted and agreed with the said W. C. Maxwell that they were seized in fee of the said land, and had the right to convey the same in fee, and that they would warrant and defend the title to the same against the claims of all persons whomsoever. In this deed reference is made to the deed executed by Mary E. Parker to W. H. Gilmore and Frances E. Gilmore, dated 9 June, 1888, and recorded in Book No. 60, at page 378, in the office of the register of deeds of Mecklenburg County.

This deed was duly recorded in the office of the register of deeds of Mecklenburg County on 3 September, 1904, in Book No. 192, at page 222.

On 4 July, 1906, by deed duly executed by them, W. C. Maxwell and his wife, C. B. Maxwell, conveyed the land described in the complaint to W. S. Clanton in fee simple. In this deed reference is made to the deed from W. H. Gilmore and his wife, Frances E. Gilmore, and Mary E. Parker to W. C. Maxwell, dated 1 September, 1904, and duly recorded in the office of the register of deeds of Mecklenburg County, in Book No. 192, at page 222.

This deed was duly recorded in the office of the register of deeds of Mecklenburg County, in Book No. 212, at page 451.

On 9 April, 1914, by deed duly executed by them, pursuant to a final order and judgment in a special proceeding pending in the Superior Court of Mecklenburg County, entitled "W. S. Clanton *et al. v.* Corneil C. Clanton *et al.,*" W. S. Clanton and his wife, M. A. Clanton, conveyed the land described in the complaint to the children of W. S. Clanton, in fee simple, subject to an estate for his life in said land, which was expressly reserved to the said W. S. Clanton. In this deed reference is made to the deed from W. H. Gilmore and his wife, Frances E. Gilmore, and Mary E. Parker to W. C. Maxwell, dated 1 September, 1904, and duly recorded in the office of the register of deeds of Mecklenburg County, in Book No. 192, at page 222.

This deed was duly recorded in the office of the register of deeds of Mecklenburg County, on 20 April, 1914, in Book No. 322, at page 534.

Frances E. Gilmore, wife of W. H. Gilmore, was the only child of Mary E. Parker, who is dead. At her death she left surviving both her said daughter, Frances E. Gilmore, and her husband, W. H. Gilmore. W. H. Gilmore is dead. At his death he left surviving him his wife, Frances E. Gilmore, who died on 14 June, 1934. She had no children begotten upon her body by her husband, W. H. Gilmore. She did not remarry after his death and left no children, or issue surviving her at her death.

On 9 June, 1888, the date of her deed to W. H. Gilmore and his wife, Frances E. Gilmore, Mary E. Parker had brothers and sisters living. The plaintiffs are the issue of such brothers and sisters, living at the death of Frances E. Gilmore, or grantees of such issue.

The issue submitted to the jury was as follows:

"Are the plaintiffs the owners in fee and entitled to the possession of the land described in the complaint?"

The plaintiffs, in writing and in apt time, requested the court to instruct the jury as follows:

"Gentlemen of the jury, the court charges you that upon the whole evidence, if you believe the evidence, you should answer the issue 'Yes.'"

To the refusal of the court to so instruct the jury, the plaintiffs duly excepted.

The court then instructed the jury as follows:

"Gentlemen of the jury, if you believe all the evidence, and believe it to be true by its greater weight, you will answer the issue 'No.'"

The plaintiffs duly excepted to this instruction.

In accordance with the instruction of the court, the jury answered the issue "No."

From an adverse judgment, the plaintiffs appealed to the Supreme Court, assigning as errors the refusal of the court to instruct the jury as requested by the plaintiffs, and the instruction of the court to the jury in its charge.

Ryburn & Hoey and Hal B. Adams for plaintiffs.
John M. Robinson and Hunter M. Jones for defendants.

CONNOR, J. In support of their assignments of error on their appeal to this Court from the judgment of the Superior Court in this action, the plaintiffs contend that under the deed executed by Mary E. Parker, dated 9 June, 1888, upon the death of Frances E. Gilmore leaving surviving her no child begotten upon her body by her husband, W. H. Gilmore, an estate in fee simple in the land described in the complaint vested in the heirs of Mary E. Parker, deceased, living at the death of Frances E. Gilmore, as a remainder created by said deed, and that all the evidence at the trial showed that the plaintiffs and those under whom they claim are such heirs of Mary E. Parker, deceased. This contention cannot be sustained.

The provision in the deed that "in the event Frances E. Gilmore should have no children of her body by the said W. H. Gilmore, then the estate in fee simple forever to the right heirs of Mary E. Parker," does not create a contingent remainder. At most, it creates a reversion in the grantor, Mary E. Parker, which was subsequently conveyed by her to W. C. Maxwell, under whom the defendants claim.

In *King v. Scoggin,* 92 N. C., 99, it is said: "It is true, remainders are created by deed or writing, but the estate is sometimes created so that what is called a remainder is, in effect, only a reversion; as, for instance, where an estate is given to one for life, remainder to the right heirs of the grantor (2 Washburn Real Property, 692; Burton Real Property, 51), and this must be the kind of remainder classed with reversions which go to the donor or to him who can make himself heir to him; but it cannot be that when the owner in fee conveys it by deed or will, to one for life and after his death to another in remainder in fee, the estate could under any circumstances return to the donor, for he has parted with all his interest, and under the rule as laid down in *Lawrence v. Pitt,* 46 N. C., 344, the person who claims the estate must make himself heir to the remainderman, who is the first purchaser of the remainder, because being the first purchaser of the remainder, he thereby becomes a new *stirpes* of the inheritance." See *Grantham v. Jinnette,* 177 N. C., 229, 98 S. E., 724; and *Thompson v. Batts,* 168 N. C., 333, 84 S. E., 347.

The plaintiffs claim the land described in the complaint as heirs of Mary E. Parker. They therefore claim by descent and not by purchase. *Yelverton v. Yelverton,* 192 N. C., 614, 135 S. E., 632. As their ancestor, Mary E. Parker, before her death, had conveyed the land to W. C. Maxwell, by deed dated 1 September, 1904, and duly recorded in the office of the register of deeds of Mecklenburg County on 3 September, 1904, the plaintiffs are not now the owners of said land and entitled to its possession.

There was no error in the refusal of the trial court to instruct the jury as requested by the plaintiffs, or in the instruction given by the court to the jury.

The judgment is affirmed.

No error.

MARY FULTON v. THE METROPOLITAN LIFE INSURANCE COMPANY.

(Filed 30 June, 1936.)

1. **Insurance F b—Employee held to have allowed insurance to lapse by failing to give proof of disability within reasonable time after termination of employment by reason of disability.**

Plaintiff was insured under a group policy providing for the payment of benefits upon receipt by insurer of proof of disability while the group policy was in force and plaintiff insured thereunder. Plaintiff became disabled and was forced thereby to cease her employment. Plaintiff did

not give insurer notice of her disability until more than a year after she had ceased to be an employee, and more than four months after the cancellation of the group policy. *Held:* Insurer's obligation rested upon the receipt of proof of disability and not upon the mere existence of disability, and plaintiff's rights under the policy lapsed by reason of her failure to give due proof of disability while she was an employee and insured, or within a reasonable time thereafter, in the absence of a showing of good and sufficient reason for failing to give such proof within a reasonable time.

2. **Insurance M e—Correspondence by insurer more than two years after inception of disability relative to facts of disability held not waiver of proof of disability.**

   Correspondence between insurer and insured's attorney relative to insured's disability and facts necessary to establish insured's claim, had after notice by insured of such disability more than a year after its inception, but without intimation by insurer that it intended to waive the defense of failure to furnish proof of disability as required by the policy or within a reasonable time after the inception of the disability, *is held* not a waiver by insurer of such defense.

APPEAL by plaintiff from *Clement, J.*, at March Term, 1936, of ROCKINGHAM. Affirmed.

This is an action to recover upon a certificate of group insurance issued by the defendant to the plaintiff as an employee of the Riverside and Dan River Cotton Mills, Inc.

At the close of the plaintiff's evidence, the court sustained the motion of the defendant for judgment as of nonsuit, and the plaintiff reserved exception and appealed to the Supreme Court, assigning error.

P. T. Stiers for plaintiff, appellant.
Smith, Wharton & Hudgins for defendant, appellee.

SCHENCK, J. From the admissions in the pleadings and from the plaintiff's evidence it appears that on 1 January, 1920, the defendant Metropolitan Life Insurance Company executed and delivered to Riverside and Dan River Cotton Mills, Incorporated, of Danville, Virginia, a group insurance policy, No. 726-G, providing for the payment of certain disability and death benefits upon the terms specified in the policy, to certain employees of the mill company. On 10 October, 1926, Serial Certificate No. 24203 for $500.00 was, pursuant to the terms of the group policy, duly executed by the defendant and delivered to the plaintiff Mary Fulton, an employee of the mill company. Mary Fulton continued in the employment of the mill company until 15 December, 1929, when she became totally and permanently disabled and left the employ of the mill company.

The first notice of any type which was given to the defendant of the disability of the plaintiff was contained in a letter dated 31 December, 1930, and addressed to the defendant by P. T. Stiers, attorney for the plaintiff. The first proof of disability as required by the policy was furnished on 14 April, 1931. It also affirmatively appears from the plaintiff's evidence that the group insurance policy was canceled on 21 August, 1930.

The group insurance policy involved provided that:

"On receipt by the company at its home office of due proof that any employee insured hereunder has become wholly and permanently disabled by accidental injury or disease, before attaining the age of sixty years, so that he is and will be permanently, continuously, and wholly prevented thereby from performing any work for compensation or profit, the company will waive the payment of each premium applicable to the insurance on the life of such disabled employee that may become payable thereafter under this policy during such disability, and, in addition to such waiver, will pay to such employee during such disability, in full settlement of all obligations hereunder pertaining to such employee, and in lieu of the payment of insurance as herein provided, such monthly or yearly installments as may be selected by such employee by written notice to the company at its home office. . . ."

The serial certificate issued to the plaintiff contained the following language:

"This is to certify that under and subject to the terms and conditions of the group policy No. 726-G, Mary Fulton, an employee of Riverside and Dan River Cotton Mills, Inc. (herein called the employer), is hereby insured for five hundred dollars."

The group policy also provides that:

"Upon termination of active employment, the insurance of any discontinued employee under this policy automatically and immediately terminates and the company shall be released from any further liability of any kind on account of such person, unless an individual policy is issued in accordance with the above provision."

The group policy provides that the benefit thereunder shall accrue upon the receipt by the insurance company of proof of the total and permanent disability of an insured employee. The evidence in this case establishes that the plaintiff ceased to be an employee of the insured company on 15 December, 1929, and that the first notice to the insurance company of any disability on the part of the plaintiff was given to it by the attorney of the plaintiff on 31 December, 1930, more than a year after she had ceased to be an employee, and more than four months after the cancellation of the policy. Manifestly, the plaintiff having ceased to be an employee of the insured company more than a year before giving notice of her disability, and the policy having been canceled more

than four months before the giving of such notice, this action cannot be maintained under the provisions of the group policy and serial certificate.

What was said by *Devin, J.*, in *Dewease v. Ins. Co.*, 208 N. C., 732, wherein the interpretation of a group insurance policy similar to the one under consideration was involved, is here applicable: "The language of the policy of insurance sued on in the instant case, as interpreted by this Court in construing similar provisions in *Johnson v. Ins. Co.*, 207 N. C., 512; *Hundley v. Ins. Co.*, 205 N. C., 780; and *Modlin v. Woodmen of the World, ante,* 576, in the light of the evidence offered here, compels the conclusion that the failure to furnish proof or notice of any kind to defendant insurance company until two years after the plaintiff's employment had ended, and the payment of premiums had ceased, rendered plaintiff's claim unenforceable. Due proofs were not furnished the insurance company while she was insured under her policy. Her policy had lapsed." The obligation of the insurance company does not rest upon the existence of the disability of the employee, but upon the receipt by the company of due proof of such disability. *Bergholm v. Peoria Life Ins. Co.*, 284 U. S., 489. Proof of the disability of the insured employee is a prerequisite to the liability of the insurance company, and such proof must be made within a reasonable time after such disability occurs, or good and sufficient reason for not making such proof within such time must appear. No such reason appears on this record.

We do not concur in the position taken by the appellant that the defendant waived the defense of the lapse of the plaintiff's insurance by the correspondence had with the plaintiff's attorney, and by requesting and receiving further information relative to the plaintiff's disability. All that was said and done occurred after 31 December, 1930. The plaintiff was asked to do and did nothing more than she was required by the terms of the policy to do to establish her claim. There is no intimation in the correspondence of an intention to waive the defense of the lapse of the plaintiff's insurance, or any other defense to the plaintiff's claim.

Having ceased to be an employee of the Riverside and Dan River Cotton Mills, Inc., on 15 December, 1929, and having waited until 31 December, 1930, after the cancellation of the group insurance policy, to file proof of her claim for disability benefits, which she alleges commenced on 15 December, 1929, the plaintiff cannot now maintain this action, instituted on 14 November, 1934. She allowed such insurance as she had to lapse by failing to make due proof of her disability while she was an employee and insured, or within a reasonable time after she ceased to be an employee by reason of her disability.

The judgment of the Superior Court is

Affirmed.

IN RE WILL OF PETER R. NELSON.

(Filed 30 June, 1936.)

Wills D d: Evidence H a—Testimony as to general business reputation of testator held incompetent on issue of mental capacity.

Testimony of the general reputation of testator in the community as a business man is incompetent on the issue of mental capacity, such evidence not coming within any of the exceptions to the hearsay rule, and the testimony admitted in this case as to testator's business sagacity in particular types of transactions *is held* incompetent on the further ground that it violates the rules that particular facts may not be proven by general reputation. The rule permitting opinion testimony as to testator's mental capacity, based upon the witness' observation and contact with testator, distinguished.

APPEAL by the caveators from *Hill, Special Judge,* at October Term, 1935, of SURRY. New trial.

This is a proceeding for the probate of three paper writings propounded as the last will and testament of Peter R. Nelson and codicils thereto.

The issues were answered in favor of the propounders, and from judgment based upon the verdict the caveators appealed, assigning errors.

Folger & Folger for caveators, appellants.

W. R. Badgett, D. L. Hiatt, and E. C. Bivens for propounders, appellees.

SCHENCK, J. The issue raised by the pleadings related to the testamentary capacity of Peter R. Nelson at the time he signed the paper writings offered for probate. The court, over exceptions duly noted, permitted the propounders to ask the following questions and receive the following answers from the witness I. M. Gordan, to wit:

"Q. Do you know the general reputation of P. R. Nelson in the community where he lived as to his business ability?

"A. I think I do.

"Q. What is it?

"A. Very high. He was considered an exceptional business man in his line of business, that is handling farms and dealing with renters so as to make the renters make something for themselves and for him, too."

The court, also over objection and exception of the caveators, allowed the following questions and answers to and from the witness W. H. Reid, to wit:

"Q. Do you know his (P. R. Nelson's) general reputation for business ability?

"A. I think I do.

"Q. What is it?

"A. Good."

The court further, over objection and exception of the caveators, allowed the following questions and answers to and from the witness W. L. Lynch, to wit:

"Q. Did you know the general reputation as to business ability of Mr. Nelson?

"A. Yes.

"Q. What was it?

"A. Good."

We are of the opinion, and so hold, that in admitting the evidence as to the general reputation of the testator's business ability the court committed error. "It follows, since reputation is looked to merely as evidence of the character reputed, that the reputation is *hearsay testimony;* for it is the expression of an opinion on the part of the community, used testimonially, but uttered out of court and not under cross-examination. It is therefore receivable, if at all, as an exception to the hearsay rule." Wigmore on Evidence (2 Ed.), Vol. 3, par. 1609, p. 357. "Evidence, whether oral or written, is called hearsay when it depends, either wholly or in part, upon the competency and credibility of some person other than the witness who is testifying. Such evidence is inadmissible for the reason that the statements made were not under oath, the judge and jury cannot observe the demeanor of the absent witness, and for the further and more important reason that the constitutional guaranty that the accused shall be confronted with the witnesses against him so as to allow opportunity for cross-examination, is not complied with. There are certain exceptions to the above rule by which hearsay evidence is admitted when the circumstances are such as to make the truth of the evidence highly probable. The exceptions are admissions, confessions, dying declarations, declarations against interest, ancient deeds, declarations concerning matters of public interest, boundary, matters of pedigree, the *res gestæ,* and perhaps some others." Lockhart's N. C. Handbook of Evidence, par. 138, pp. 156-157. It will be noted that evidence of the general reputation for mental capacity is not enumerated among the exceptions to the rule that hearsay evidence is inadmissible. We have also scanned our decisions and can find no precedent or reason for excepting such evidence from the general rule. "On the issue of testamentary capacity, . . . evidence as to the testator's reputation for sanity or insanity is inadmissible." 68 C. J., par. 63, p. 458. See, also, *Thompson v. Ish,* 99 Mo., 160; *Brinkman v. Rueggesick,* 71 Mo., 553; *Pidcock v. Potter,* 68 Pa., 342; *In re Wah-kon-tah-he-um-pah's Estate,* 109 Okl., 126; *In re Lawrence's Estate,* 286 Pa., 58.

The evidence as admitted by the court also contravenes the principle frequently enunciated by this Court that particular facts cannot be proven by general reputation. *S. v. Holly,* 155 N. C., 485; *Edwards v. Price,* 162 N. C., 243; *S. v. Nance,* 195 N. C., 47. Here the propounders were permitted to prove by evidence of general reputation that the testator was a man of good business ability. While it is true that upon an issue of *devisavit vel non* a witness may testify as to his opinion of the mental capacity of the testator from his observation and contact with him, this does not extend to allowing a witness to give hearsay testimony as to the ability of the testator by testifying as to his general reputation for mental ability.

For the error assigned, the caveators are entitled to a

New trial.

CALDWELL WILLIAMS v. SAFE BUS, INCORPORATED.

(Filed 30 June, 1936.)

1. Negligence C a—Evidence that plaintiff gave match to another to strike near gasoline fumes held to support plea of contributory negligence.

Allegation and evidence that plaintiff, a passenger on defendant's bus, gave a match to a fellow passenger to strike a light to look for a coin on the floor of the bus while gasoline was being put into the gas tank of the bus through its intake on the inside of the bus, *is held* sufficient to support the issue of contributory negligence tendered by defendant bus company in plaintiff's action to recover for injuries sustained when the gas fumes became ignited from the match struck by plaintiff's fellow passenger.

2. Appeal and Error A f—

Defendant is not entitled to be heard on its appeal unless and until reversible error has been made to appear on plaintiff's appeal.

APPEAL by plaintiff and defendant from *Hill, Special Judge,* at September Term, 1935, of FORSYTH. Affirmed.

Moses Shapiro for plaintiff.
Price & Jones and Ingle & Rucker for defendant.

SCHENCK, J. This was a civil action instituted in the Forsyth County court to recover damages for personal injuries alleged to have been proximately caused by the negligence of the defendant. The defendant denied that it was negligent, and also pleaded the plaintiff's contributory negligence in bar of recovery. The defendant tendered an issue as to the contributory negligence of the plaintiff, which the court

declined to submit and the defendant made this declination the subject of an exceptive assignment of error.

The case was tried upon the following issues:

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

"2. What amount of damage is the plaintiff entitled to recover of the defendant?"

Upon the first issue being answered "Yes," and the second issue being answered "$450.00," the court entered judgment for the plaintiff, and the defendant appealed to the Superior Court, assigning errors.

Upon appeal, the case came on for hearing in the Superior Court, and the court, being of the opinion that the defendant was entitled to have an issue as to the contributory negligence of the plaintiff submitted to the jury, entered judgment remanding the case to the Forsyth County court for a new trial. From this judgment both plaintiff and defendant appealed to the Supreme Court, the plaintiff contending that the judge of the Superior Court erred in not affirming the judgment of the Forsyth County court, and the defendant contending that the judge of the Superior Court erred in not sustaining its exception to the refusal of the Forsyth County court to grant its motion for judgment as of nonsuit.

The evidence tended to show that the defendant operated a bus line in the city of Winston-Salem, and was a common carrier of passengers for hire, and that the plaintiff boarded as a passenger one of the defendant's buses, and that while the plaintiff, with other passengers, was on the bus, the driver of the bus turned it into a filling station of the defendant to fill the tank with gasoline; that the tank of the bus was in the front thereof and the intake of the tank was inside the bus; that while the bus was standing still the driver got out and was in the act of filling the tank by means of a hose which ran from the tank of the filling station to the tank of the bus, when a passenger on the bus, one Plummer Burgess, who was searching the floor of the bus for a "nickel" he had dropped, asked the plaintiff for a match; that the plaintiff gave Burgess a match, which Burgess struck, and caused the fumes from the gasoline which was being conveyed to the tank of the bus to ignite, and to blaze up; that the plaintiff, to extricate himself from apparent danger, "dove" through a rear window of the bus, and fell on the concrete flooring, thereby cutting and bruising himself. The defendant alleges as contributory negligence, *inter alia,* "that the plaintiff contributed to his own injury and proximately caused any alleged injury which he might have sustained by giving the match to another passenger on the bus, when he knew or could have known that his act of giving a match to this passenger under the circumstances, . . . was calculated to produce the resulting injury."

We are of the opinion, and so hold, that the evidence, when viewed in the light of the allegations of the answer, was sufficient to be submitted to the jury upon an issue as to the contributory negligence of the plaintiff, and that the trial judge erred when he declined to submit such an issue, and that the judge of the Superior Court ruled correctly when he remanded the case to the Forsyth County court for a new trial. We therefore find no error on the plaintiff's appeal.

The defendant is not entitled to be heard on its appeal unless and until reversible error has been made to appear on plaintiff's appeal. *Bank & Trust Co. v. Atlantic Greyhound Lines et al., ante,* 293, and cases there cited.

The judgment of the Superior Court remanding the case to the Forsyth County court for a new trial is affirmed.

Plaintiff's appeal, affirmed.

Defendant's appeal, dismissed.

J. A. SINK ET AL. V. A. E. HIRE ET AL.

(Filed 30 June, 1936.)

Trial D e—Where answer does not entitle defendants to affirmative relief, plaintiff may take voluntary nonsuit before verdict as matter of right.

Plaintiffs instituted this action to restrain collection of drainage assessments, to remove cloud on title, and to have defendant drainage district declared null and void. Defendants denied the allegations of the complaint and pleaded *res judicata.* During the progress of the trial one of plaintiffs' attorneys became ill and plaintiffs sought a voluntary nonsuit. Defendants objected on the ground that the action was a proceeding *in rem,* and the trial court refused to permit plaintiffs to take a nonsuit. *Held:* The plea of *res judicata* is a plea in bar and does not set up a cross action, and no rights having attached in defendants' favor which they were entitled to have determined in the action, plaintiffs were entitled to take a voluntary nonsuit as a matter of right.

APPEAL by plaintiffs from *Hill, Special Judge,* at November Term, 1935, of FORSYTH.

Civil action to restrain collection of drainage assessments, to remove cloud from title, and to have Forsyth County Drainage District No. 2 declared null and void.

Answer by defendants denying allegations of complaint, pleading *res judicata,* and praying that plaintiffs' action be dismissed.

During the progress of the trial, J. M. Wells, Jr., leading counsel for plaintiffs, was taken ill and was unable to appear in court on the second

day; whereupon other counsel for plaintiffs asked that a juror be withdrawn and a mistrial ordered, as they were not able to proceed without the presence and assistance of Mr. Wells. Overruled; exception.

The plaintiffs then announced in open court that they elected to take a voluntary nonsuit. Objection by defendants on the ground that the action is a proceeding *in rem.* The court declined to permit the plaintiffs to take a nonsuit. Exception.

From verdict and judgment for defendants the plaintiffs appeal, assigning errors.

Elledge & Wells and Parrish & Deal for plaintiffs, appellants.

Manly, Hendren & Womble and W. P. Sandridge for defendants, appellees.

STACY, C. J. No rights of the defendants having attached by plea, decretal order, verdict, or otherwise, it would seem the court's refusal to allow the plaintiffs to suffer a voluntary nonsuit is at variance with the practice established by a number of decisions. *Oil Co. v. Shore,* 171 N. C., 51, 87 S. E., 938; *Olmsted v. Smith,* 133 N. C., 584, 45 S. E., 953; *Pass v. Pass,* 109 N. C., 484, 13 S. E., 908; *Bynum v. Powe,* 97 N. C., 374, 2 S. E., 170; *Graham v. Tate,* 77 N. C., 120. In the absence of some right attaching which the defendant is entitled to have determined in the action, it is generally understood that "the plaintiff can take a nonsuit, as a matter of right, at any time before verdict." *Mfg. Co. v. Buxton,* 105 N. C., 74, 11 S. E., 264; *Campbell v. Power Co.,* 166 N. C., 488, 82 S. E., 842; *Cahoon v. Brinkley,* 168 N. C., 257, 84 S. E., 263; *Carpenter v. Hanes,* 167 N. C., 551, 83 S. E., 577; *Caldwell v. Caldwell,* 189 N. C., 805, 128 S. E., 329; *Bank v. Stewart,* 93 N. C., 402.

The party retiring is not, in a strict sense, said to take a nonsuit, "but is allowed to withdraw or depart with costs against him." *Gatewood v. Leak,* 99 N. C., 363, 6 S. E., 706; *Lafoon v. Shearin,* 95 N. C., 391. "As the plaintiff possessed the power of becoming nonsuit when called before verdict, it became a general practice to allow him to do so at any time before verdict, when he desired from any cause to abandon his action. So long as he is merely a plaintiff, the court has no means by which he can be compelled to appear and prosecute his suit against his will, and no injury can result from allowing him to abandon it"—*Rodman, J.,* in *McKesson v. Mendenhall,* 64 N. C., 502. The following cases are also in point and to the same effect: *In re Baker,* 187 N. C., 257, 121 S. E., 455; *Dawson v. Thigpen,* 137 N. C., 462, 49 S. E., 959; *Rumbough v. Young,* 119 N. C., 567, 26 S. E., 143.

The trial court seems to have interpreted the answer as setting up a cross action, but *res judicata* is usually regarded a plea in bar. 15 R. C. L., 1045, *et seq.* Indeed, the appropriateness of a cross action in the present proceeding may be doubted. *S. v. Lbr. Co.,* 199 N. C., 199, 154 S. E., 72.

The principles announced in *R. R. v. R. R.,* 148 N. C., 59, 61 S. E., 683; *Waddell v. Aycock,* 195 N. C., 268, 142 S. E., 10, and others of similar import, cited and relied upon by defendants, are not applicable to the present record. *Killian v. Chair Co.,* 202 N. C., 23, 161 S. E., 546.

The verdict and judgment will be stricken out and the cause remanded for judgment dismissing the action as in case of nonsuit.

Reversed.

FREEZE LOFLIN v. NORTH CAROLINA RAILROAD COMPANY.

(Filed 30 June, 1936.)

Railroads D b—Evidence held not to show contributory negligence as matter of law on part of plaintiff in crossing defendant's tracks.

The evidence, considered in the light most favorable to plaintiff, tended to show that plaintiff approached defendant's four parallel tracks crossing the highway during the daytime, that plaintiff stopped his car forty-three feet from the first track and looked and listened, and again stopped, looked, and listened when he reached the first track, and, failing to see or hear defendant's approaching train, attempted to cross the tracks, and when reaching the third track, saw defendant's train approaching from the east on the third track when it was about three hundred feet away, that the train was running at a rate of sixty to sixty-five miles per hour and gave no signal by whistle or bell, and that the train struck plaintiff's car as he was attempting to leave it after seeing that he could not get safely across the track. The evidence also tended to show that an embankment on defendant's right of way prevented plaintiff from seeing more than three hundred feet to the east from the place where he first stopped, and prevented him seeing more than seven or eight hundred feet to the east from the place where he stopped the second time, and prevented him seeing more than six or seven hundred feet to the east when reaching the third track. *Held:* The evidence fails to disclose contributory negligence of plaintiff as a matter of law, and defendant's motion to nonsuit, based thereon, was properly refused.

STACY, C. J., dissents.

APPEAL by the defendant from *Shaw, J.,* at October Term, 1935, of DAVIDSON. No error.

Phillips & Bower and Spruill & Olive for plaintiff, appellee.
Don A. Walser and Linn & Linn for defendant, appellant.

SCHENCK, J. This was a civil action to recover damages for personal injuries and for destruction of an automobile alleged to have been proximately caused by the negligence of the defendant. The defendant pleaded the contributory negligence of the plaintiff in bar of his recovery. The defendant offered no evidence, and in the course of the trial conceded its own negligence, and upon its appeal presents but one question, namely, did the court err in denying its motion for judgment as of nonsuit, upon the ground that the plaintiff's evidence showed that he was guilty of contributory negligence?

The evidence, construed most favorably to the plaintiff, as it must be upon a motion to nonsuit, tended to show that the plaintiff, Freeze Loflin, in December, 1934, was working for the Hughes Lumber Company in Thomasville, which was located about 600 feet from the crossing of East End Street and the tracks of the defendant. That there were four tracks, the first known as the Belt Line track, the second as the Northbound track, the third as the Southbound track, and the fourth as the Switch track. Between 10 and 11 o'clock a.m., the plaintiff got in his Chevrolet automobile and started to drive from the lumber company's plant, located on the south side of defendant's tracks, to his brother's store, located on the north side thereof. While traveling along East End Street, and when in about 43 feet from the Belt Line track, the plaintiff stopped his car, looked up and down the track of the defendant, and, not seeing nor hearing any train, approached the crossing with his automobile in low gear and traveling four or five miles per hour. When he reached the first track of the defendant, the Belt Line track, he again looked up and down said tracks, and, not seeing nor hearing any train, continued on across the Northbound track, and when his car was on the third track, the Southbound track, he saw the defendant's train about 100 yards away, coming at a very rapid rate of speed, and, realizing that he did not have time to get across this track, jerked the left-hand door of his automobile open and attempted to get his body out of the way of the oncoming train, but when his feet were on the left running board of his automobile, the train struck it and knocked it about 50 yards west of the crossing, hurling the defendant 15 or 20 feet, and thereby injuring him and destroying his automobile. That the embankment on the defendant's right of way prevented the plaintiff, when he stopped 43 feet from the Belt Line track, from seeing more than 300 feet east down the defendant's tracks; that when the plaintiff's car reached the Belt Line track, where he again looked up and down said tracks, the curve in the defendant's tracks east of said crossing

prevented the plaintiff from seeing more than 700 or 800 feet east, and when the plaintiff's car reached the Southbound track, where it was struck by the defendant's train, the said curve prevented him from seeing more than 600 or 700 feet; that the defendant's train approached and passed over the said crossing, traveling at the rate of 60 or 65 miles an hour, and without blowing the whistle or ringing the bell or giving any other signal of its approach to said crossing.

We think, and so hold, that under the foregoing evidence his Honor properly submitted to the jury the issue of contributory negligence, and the jury having answered the issue in favor of the plaintiff, under a charge to which no exception is taken, we find on the record

No error.

STACY, C. J., dissents.

STATE v. JAMES HUMPHRIES.

(Filed 30 June, 1936.)

1. **Statutes B a: Gaming A b—**

Ch. 282, Public Laws of 1935, and ch. 37, Laws of the same year, both dealing with slot machines, must be construed together.

2. **Statutes B a—Courts must supply word omitted when necessary to effect clear purpose of Legislature in enacting the statute.**

A statute will be construed to effect the intent of the Legislature if such intent can be gathered from the act with reasonable clearness and certainty, and where the purpose of an act is clear, and it appears with certainty, either from context or by reference to a statute *in pari materia*, that the interpolation of a certain word, evidently omitted through clerical error, and the deletion of another word are necessary to give the act grammatical form and to express with clearness the legislative intent, it is the duty of the courts to make the necessary corrections in order to effectuate the legislative will.

3. **Gaming A b—Slot machines which depend upon chance in determining the results of their operation held unlawful.**

Coin slot machines which depend in whole or in part upon the element of chance in determining the results of their operation, which results cannot be predicted prior to their operation, are made unlawful by ch. 282, Public Laws of 1935, by a proper construction of the act, and the unlawfulness of such machines is not affected by the fact that the results of their operation may be influenced by skill, or by the fact that such machines may sell merchandise or provide entertainment.

4. **Gaming A b—**

The meaning of sec. 4, ch. 282, Laws of 1935, *is held* not necessary to be determined in a prosecution under sec. 3 of the act.

5. **Same—**
Ch. 37, Public Laws of 1935, is not repealed by ch. 282, Laws of the same year, since the statutes are not in conflict.

6. **Statutes C a—**
Where two statutes deal with the same subject matter, and the later statute repeals all laws in conflict therewith, the later statute will not repeal the former when the statutes are not in conflict, but are supplementary in remedying the same evil.

7. **Statutes B c—**
The rule that criminal statutes must be strictly construed means that they will not be enlarged by implication to embrace cases not within their meaning, but the rule that the legislative intent will be given effect applies to criminal statutes as well as to civil statutes.

8. **Gaming B d—**
In a prosecution under sec. 3, ch. 282, Public Laws of 1935, for possession of an illegal slot machine, evidence as to the licensing of the machine is properly excluded.

STACY, C. J., dissenting.

CONNOR, J., concurs in the dissent.

APPEAL by defendant from *Sinclair, J.,* at December Special Term, 1935, of CUMBERLAND. No error.

Criminal action, tried upon indictment charging the defendant with possession of a slot machine in violation of chapter 282, Public Laws 1935.

The State's evidence tended to show that the defendant was in the possession of a machine or device adapted to be operated by the insertion of a coin in a slot. It was called a marble game or table. By placing a nickel coin in the slot the user or operator was entitled to shoot five balls or marbles, one at a time, by means of a plunger attached to a spring. This causes the balls to roll about over the table under a glass top. If the balls fall in certain designated holes, the player or operator receives "free games," or "if you hit the thing right, it will pay off in money," the amount ranging up to twenty nickels, depending upon the combination of the holes into which the balls drop. "You are unable to predict in advance whether you will receive the same thing each time for a nickel—whether you will receive something or nothing."

The defendant offered to show in cross-examination of a State's witness the following:

"The skill of the player has a lot to do with what he gets. For every nickel deposited in the machine the player gets the same number of balls. He is given five balls and the nickel entitles the player to five shots. The machine is so designed that the player can put a greater amount

of force on one ball than another by the use of the plunger. There is a scale by the side of the plunger that is used by the player, designating the amount of force and tension that can be placed on the ball. I don't know just what the range is. I know there is a scale there."

Upon objection by the State this evidence was excluded, and defendant excepted.

The machine was placed in evidence and operated before the court and jury. The element of chance or unpredictable outcome was demonstrated by such operation.

The defendant offered no evidence.

The court instructed the jury as follows:

"Gentlemen of the jury, the court directs that if you find beyond a reasonable doubt the facts in this case to be as testified by all the witnesses, you will return a verdict of guilty."

The jury returned a verdict of guilty, and from judgment thereon the defendant appealed.

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

Malcolm McQueen and Downing & Downing for defendant.

DEVIN, J. The bill of indictment sets out *verbatim* sec. 3 of ch. 282, Acts 1935, which defines an unlawful slot machine as follows:

"That any machine, apparatus, or device is a slot machine or device prohibited by the provisions of this act if it is one that is adapted for use in such a way that, as a result of the insertion of any piece of money or coin or other object, such machine or device is caused to operate or may be operated, and by reason of any element of chance over which the operator cannot have any control over the outcome of the operation of such machine or device each and every time the same is operated, or to the operator the outcome of each separate operation of such machine or device is unpredictable in advance of each and every operation of such machine or device, may receive or become entitled to receive any piece of money, credit, allowance, or thing of value, or any check, slug, token, or memorandum, whether of value, except as herein permitted, which may be exchanged for any money, credit, or thing of value or allowance, or which may be given in trade or the user may secure additional chances or rights to use such machine, apparatus, or device, irrespective of whether it may, apart from any element of chance over which the user may not have any control over the outcome of the operation or where the definite outcome of each separate operation of such machine or device is not predictable to the user in advance, or the outcome of such operation is not dependent in whole or in part upon

skill and practice of the operator, also sell, deliver, or present some merchandise, indication, or weight, entertainment, or other thing of value."

The above quoted section, consisting of a single involved sentence, is somewhat confused, and presents some difficulty in interpretation. But, under the maxim, "*Ut res magis valeat quam pereat,*" it becomes the duty of the court, by proper construction, to determine and declare its meaning if that may be ascertained with reasonable clearness and certainty. The purpose of the statute is manifest. The General Assembly, under its police power, undertook to prohibit the possession and operation of certain slot machines which it declared were public nuisances. To the statutes already in force against lotteries and gambling devices the General Assembly of 1931 added chapter 14 of the Public Laws of that session defining and prohibiting the keeping of slot machines, and by Act of 1935, chapter 282, under which this defendant was indicted, the provisions of existing law against such devices were sought to be made comprehensive enough to include the possession of any kind of coin operated machine where by reason of any element of chance the outcome of its operation was unpredictable in advance.

The General Assembly of 1935 had previously enacted chapter 37, making the possession of a slot machine unlawful, and defined such machine as follows:

Sec. 3. "That any machine, apparatus, or device is a slot machine or device within the provisions of this act if it is one that is adapted, or may readily be converted into one that is adapted, for use in such a way that, as a result of the insertion of any piece of money or coin or other object, such machine or device is caused to operate or may be operated, and by reason of any element of chance or of other outcome of such operation unpredictable by him, the user may receive or become entitled to receive any piece of money, credit, allowance, or thing of value, or any check, slug, token, or memorandum, whether of value or otherwise, which may be exchanged for any money, credit, allowance, or thing of value, or which may be given in trade, or the user may secure additional chances or rights to use such machine, apparatus, or device; irrespective of whether it may, apart from any element of chance or unpredictable outcome of such operation, also sell, deliver, or present some merchandise, indication or weight, entertainment, or other thing of value."

The similarity of the provisions of the last quoted sec. 3 to those of sec. 3 of chapter 282 is apparent. Corresponding sections of the later act merely added certain clauses parenthetically to the former. These two acts being *in pari materia* must be construed together. The former gives us light in the interpretation of the later. *Castevens v. Stanly Co.,* 209 N. C., 75. Sec. 3 of ch. 282, under which defendant was

indicted, standing alone, is ungrammatical. It cannot be parsed. The predicate "may receive" in line 12 has no subject. But by reference to line 8, in sec. 3 of ch. 37, we see that the word "user" is the subject of the verb "may receive," and that in the later act this word was by error of the draftsman or the printer inadvertently omitted. It is the duty of the court to supply such an omission and to interpolate words manifestly omitted by clerical error. With the word "user" or "operator" inserted, the section has grammatical form and intelligible meaning to carry out the legislative intent.

The object of all interpretation is to determine the intent of the lawmaking body. Intent is the spirit which gives life to a legislative enactment. The heart of a statute is the intention of the law-making body. *Trust Co. v. Hood, Comr.,* 206 N. C., 268; *S. v. Earnhardt,* 170 N. C., 725. In the language of Chancellor Kent: "In the exposition of a statute the intention of the lawmaker will prevail over the literal sense of the terms, and its reason and intention will prevail over the strict letter. When the words are not explicit, the intention is to be collected from the context, from the occasion and necessity of the law, from the mischief felt and the remedy in view, and the intention is to be taken or presumed according to what is consonant with reason and good discretion." I Kent Com., 461.

Clerical errors, which, if uncorrected, would render the statute unmeaning or nonsensical, or would defeat its intended operation, will not vitiate the act. They will be corrected by the court and the statute read as amended, provided the true reading is obvious and the real meaning of the Legislature is apparent on the face of the whole enactment. Black Int. Laws, p. 157.

Words may be interpolated when the meaning is plain and unmistakable. The language used in a statute must, if possible, be so construed as to give it some force and effect; and, consequently, when the language is elliptical the words which are obviously necessary to complete the sense will be supplied. Black Int. Laws, p. 167; *Loper v. State,* 82 Minn., 71.

"In order to carry out the will of the Legislature expressed in an imperfect way, the courts will interpolate punctuation or words evidently intended to be used when the omission is plainly indicated and the statute as written is incongruous or unintelligible." 2 Lewis' Sutherland Stat. Cons., p. 737; *Holmberg v. Jones,* 7 Idaho, 752; *Hutchins v. Bank,* 91 Va., 68 (word "not" supplied).

If the grammatical sense of the words is inconsistent with the purpose of the statute, or would involve an absurdity, the grammatical sense must be modified or extended to avoid such inconvenience. "Words may

be modified, altered, or supplied to give the effect intended by the Legislature." Black Int. Laws (2d), p. 148.

It is the duty of the court to construe an ambiguous statute to determine the legislative intent, and in doing so may eliminate words and clauses having no grammatical place in the sentence. *Ikerd v. R. R.*, 209 N. C., 270.

But the defendant rests his appeal on the proposition that section 3 of chapter 282, under which he was indicted, excludes from its prohibition a machine where the result of its operation is dependent in whole or in part upon the skill of the operator. In the instant case he offered to show that the skill and practice of the operator had something to do with the result, though the operation was still subject to the element of chance, with the outcome unpredictable. This requires an examination of the last clause of sec. 3, ch. 282, beginning with the word "irrespective." In chapter 37 this word is preceded by a semicolon instead of a comma, as in chapter 282. To adopt the punctuation in the former act makes it clearer that the word "irrespective" governs and controls the remaining clauses of this section, and sustains the interpretation that the section defines a slot machine as unlawful when it is one adapted to use in such a way that by the insertion of a coin the outcome of its operation, by reason of any element of chance, is unpredictable, without regard to the fact that it may also, apart from question of skill, afford entertainment or sell merchandise. The use of the word "also" supports this construction. This interpretation is consistent with the remaining portions of this section, with chapter 37, and with the manifest purpose and intent of the General Assembly.

Analyzing and paraphrasing these last lines of section 3, and omitting useless verbiage, the meaning of the language used emerges, and it may reasonably be construed to convey the legislative purpose and intent to be that the language previous to the word "irrespective" defines what constitutes an unlawful slot machine, and that this definition must abide, irrespective of whether the machine may also, leaving out of consideration any element of chance or uncertainty of outcome or the question whether the outcome is not dependent on skill, sell merchandise or present entertainment. That is, if the machine is rendered unlawful by reason of the fact that the element of chance is present, and that from its operation the result is unpredictable, its unlawfulness is not to be affected by the further fact that the machine may also sell merchandise, or present entertainment, disconnected from such element of chance or where the outcome is not dependent on skill.

The first section of chapter 37 makes unlawful the possession of "any slot machine as thereinafter defined." Sec. 1 of chapter 282 contains the identical language save for the addition of one word. It declares

unlawful "any slot machine or device except as hereinafter defined." The addition of the word "except" in the last line of sec. 1 of the act, standing alone, would give us some concern, since it apparently would make every sort of slot machine unlawful except that defined in sec. 3, and the court is not at liberty to interpret a statute so as to make an act criminal unless the act is embraced within the language of the statute when properly construed.

But the language of sec. 3 of ch. 282, slightly differing from that of sec. 3 of ch. 37, undertakes to define what sort of slot machine or device is "prohibited by the provisions of this act," thus showing the legislative intent to make the possession of the described machine unlawful. Construing these sections together, we conclude, from the later inclusion of such machine in the prohibition, that the word "except" was not intended to exclude from unlawfulness the machine defined. This construction is consistent with the apparent purpose of the statute. To hold otherwise would result in an absurdity and tend to defeat an act passed for the salutary purpose of remedying a recognized evil.

"The ascertainment of the legislative intent is the cardinal rule, or rather the end and object, of all construction; and where the real design of the Legislature in ordaining a statute, although it be not precisely expressed, is yet plainly perceivable, or ascertained with reasonable certainty, the language of the statute must be given such construction as will carry that design into effect, even though, in so doing, the exact letter of the law be sacrificed, or though the construction be, indeed, contrary to the letter. And this rule holds good even in the construction of criminal statutes." Endlich Int. Stat., p. 400.

"Where words in a statute are susceptible of two constructions, one of which will lead to an absurdity, the other not, the latter is to be adopted. And where one portion or provision of a statute, if literally construed, would practically nullify the whole or some material portion of the remainder, it is a settled rule of construction, flowing from the obvious absurdity of any other, that such an interpretation shall, if possible, be placed upon the statute, *ut res magis valeat quam pereat.*" Endlich Int. Stat., p. 351.

"Where the language of a statute, in its grammatical construction, leads to manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence. This is done sometimes by giving an unusual meaning to particular words, or by rejecting them altogether, or by interpolating other words, under the view that the modifications thus made are mere corrections of careless language, and really give the true legislative intention." Endlich Int. Stat., p. 399.

The meaning of sec. 4 of ch. 282 might present another difficulty, but its interpretation is not necessary for the determination of a prosecution under sec. 3.

Sec. 9 of ch. 282 provides that "laws in conflict with this act are repealed." This section cannot be held to repeal ch. 37, because the two acts are not in conflict. Both evince the same purpose to remedy the same evil. The later act adds certain words and clauses to section 3 of the prior act, and then adds additional sections making unlawful the operation of a machine prohibited by the act, and its display with intent to operate. The later act also exempts certain counties from its provisions, and makes no reference to the section in the former act preventing the levy and collection of license taxes on the unlawful machine.

The rule is that if two statutes cover the same matter in whole or in part, and are not absolutely irreconcilable, it is the duty of the court to give effect to both (Black Int. Laws, p. 325), and the later act does not repeal the earlier. *S. v. Broadway,* 157 N. C., 598; *Castevens v. Stanly Co., supra.*

So that these two acts take their places with the other statutes and enactments of the General Assembly, emphasizing the settled policy of this State to outlaw the devices described in the bill of indictment under which this defendant was convicted.

We hold that the defendant might well have been indicted under either act, or by a bill charging in more concise language the possession of an unlawful slot machine in violation of the statutes in such cases made and provided.

While it has been said of old that penal statutes must be construed strictly, it was well said in *Freight Discrimination Cases,* 95 N. C., 434, that this ruling means no more than that the court will not, through interpretation, extend by implication the purpose of the statute so as to embrace cases not within its meaning. "This rule is, however, never to be applied so strictly and unreasonably as to defeat the clear intention of the Legislature. On the contrary, that intention must govern, in construing penal as well as other statutes. This is a primary rule of construction, applicable in the interpretation of all statutes."

In the interpretation of penal statutes it is generally recognized that the paramount duty of the judicial interpreter is to put upon the language of the Legislature, honestly and faithfully, its plain and rational meaning, and to promote its object. Endlich, p. 452.

The exception to the exclusion of evidence as to licensing the slot machine cannot be sustained. *S. v. May,* 188 N. C., 470.

For the reasons stated, we conclude that the rulings of the court below were correct, both in excluding the proffered testimony and in his instructions to the jury. In the trial we find

No error.

STACY, C. J., dissenting: On 20 February, 1935, the General Assembly enacted a statute, ch. 37, Public Laws 1935, prohibiting the manufacture, sale, possession, and use of certain slot machines, gambling apparatus and devices, as therein defined, which by later amendment, ch. 85, was to become effective 1 May, 1935, "it being the purpose of this amendment to permit the present owner and/or operators of the said machines until May first, one thousand nine hundred thirty-five, to dispose of the said machines."

As originally adopted, the possession of defendant's slot machine, for use or lease, was undoubtedly made unlawful by the terms of this act. The statute prohibited the possession for use of any and all such slot machines.

However, on 3 May, 1935, the above act was rewritten and reënacted in substantially different form, ch. 282, Public Laws 1935, and all laws and clauses of laws in conflict therewith were repealed. The purpose of this latter statute, as expressed in its title, is "to regulate the operation of certain coin operated games, devices, and apparatus," etc. In the rewritten act, the prohibition or condemnation of the statute is limited to any slot machine, apparatus, or device, the operation of which is dependent upon some element of chance, or unpredictable outcome, and "not dependent in whole or in part upon skill and practice of the operator." *S. v. Gupton,* 30 N. C., 271.

In addition to the change in title, which may be called in aid of construction, the first section of the rewritten act provides that it shall be unlawful to manufacture, sell, rent, lease, or operate any slot machine or device "except as hereinafter defined." Section 3 then defines the slot machines "prohibited by the provisions of this act . . . *except as herein permitted.*" Following this exception is the language "or the outcome of such operation is not dependent in whole or in part upon skill and practice of the operator."

It is further provided in section 4 of the rewritten act that "No person who has charge of the supervision of such coin operated devices shall permit any person under the age of eighteen (18) years to engage in the operation of such device unless such person be accompanied by a parent or other person *in loco parentis* who, being present, sanctions such play."

This section 4 is new and is not to be found in ch. 37 at all. Indeed, it could have no place in a prohibitory statute, while it is quite in keeping with a permissive or regulatory one.

It seems clear that what the General Assembly intended to do was to recede from its position of absolute prohibition declared in ch. 37, and to permit the operation of some "such coin operated devices" under supervision and regulation. Yet, the Court says if any element of

chance be present, or the outcome is unpredictable to the operator, the question of skill is not material. If this be the correct interpretation, then nothing was accomplished by the enactment of ch. 282, for the same thing had already been done in ch. 37, the only difference being that in the first act the purpose is clearly expressed, whereas in the second, if prohibition were also its purpose, a more inappropriate choice of language to express the legislative intent could hardly have been selected. *S. v. Burnett,* 173 N. C., 750, 91 S. E., 597. It is not to be supposed the lawmakers intended to execute a circular performance or to engage in a futile gesture. *Garrison v. R. R.,* 150 N. C., 575, 64 S. E., 578.

Moreover, there is reason in the method pursued by the General Assembly in changing the statute from one of prohibition to one of regulation. It is not unlawful to engage in games of skill, or those wholly dependent upon "skill and practice of the operator." They are neither immoral nor inherently wrong. Hence, it may have been regarded as an arbitrary discrimination to say that coin operated devices could not be kept and used for such purpose. *S. v. Williams,* 146 N. C., 618, 61 S. E., 61; *Nance v. R. R.,* 149 N. C., 366. For example, it may be doubted whether the General Assembly could validly prohibit the possession for use of coin operated scales, music boxes, vending machines, etc., so long as the purposes accomplished by them are lawful. In other words, given a lawful end, to wit, a game of skill, it may be doubted whether the possession of innocent means for the accomplishment of that end alone, could be made unlawful under our constitutional system. *S. v. Brockwell,* 209 N. C., 209. At any rate, this is what the General Assembly was trying to avoid, and investments have been retained on the strength of the effort thus made to relax the rigors of the prohibitory statutes on the subject. Conversely, if the General Assembly meant nothing by the enactment of ch. 282, as indicated by the present holding, then a false hope has been held out to those who have moneys invested in these properties. This was not intended by the General Assmbly, as witness ch. 85 of the same session.

However much our predilections may incline us to the prohibitive view, there is no justification for invading the legislative field. *Wake County v. Faison,* 204 N. C., 55, 167 S. E., 391; *Person v. Doughton,* 186 N. C., 723, 120 S. E., 481; *Moore v. Jones,* 76 N. C., 187. "It is ours to construe the laws and not to make them"—*Hoke, J.,* in *S. v. Barksdale,* 181 N. C., 621, 107 S. E., 505. "It is in the province of the lawmaking power to change or modify the statute, not ours"—*Clarkson, J.,* in *Dill-Cramer-Truitt Corp. v. Downs,* 201 N. C., 478, 160 S. E., 492. The intention of the lawmaking body is not to be defeated by interpretation. *Freight Discrimination Cases,* 95 N. C., 434.

To interpret ch. 282 as a prohibitory statute, rather than a regulatory one, is to disregard its title, to overlook the expression "except as herein permitted," and to strike out section 4 altogether. This strips the act of its pronounced features, sacrifices the spirit for the letter, and leaves the law as it was before its passage. Another case in which "the letter killeth, but the spirit giveth life." 2 Cor., 3:6.

There is no debate over the proposition that the heart of a statute is the intention of the lawmaking body (*Trust Co. v. Hood, Comr.,* 206 N. C., 268, 173 S. E., 601), and that when not clearly expressed, this is to be ascertained by judicial interpretation. *Abernethy v. Comrs.,* 169 N. C., 631, 86 S. E., 577; *Fortune v. Comrs.,* 140 N. C., 322, 52 S. E., 950. Words obviously omitted may be interpolated to make the sense complete, but they are never to be added or deleted so as to defeat or thwart the legislative will. *Freight Discrimination Cases, supra.* "It is 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"—*Hoke, J.,* in *S. v. Barksdale, supra.*

Speaking to the subject in *S. v. Earnhardt,* 170 N. C., 725, 86 S. E., 960, *Walker, J.,* delivering the opinion of the Court, animadverted as follows:

"It is common learning that a statute must be so construed as to give effect to the presumed and reasonably probable intention of the Legislature, and so as to effectuate that intention and the object for which it was passed. Where it is clearly worded, so that it is free from ambiguity, the letter of it is not to be disregarded in favor of a mere presumption as to what policy was intended to be declared (*Lewis v. U. S.,* 92 U. S., 618; *Lake County v. Rollins,* 130 U. S., 662; *B. R. Co. v. Sulzberger,* 157 U. S., 1); but where it admits of more than one construction, or is doubtful of meaning, uncertain, or ambiguous, it is not to be construed only by its exact language, but by its apparent general purpose, that meaning being adopted which will best serve to execute the design and purpose of the act, for a thing within the intention is as much within the statute as if it were within the letter," citing as authority for the position: *Wood v. U. S.,* 16 Peters, 342; *Bernier v. Bernier,* 147 U. S., 242; *Smythe v. Fiske,* 23 Wall., 374; *Fortune v. Comrs.,* 140 N. C., 322; *McLeod v. Comrs.,* 148 N. C., 85.

Under a proper interpretation of the statute, the evidence elicited on cross-examination from the State's witness was admissible and the directed verdict erroneous. *S. v. Ellis, ante,* 166.

CONNOR, J., concurs in dissent.

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1936

ELLEN HILL AND HER HUSBAND, CHARLES W. HILL, v. THE ALBEMARLE FERTILIZER COMPANY, INC., W. S. CARAWAN, THE FEDERAL FARM LOAN BANK OF COLUMBIA, S. C., AND W. O. McGIBONEY, TRUSTEE.

(Filed 23 September, 1936.)

1. Mortgages H p—

Mere inadequacy of purchase price, without evidence of fraud, oppression, or unfairness on the part of the trustee or holder of the notes, is insufficient to upset a foreclosure sale had in strict conformity with the power of sale contained in the deed of trust.

2. Mortgages H j—

A *cestui que trust* has the right to buy the property at the foreclosure sale of the deed of trust in the absence of fraud or collusion.

3. Mortgages H p—Trustors renting property after foreclosure sale held estopped from attacking validity of the sale.

The *cestui que trust* bought the property at the foreclosure sale and thereafter sold same. The trustors, with knowledge of all the facts, surrendered possession to the purchaser, rented a part of the property from him, and stood by without objection while the purchaser expended large sums in improvements on the tract of land. *Held:* The trustors are estopped from attacking the validity of the foreclosure sale.

4. Appeal and Error J g—

Where it is determined on appeal that plaintiffs were properly nonsuited in accordance with the contentions of one defendant, the contentions of other defendants, presented as a further bar of recovery by plaintiffs against them, need not be considered.

APPEAL by plaintiffs from *Small, J.*, at March Term, 1936, of CHOWAN. Affirmed.

This is an action to have certain deeds and deeds of trust described in the complaint adjudged void and set aside as against the plaintiffs, to the end that the plaintiffs may redeem the land which they had conveyed by a deed of trust to J. H. LeRoy, trustee, to secure their note to the defendant Albemarle Fertilizer Company, Inc., and for other relief.

The facts shown by the evidence at the trial are as follows:

On 19 April, 1910, J. C. Meekins, Sr., by a deed which was duly recorded in the office of the register of deeds of Tyrrell County, conveyed to the plaintiff Ellen Hill, wife of the plaintiff Charles W. Hill, a certain tract of land situate in Tyrrell County, containing 480 acres, more or less, and known as the Ben Hassell Farm. The plaintiffs entered into possession of said tract of land, under said deed, and cultivated the same until some time in December, 1931, when they surrendered such possession to the defendant W. S. Carawan.

On 10 March, 1926, the plaintiffs, by a deed of trust which was duly recorded in the office of the register of deeds of Tyrrell County, conveyed the said tract of land to J. H. LeRoy, trustee, for the purpose, as recited in said deed of trust, of securing the payment of their note to the defendant Albemarle Fertilizer Company, Inc., in the sum of $1,846.42. The said note was due and payable one year after date, to wit: 10 March, 1927. The consideration of said note was fertilizer sold and delivered by the said Albemarle Fertilizer Company, Inc., to the plaintiffs. The said fertilizer had been used by the plaintiffs in the cultivation of said tract of land. On 4 August, 1928, the plaintiffs paid on said note the sum of $306.24, which was duly credited by the holder of the note. No other or further sum was paid on said note.

On 21 July, 1931, default having been made by the plaintiffs in the payment of said note, J. H. LeRoy, trustee, at the request of the Albemarle Fertilizer Company, Inc., the holder of said note, after fully complying with all the terms of the power of sale contained in said deed of trust, offered said tract of land for sale to the highest bidder, for cash, at the courthouse door in the town of Columbia, in Tyrrell County, when and where the defendant Albemarle Fertilizer Company, Inc., was the last and highest bidder in the sum of $1,000.00; the said J. H. LeRoy, trustee, immediately reported said sale to the clerk of the Superior Court of Tyrrell County, who, after the expiration of ten days, confirmed said sale by an order dated 3 August, 1931, and ordered the said J. H. LeRoy, trustee, upon compliance by the Albemarle Fertilizer Company, Inc., with its bid, to execute and deliver to the said Albemarle Fertilizer Company, Inc., a deed conveying the said tract of land to said company in fee. Pursuant to said order, and by virtue of the power of sale con-

tained in said deed of trust, J. H. LeRoy, trustee, by a deed dated 8 August, 1931, and duly recorded in the office of the register of deeds of Tyrrell County, conveyed the said tract of land to the defendant Albemarle Fertilizer Company, Inc., in fee simple.

At the date of the execution by the plaintiffs of the deed of trust to J. H. LeRoy, trustee, and at the date of the sale of the tract of land conveyed thereby under the power of sale contained in said deed of trust, J. H. LeRoy was a stockholder of the Albemarle Fertilizer Company, owning not to exceed two shares of its capital stock, and was the manager of the said Albemarle Fertilizer Company, Inc., having charge of its business in Tyrrell County. Prior to advertising the said tract of land for sale under the power of sale contained in said deed of trust, J. H. LeRoy went to the home of the plaintiffs in Tyrrell County, and there notified the plaintiff Charles W. Hill that in view of the fact that plaintiffs had not paid taxes on said tract of land due to Tyrrell County, and had permitted Tyrrell County to sell said tract of land for taxes, he would advertise said tract of land for sale as trustee in the deed of trust executed by the plaintiffs. Thereafter, at the request of W. N. Gregory, president of the Albemarle Fertilizer Company, Inc., the said J. H. LeRoy, trustee, duly advertised and sold the said tract of land. After the sale and conveyance of said tract of land, J. H. LeRoy ceased to be manager of the Albemarle Fertilizer Company, Inc., having been discharged as such manager by J. V. Champion, who had succeeded W. N. Gregory as president of the said company.

On 23 November, 1931, the defendant Albemarle Fertilizer Company, Inc., by deed duly recorded in the office of the register of deeds of Tyrrell County, in consideration of the sum of $1,631.03, conveyed the said tract of land to the defendant W. S. Carawan, who immediately went to the home of the plaintiffs in Tyrrell County, and there notified them that he had purchased said tract of land from the defendant Albemarle Fertilizer Company, Inc. In addition to the purchase price which he paid for said tract of land, as recited in his deed, the defendant W. S. Carawan paid the taxes due on said tract of land to Tyrrell County for the years 1929, 1930, and 1931, aggregating the sum of $726.01, making the total amount which he paid for said tract of land $2,357.06. Some time during the month of December, 1931, the plaintiffs surrendered possession of said tract of land to the defendant W. S. Carawan, and rented from him a farm on said tract of land, which they cultivated as tenants of the said W. S. Carawan during the years 1932 and 1933. Other farms on said tract of land were rented by the said W. S. Carawan to other persons, who cultivated the same as his tenants during the years 1932 and 1933.

After he took possession of said tract of land under his deed from the defendant Albemarle Fertilizer Company, Inc., on or about 1 January, 1932, and while the plaintiffs were in possession of a farm on said tract of land as his tenants, the defendant W. S. Carawan expended a large sum of money, to wit: $3,802.52, in making improvements on said tract of land. He employed the plaintiff Charles W. Hill to supervise the laborers who made these improvements, and paid him for his services. The plaintiff Ellen Hill knew that her husband, Charles W. Hill, had been employed by the defendant to supervise said improvements, and that he was paid by the defendant for his services. She also knew that her husband, Charles W. Hill, was paying rent to the defendant for the farm on said tract of land, which he and she were cultivating during the years 1932 and 1933. At no time prior to the commencement of this action did the plaintiffs, or either of them, make any claim or demand on the defendant W. S. Carawan, or the defendant Albemarle Fertilizer Company, Inc., with respect to said tract of land.

This action was begun in the Superior Court of Tyrrell County, on 24 January, 1934. At April Term, 1935, of said court the action was removed from said court to the Superior Court of Chowan County for trial. Thereafter, on 16 May, 1935, the Federal Farm Loan Bank of Columbia, S. C., and W. O. McGiboney, trustee, were duly made parties defendant.

On 19 March, 1934, the defendant W. S. Carawan and his wife, by two deeds of trust, which were duly recorded in the office of the register of deeds of Tyrrell County, conveyed the said tract of land to the defendant W. O. McGiboney, trustee, to secure the payment of their notes aggregating the sum of $8,000, payable to the order of the defendant, The Federal Farm Loan Bank of Columbia, S. C. The consideration for said notes was money loaned by the defendant, The Federal Farm Loan Bank, to the defendant W. S. Carawan. Neither of these notes has been paid.

There was conflict in the evidence as to the value of the tract of land at the date of the sale by J. H. LeRoy, trustee, under the power of sale contained in the deed of trust to him executed by the plaintiffs. The evidence for the plaintiffs tended to show that said tract of land at said date was worth from $10,000 to $15,000; the evidence for the defendants tended to show that said tract of land was worth, at said date, and before the improvements were made thereon by the defendant W. S. Carawan, during the year 1932, from $2,500 to $3,000.

At the close of all the evidence, the action was dismissed by judgment as of nonsuit, and the plaintiffs appealed to the Supreme Court, assigning as error said judgment.

H. S. Ward and P. H. Bell for plaintiffs.
M. B. Simpson for defendant Albemarle Fertilizer Company, Inc.
W. L. Whitley for defendant W. S. Carawan.
MacLean & Rodman for defendants, The Federal Farm Loan Bank of Columbia, S. C., and W. O. McGiboney, trustee.

CONNOR, J. At the trial of this action, there was no contention by the plaintiffs, or by either of them that the deed of trust, which was executed by them on 10 March, 1926, to J. H. LeRoy, trustee, was for any reason void or voidable. They conceded that said deed of trust was valid in all respects, and that their note secured by said deed of trust was due and payable at the date of the sale by the trustee under the power of sale contained in the deed of trust. They contended that notwithstanding the foreclosure of the deed of trust by the sale of the tract of land conveyed thereby, under the power of sale contained in the deed of trust, they now have the right to redeem said tract of land by paying the note secured thereby, for the sole reason that the purchase price paid for said tract of land by the defendant Albemarle Fertilizer Company, Inc., was grossly inadequate.

There was no evidence at the trial tending to show that there was actual fraud, oppression, or unfairness on the part of the trustee or of the creditor whose debt was secured by the deed of trust, in advertising or selling the tract of land. All the evidence showed that the sale was made after a strict compliance by the trustee with all the terms of the power of sale contained in the deed of trust. The plaintiffs, with full knowledge that the land had been sold under the power of sale contained in the deed of trust, and that the defendant Albemarle Fertilizer Company, Inc., was the purchaser at the sale, and had thereafter conveyed the land to the defendant W. S. Carawan, surrendered possession to the defendant W. S. Carawan, and rented from said defendant a farm on said land, which they cultivated as tenants of said defendant for two years before the commencement of this action. They knew that while they were in possession of said farm, as his tenants, the defendant W. S. Carawan was expending large sums of money in making necessary improvements on said tract of land.

In *Roberson v. Matthews,* 200 N. C., 241, 156 S. E., 496, it is said: "Mere inadequacy of purchase price alone is not sufficient to upset a sale when duly and regularly made. But gross inadequacy of consideration, when coupled with any other inequitable element, even though neither standing alone may be sufficient for the purpose, will induce a court of equity to interpose and do justice between the parties. *Weir v. Weir,* 196 N. C., 268, 145 S. E., 281."

In *Bunn v. Holliday,* 209 N. C., 351, 183 S. E., 278, it is said: "It is well settled in this jurisdiction that the *cestui que trust* has a right to buy at the trust sale unless fraud or collusion is alleged and proved. *Monroe v. Fuchtler,* 121 N. C., 101; *Hayes v. Pace,* 162 N. C., 288; *Winchester v. Winchester,* 178 N. C., 483; *Simpson v. Fry,* 194 N. C., 623. See *Hinton v. West,* 207 N. C., 708. The principle is different as between mortgagor and mortgagee. *Lockridge v. Smith,* 206 N. C., 174.

"After the sale by the trustee and the purchase by the defendants, Holliday and Whitaker, of the plaintiff's land, the plaintiff, who was *sui juris,* rented the land from them, and for several years paid the rent to them. We think from plaintiff's testimony that he is estopped and the nonsuit was proper."

As there was no error in the judgment of nonsuit as to the defendant Albemarle Fertilizer Company, Inc., the judgment is affirmed without considering the contentions on this appeal of the other defendants, that they are innocent purchasers, without notice of equities, if any, of the plaintiffs against the defendant Albemarle Fertilizer Company, Inc.

Affirmed.

C. M. MINTON v. FARMVILLE-WOODWARD LUMBER COMPANY AND W. F. BARBER AND WIFE, ISOLENE BARBER.

(Filed 23 September, 1936.)

1. Trusts A b—Held: This was an action to establish a parol trust and not an action to enforce a contract.

Plaintiff procured an option on certain standing timber. He took the option to the corporate defendant and thereafter the corporate defendant exercised the option and had conveyance made to it by the individual defendants. Plaintiff alleged that the corporate defendant agreed to pay the individual defendants the purchase price of the timber for plaintiff, the plaintiff to cut the timber and deliver it to the corporate defendant for a stipulated price per thousand feet, and the corporate defendant to reimburse itself for the purchase price advanced by retaining a part of the purchase price of the lumber as it was delivered by plaintiff, and that under the agreement the corporate defendant held title to the timber in trust for plaintiff. The jury answered in the affirmative the issue as to whether the corporate defendant agreed to advance the purchase price and hold title to the timber for the benefit of plaintiff, and thereupon the court, in accordance with the agreement of the parties, found that the corporate defendant held title to the timber as trustee for plaintiff, and entered judgment to that effect. *Held:* Under the theory of trial, the action was not one to enforce a contract, but one to engraft a parol trust upon the corporate defendant's timber deed.

2. **Appeal and Error B b—**

An appeal will be determined in accordance with the theory of trial in the lower court.

3. **Trusts B c—**

In order to engraft a parol trust on a written instrument, plaintiff must prove the facts constituting the basis of his claim by clear, strong, and convincing proof, and an instruction that the burden is on him to establish such facts by the preponderance of the evidence entitles defendant to a new trial.

4. **Cancellation of Instruments B d—**

A nonsuit is properly entered upon an interplea seeking to have certain instruments canceled for fraud when the parties seeking the relief fail to introduce any evidence that they were defrauded.

APPEAL by the defendants from *Harris, J.*, at March Term, 1936, of MARTIN.

Wheeler Martin, B. A. Critcher, and J. H. Matthews for plaintiff, appellee.

J. Faison Thomson and Elbert Peel for defendant Farmville-Woodward Lumber Company, appellant.

H. L. Swain for defendants Barber and wife, appellants.

SCHENCK, J. This is an action to have the defendant Farmville-Woodward Lumber Company declared a trustee for the plaintiff of certain timber conveyed by deed to said lumber company by the defendants W. F. Barber and wife. The plaintiff alleges, *inter alia,* "that under the aforesaid agreement heretofore had by and between the defendant Farmville-Woodward Lumber Company and the plaintiff, the said defendant Farmville-Woodward Lumber Company now holds the title to the said tract of timber under the aforesaid deed executed by W. F. Barber and wife, and recorded in Book O-3, page 286, in the office of the register of deeds of Martin County, in trust for the plaintiff, and the plaintiff is entitled to the conveyance of said tract of timber by the said defendants."

The defendant Farmville-Woodward Lumber Company filed answer and denied the existence of any agreement between it and the plaintiff whereby it could be construed that it held the timber deeded to it by the defendants Barber and wife in trust for the plaintiff.

The defendants W. F. Barber and wife answered and filed an interplea, in which they alleged that the option to the plaintiff and the deed to the defendant Farmville-Woodward Lumber Company executed by them were obtained by fraud, and asked that both be declared void.

At the close of the evidence the plaintiff's motion that the interplea of the defendants Barber and wife be nonsuited was sustained, and their alleged cause of action was dismissed. The defendants Barber and wife excepted and appealed.

The plaintiff offered evidence tending to show that he procured a written option on the timber involved from the defendants Barber and wife upon the agreed consideration of $2,500, and that he then entered into an oral agreement with the defendant Farmville-Woodward Lumber Company to finance the purchase of said timber, that the terms of this agreement were that the lumber company would pay the $2,500 to Barber and wife for the plaintiff, and would pay the plaintiff $11.00 per thousand feet for the lumber delivered at its mill in Williamston, that $3.00 of this $11.00 was to be withheld to apply on the repayment of the advancement by the lumber company to Barber and wife until the entire $2,500 was repaid, and $8.00 paid to the plaintiff to defray operating expenses, and, in addition, the defendant lumber company was to furnish the plaintiff certain logging equipment; and further tending to show that the plaintiff left his written option from the Barbers with the lumber company and that the lumber company used this option and procured a deed to itself from Barber and wife for the timber involved.

The defendant Farmville-Woodward Lumber Company offered evidence tending to show that the option was obtained by the plaintiff for its benefit, and that it paid the purchase price of $2,500 for the timber and took title to the timber, and that the only agreement existing between it and the plaintiff was that the plaintiff could have the job of logging the timber if his bid met the bid of competitive bidders.

The case was tried upon the following issues:

1. Did the defendants W. F. Barber and wife execute the contract to convey the timbers, rights, privileges, and easements to the plaintiff, as alleged in the complaint?

2. Did the plaintiff tender to the defendants W. F. Barber and wife the purchase price of $2,500 and demand the execution and delivery of deed for the said timbers, rights, privileges, and easements to the plaintiff, within sixty days provided for in the contract, as alleged in the complaint?

3. Did the defendant lumber company agree to advance the purchase price of $2,500 to pay for the said timbers, rights, privileges, and easements for the plaintiff, and to take and hold the title thereto for the use and benefit of the plaintiff until the said purchase price was repaid to the defendant lumber company by the plaintiff, as alleged in the complaint?

4. Does the defendant lumber company hold the title to the said timbers, rights, privileges, and easements as trustee for the use and benefit of said plaintiff, as alleged in the complaint?

The first two issues were answered "Yes" by consent, and it was agreed that in the event the third issue was answered by the jury in the affirmative that the court should answer the fourth issue likewise, and if the jury should answer the third issue in the negative that the court should answer the fourth issue in a similar manner. The third issue, the only issue submitted to the jury, was answered "Yes," and the fourth issue, in accord with the agreement, was, by the court, answered "Yes."

Judgment was entered declaring that the Farmville-Woodward Lumber Company held title to the timber involved for the plaintiff upon conditions in accord with the allegations of the complaint. From this judgment the defendant Farmville-Woodward Lumber Company appealed.

The Farmville-Woodward Lumber Company assigned as error the following from his Honor's charge, to wit: "The burden of that (third) issue is upon the plaintiff Minton and before you can answer that issue 'Yes' the plaintiff Minton must offer evidence which will satisfy you by its greater weight that this company did agree to buy this timber for Minton and to hold it for him and give him this contract for logging at $11.00, and $3.00 of that to be paid on the purchase price and $8.00 for operating expenses, and the balance of the timber, if any left over, to be deeded back to Minton. . . . If you are satisfied from the evidence, and by the greater weight, that that was the contract between Mr. Minton and the lumber company, then it would be your duty to answer that issue 'Yes.' If you are not so satisfied, you will answer it 'No.' "

This assignment of error must be sustained, since the degree of proof required of the plaintiff to sustain the third issue was clear, strong, and convincing, and not the mere preponderance. From the facts as they appear from the evidence the defendant Farmville-Woodward Lumber Company has the legal title to the timber in controversy, formally conveyed to it by the defendants W. F. Barber and wife, and the purpose of this action is to engraft a trust upon this title in favor of the plaintiff. The case, in our opinion, comes within the principle enunciated in *Ely v. Early,* 94 N. C., 1, and that line of cases, and the plaintiff was required to establish his allegations by clear, strong, and convincing proof. "The rule as to the *quantum* or intensity of the proof does not depend upon the particular nature of the trust, but is founded upon the theory that the written instrument speaks the truth and contains the final expression of the agreement between the parties. Whoever, therefore, seeks to show that it does not, should be required to do so by a degree of proof greater than a mere preponderance." *Boone v. Lee,* 175 N. C., 383 (385-6). See, also, *Montgomery v. Lewis,* 187 N. C., 577, and cases there cited.

We cannot agree with the position taken in the appellee's brief that this was an action to enforce a contract, and that, therefore, the degree of proof required was a mere preponderance. That the case was not tried upon that theory below is evident from the issues submitted, more especially the fourth issue. The judgment, which declares that the defendant Farmville-Woodward Lumber Company holds title to the timber involved for the benefit of the plaintiff upon certain terms and conditions, further indicates that the case was tried upon the theory that it was an action to engraft upon the deed from Barber and wife to the Farmville-Woodward Lumber Company, absolute on its face, a parol trust in favor of the plaintiff. The case must be considered on appeal in the light of the theory upon which it was tried below. *Potts v. Ins. Co.,* 206 N. C., 257.

The motion for judgment as of nonsuit upon the allegations of the interplea of the defendants W. F. Barber and wife was properly sustained, since there was no evidence that these defendants were defrauded.

Upon appeal of defendant Farmville-Woodward Lumber Company,
New trial.

Upon appeal of defendants Barber and wife,
Affirmed.

STATE OF NORTH CAROLINA, EX REL. J. W. KEEL, v. L. BRUCE WYNNE, CLERK SUPERIOR COURT, MARTIN COUNTY; L. BRUCE WYNNE, AND THE NATIONAL SURETY CORPORATION.

(Filed 23 September, 1936.)

Bills and Notes C c—Subsequent endorser held liable on check obtained by original holder by fraud and endorsed by him by forging name of payee.

The clerk of the Superior Court, in accordance with a court order, executed a check to the person named in the order, the check stating on its face that it was issued in compliance therewith. The brother of the payee of the check, by fraudulently representing himself to be the payee, obtained the check from the clerk, took the check to plaintiff and endorsed the check in plaintiff's presence by forging the name of his brother, whereupon plaintiff, in good faith, but without investigating the identity of the person representing himself to be the payee, endorsed the check by writing "O.K." and signing his name. Upon discovery of the fraud, the clerk stopped payment on the check, and the payee bank, which had cashed the check on the strength of plaintiff's endorsement, charged the check to plaintiff's account. *Held:* Plaintiff is not entitled to recover the amount of the check from the clerk individually or in his official capacity,

plaintiff's negligence in endorsing the check without attempting to ascertain the identity of the person representing himself to be the payee barring any right to recover, and the principle that where one of two persons must suffer loss, the loss must be borne by him who first reposes confidence in the wrongdoer being inapplicable. N. C. Code, 3003.

APPEAL by plaintiff from *Moore, Special Judge,* at April Term, 1936, of MARTIN. Affirmed.

Lee Johnson was a brother of Harold Johnson. There was in the hands of the defendant L. Bruce Wynne, clerk of the Superior Court of Martin County, the sum of $95.50 due Harold Johnson, under a court order.

In the agreed statement of facts are the following:

"That on the 10th day of December, 1934, L. Bruce Wynne, clerk of the Superior Court of Martin County, North Carolina, executed the following check in words and figures as follows, to wit:

" 'L. BRUCE WYNNE, No. 11
Clerk of the Superior Court
of Martin County.

" 'WILLIAMSTON, N. C., December 10, 1934.

" 'Pay to the order of HAROLD JOHNSON....................$95.50
Ninety-five and 50/100 Dollars.

" 'Court order received from M. L. Bunting to Branch Banking & Trust Company, Williamston, North Carolina.

L. BRUCE WYNNE, C. S. C.'

"That said check was delivered by L. Bruce Wynne, clerk of the Superior Court of Martin County, to Lee Johnson, who was a brother of the payee, Harold Johnson, and who represented himself to be Harold Johnson, and whom the clerk of the Superior Court, L. Bruce Wynne, assumed was Harold Johnson.

"That thereafter, on 11 December, 1934, Lee Johnson took the check to the office of J. W. Keel, the plaintiff, and represented himself to be Harold Johnson, payee in said check, and endorsed said check on the back of same, 'Mr. Harold Johnson,' in the presence of J. W. Keel, the plaintiff. Upon said representation and said endorsement, made by said Lee Johnson, Mr. J. W. Keel endorsed said check on the back of same, 'O.K., J. W. Keel.'

"Whereupon, the amount of $95.50 was paid upon said check to Lee Johnson by Planters National Bank and Trust Company of Rocky Mount.

"That later L. Bruce Wynne, clerk of the Superior Court of Martin County, upon ascertaining that Lee Johnson was not Harold Johnson, stopped payment upon said check at the Branch Banking & Trust Company in Williamston, North Carolina, drawee bank named in said check.

"That upon presentation of said check to the Branch Banking & Trust Company, Williamston, North Carolina, drawee bank in said check, to wit, $95.50, together with $1.50 protest fee, was charged by the Planters National Bank and Trust Company of Rocky Mount, to the account of J. W. Keel by reason of his endorsement of said check.

"The endorsement on said check, 'Mr. Harold Johnson,' put there by Lee Johnson in the presence of Mr. J. W. Keel, was a forgery.

"That Lee Johnson was an imposter and an impersonator and held himself out to L. Bruce Wynne, clerk of the Superior Court of Martin County, and to J. W. Keel, plaintiff, as Harold Johnson, payee in said check."

On the facts agreed, the court below rendered judgment as follows: "This cause coming on to be heard and being heard before his Honor, Clayton Moore, Special Judge, presiding at the April Term, 1936, Martin County Superior Court, and being heard upon an agreed statement of facts, which has been reduced to writing, and trial by jury being waived by all parties hereto, and the court being of the opinion that upon the agreed facts that the plaintiff is not entitled to recover: And now, therefore, upon motion of the counsel for the defendant, it is ordered and adjudged that the plaintiff take nothing by his action, and that the plaintiff pay the costs, to be taxed by the clerk of the Superior Court of Martin County. This 14 April, 1936. Clayton Moore, Special Judge, presiding."

To the signing of the judgment plaintiff excepted, assigned error, and appealed to the Supreme Court.

Chas. C. Pierce for plaintiff.
Elbert S. Peel, B. A. Critcher, and Hugh G. Horton for defendants.

CLARKSON, J. The sole question presented on this appeal: Is the defendant liable to the plaintiff on check which was drawn payable to Harold Johnson, which was delivered by defendant to Lee Johnson, who impersonated Harold Johnson, Lee Johnson having forged the endorsement of Harold Johnson on check in the presence of plaintiff, and the plaintiff having endorsed said check by writing on same "O.K., J. W. Keel," and the check bearing on its face the language, "Court order received from M. L. Bunting to Branch Banking & Trust Company, Williamston, North Carolina"? We think not.

In *R. R. v. Kitchin,* 91 N. C., 39 (44), the following principle is laid down in this jurisdiction: "Where one of two persons must suffer loss by the fraud or misconduct of a third person, he who first reposes the confidence, or by his negligent conduct made it possible for the loss to occur, must bear the loss." *Bank v. Liles,* 197 N. C., 413. The plaintiff invokes the above rule in this action, but we do not think it applicable to the facts agreed upon in this case.

Lee Johnson was a brother of Harold Johnson, but impersonated his brother to obtain the check. The check was not made payable to Lee Johnson, but to Harold Johnson, and on the check was "Court order received from M. L. Bunting." To obtain the money on the check it was necessary that Harold Johnson endorse same. This he did not do. Lee Johnson represented himself to J. W. Keel, the plaintiff, to be Harold Johnson, and forged the name of Harold Johnson to the check in his presence—"Mr. Harold Johnson." J. W. Keel endorsed said check on the back, "O.K., J. W. Keel." The endorsement by J. W. Keel "O.K." identified the imposter and no doubt induced the bank to cash the check. Keel made no investigation, required no identification, asked no questions. On the check was "Court order received from M. L. Bunting." Keel made no inquiry as to this, but endorsed "O.K." on the back of the check.

Webster's New International Dictionary (2d Ed.) defines "O.K.": "Correct; all right; endorsed or put on documents, bills, etc., to indicate approval; colloquial exc. as use of the approval of documents, etc."

The plaintiff Keel endorsed the check "O.K.," viz.: "Correct, all right," without inquiry. We think that a reasonably prudent man, under the circumstances, should not have done so, and he must bear the loss. Under the facts and circumstances of this case, if plaintiff ever had any rights against defendant Wynne, the clerk, he is estopped to complain by his own negligence. *Tolman v. Am. Nat. Bk.,* 22 R. I., 462. N. C. Code of 1935 (Michie), sec. 3003.

The judgment below is

Affirmed.

MAY F. JONES v. MRS. ROBERT J. CRADDOCK.

(Filed 23 September, 1936.)

1. Appeal and Error J d—

Upon appeal from judgment granting defendant's motion to nonsuit, the Supreme Court will examine the evidence to determine whether it was of sufficient probative force to be submitted to the jury, considering the evidence in the light most favorable to plaintiff.

2. Animals A a—

Dogs constitute a species of property, and the owner may maintain an action for the negligent injury of his dog, the right of action existing when the injury is caused by the negligent operation of an automobile as well as when it results from other forms of negligence.

3. Automobiles C f—

The driver of an automobile may not escape liability for the injury to a dog in the street by relying exclusively upon the dog's ability, through agility and celerity, to avoid being struck, but the rule of the reasonably prudent man under the circumstances will be applied.

4. Automobiles G m—Evidence held sufficient to overrule nonsuit in this action to recover for driver's negligent injury to plaintiff's dog.

Evidence that plaintiff's dog was standing in the street about seven feet from the curb and was attentive to and had started to move toward his mistress who was standing on the sidewalk and had attracted his attention and caused him to stop as he was crossing the street by yelling a warning to the driver of an on-coming car, that the driver of the car was then two hundred feet away and could have easily observed the situation, that the street was broad and free of traffic, but that the driver of the car, without slackening speed or turning to the left to avoid hitting the dog, ran over and killed the dog near the right curb, *is held* sufficient to be submitted to the jury on the issue of the driver's negligence, and not to show contributory negligence as a matter of law on the part of the owner of the dog.

5. Same—

Conflicting evidence as to the identity of defendant as the driver of the car inflicting the negligent injury in suit raises a question for the jury.

APPEAL by plaintiff from *McElroy, J.*, at April Term, 1936, of BUNCOMBE. Reversed.

Action for damages for the death of a valuable dog alleged to have been caused by the negligence of the defendant in the operation of an automobile on a street in the city of Asheville, N. C. At the close of plaintiff's evidence defendant's motion for judgment as of nonsuit was sustained, and from judgment dismissing the action plaintiff appealed.

J. Y. Jordan, Jr., for plaintiff.
Harkins, Van Winkle & Walton for defendant.

DEVIN, J. The only question presented by this appeal is whether the court below erred in granting the motion for nonsuit. It therefore becomes necessary to examine the evidence presented in support of plaintiff's action in order to determine whether it was of sufficient probative force to be submitted to the jury. On this motion the evidence is to be considered in its most favorable light for the plaintiff. *Teseneer v. Mills Co.*, 209 N. C., 615.

The plaintiff offered evidence tending to show that she was the owner of a registered pedigreed Sealyham Terrier dog, answering to the name of "Jimmy Whiskers." That on 16 August, 1934, about noon, the dog, with leash attached, escaped from plaintiff's house and ran into the street, the plaintiff and her sister pursuing and calling the dog. There was no traffic on the street. Plaintiff's car was parked against the curb in front of her house. When the plaintiff reached the edge of the sidewalk she saw the defendant's car coming from the south, making a roaring sound, and the dog, six feet out in the street, barked at the on-coming car. Plaintiff yelled, "Stop that car, you will kill my dog," defendant's car being then two hundred feet away. At the sound of her voice the dog ceased to bark, turned toward his mistress and started in her direction. The dog was then six feet and nine inches from the curb. The street at that point was forty-three feet wide and straight. The defendant, without slackening speed or swerving or making any change in her direction, drove over and killed the dog. Defendant's car barely missed plaintiff's car parked against the curb. Plaintiff testified: "The defendant's car made no effort to stop, or to swerve to the west and avoid striking my dog. I saw no indication that any brakes were applied in an endeavor to stop or swerve to the west and avoid striking my dog. At the time that I first screamed, when defendant's car was at the place I have indicated, there was ample room, and ample opportunity on Montford Avenue where the accident happened, for defendant's car to have swerved and avoided striking my dog. At that point Montford Avenue is forty-three feet wide from curb to curb."

While from the earliest times dogs have been the companions of man, for a long period their legal status was of low degree, and it was formerly held they were not property, and hence not the subjects of larceny. But in more recent times this ancient doctrine has given place to the modern view that ordinarily dogs constitute species of property, subject to all the incidents of chattels and valuable domestic animals. Cruelty to a dog is an indictable offense. It is now well settled that an action for negligent injury to a dog is maintainable. 2 A. J., 761-766; *Dodson v. Mock,* 20 N. C., 146; *Perry v. Phipps,* 32 N. C., 259; *Mowery v. Salisbury,* 82 N. C., 175; *State v. Smith,* 156 N. C., 628; *Scott v. Cates,* 175 N. C., 336; *Wilcox v. Butt's Drug Stores,* 94 A. L. R., 726 (N. M.); *Citizens Rapid-Transit Co. v. Dew,* 40 L. R. A. (Tenn.), 518; *R. R. v. Woolfolk,* 10 L. R. A. (N. S.), 1136 (Ga.).

Even in the days of Blackstone, while it was declared that property in a dog was "base property," it was nevertheless asserted that such property was sufficient to maintain a civil action for its loss. 4 Bl. Com., 236.

This is the first instance in which this Court has been called upon to consider an action for negligent injury to a dog when it has been run over and killed by an automobile in the street, but the established principle is the same as in other actions for negligent injuries to dogs, and has been so applied in other states, notably in *Sanders v. Hayes,* 128 S. C., 181; *Flowerree v. Thornberry,* 183 S. W. (Mo.), 359; *Wallace v. Waterhouse,* 86 Conn., 546; 42 C. J., 1063; *Lacker v. Strauss,* 226 Mass., 579; *Denny v. Randall,* 202 S. W. (Mo.), 602.

In *Sanders v. Hayes, supra,* it was urged that no liability should attach for the reason that the driver of an automobile has a right to presume that the dog, being possessed of agility and celerity, will take care of himself and get out of the way, but that Court held that "the motorist's liability for negligence in those circumstances is tested by the application of the standard of due care, untrammeled by presumptions of any kind. (*King v. Holliday,* 116 S. C., 463.) In the application of that standard the extent to which the driver of a motor vehicle in a street or highway may safely rely upon the intelligence and agility of a dog to avoid a collision is a matter for the consideration of the triers of fact."

Here the plaintiff's evidence, taken in its most favorable light, tended to show that the dog had stopped in the street about six feet and nine inches from the curb, and was attentive to and moving toward his mistress, who was on the sidewalk; that this was easily observable by the driver of the on-coming car for a distance of two hundred feet; that a very slight turn to the left in a broad street, free from traffic, or the application of brakes, would have avoided the injury, but that instead of doing so, the defendant drove the car without swerving or slackening speed, and ran over and killed the dog. There was evidence that the dog was of substantial market value. The contention that the plaintiff was guilty of contributory negligence on her own statement is untenable on this record. Plaintiff's evidence was sufficient to require its submission to the jury.

It is proper to say that the defendant contends it was not her car that ran over the dog, but that of another, and that she was in no wise negligent. Plaintiff, however, testifies defendant admitted at the time that she killed the dog. This will be a matter for the jury.

In *Strong v. Georgia Ry. & Elec. Co.,* 118 Ga., 515, will be found an interesting tribute to the dog, and a delineation of his legal history, showing how "the dog has figured in mythology, history, poetry, fiction, and art from the earliest times to the present."

The life of "Jimmy Whiskers" was crushed out beneath the wheels of defendant's automobile, so plaintiff contends. She complains that her

property has been destroyed by the failure of the defendant to exercise ordinary care to avoid the injury, and she asks compensation therefor. She is entitled on the evidence shown by the record to have her case submitted to a jury under appropriate instructions.

There was error in granting the motion for nonsuit.

Reversed.

W. H. APPLEWHITE COMPANY, INC., v. W. O. ETHERIDGE.

(Filed 23 September, 1936.)

1. Constitutional Law E a—

A statute in effect at the time of the execution of a contract cannot be successfully attacked as impairing the obligations of the contract, since in such instance the contract is presumed to have been made with reference to the existing law. Federal Constitution, Art. I, sec. 10.

2. Constitutional Law I a—

A statute requiring registration of a chattel mortgage in the state when the property, subject to a chattel mortgage registered in another state is removed to the state, in order to affect the rights of innocent purchasers for value without notice does not deprive the mortgagee of his rights in violation of the due process clause of the 14th Amendment to the Federal Constitution.

3. Chattel Mortgages B b—

The registration of a chattel mortgage in the proper county in this State is constructive notice of the lien in all states except those requiring registration therein in order to charge purchasers for value without notice who purchase the property after it has been removed to such state and brought to rest therein.

4. Chattel Mortgages G c—Purchaser for value without notice in state requiring registration therein held to take property free from chattel mortgage registered only in this State.

The owner of property subject to a chattel mortgage, registered in the proper county of this State, removed the property to Virginia, and there sold it to a *bona fide* purchaser for value without notice, who thereafter brought the property back to this State, where it was claimed by the mortgagee. The State of Virginia requires registration of chattel mortgages within its jurisdiction when the property has been removed to that state in order to charge purchasers for value without notice. Virginia Code, 5197. *Held:* Under the law of the State of Virginia, wherein the sale took place, the purchaser obtained title free from the lien of the chattel mortgage, and plaintiff mortgagee is not entitled to recover in the action instituted in this State.

5. Courts D a—

Where property, subject to a chattel mortgage registered in this State, is removed to another state and there sold, the registration laws of such

state govern the rights of the purchaser, although action is instituted in this State by the mortgagee to recover the property upon the subsequent removal of the property here by the purchaser.

APPEAL by the plaintiff from *Small, J.*, at January Term, 1936, of PASQUOTANK. No error.

The evidence tended to show the following: In 1929 W. H. Shackleford, then a resident of Wilson County, North Carolina, executed to the plaintiff, a North Carolina corporation with its principal place of business in Wilson County, a mortgage upon a certain sawmill and its equipment. The chattel mortgage was duly executed and recorded in Wilson County. In 1934, about 1 February, Shackleford removed the mortgaged property to a point near St. Brides, in the State of Virginia, where he began to use it in a certain logging operation about 1 April of the same year. On or about 1 May, Shackleford moved his family to St. Brides, Va., where they continued to reside until some time in October of that year, when Shackleford sold the mortgaged property to the defendant. The property was delivered and the purchase price paid in the State of Virginia. The price paid was adequate, representing the full value of the property. The plaintiff's mortgage has never been recorded in Virginia, and the defendant at the time of the sale to him was without notice of such mortgage. Shortly following the sale, the defendant removed the property to North Carolina, where it has since remained, and thereafter, on 29 July, 1935, this action in claim and delivery was instituted.

The court instructed the jury, in effect, that if they found the facts to be as shown by the evidence, they would answer the issues in favor of the defendant. The issues were so answered, and from judgment based upon the verdict the plaintiff appealed, assigning errors.

J. H. LeRoy, Jr., for plaintiff, appellant.
McMullan & McMullan for defendant, appellee.

SCHENCK, J. Section 5197 of the Virginia Code provides: "No mortgage, deed of trust, or other encumbrance created upon personal property while such property is located in another state shall be a valid encumbrance upon said property after it is removed into this State as to purchasers for valuable consideration without notice and creditors unless and until the said mortgage, deed of trust, or other encumbrance be recorded according to the laws of this State in the county or corporation in which the said property is located in this State."

The appellant assails the charge of the court upon two grounds: First, that the Virginia statute is in contravention of the Constitution

of the United States; and, second, that even if constitutional, said statute has no extraterritorial effects, and therefore will not be enforced by the courts of North Carolina.

It is contended by appellant that the Virginia statute is in contravention of Article I, sec. 10, of the Federal Constitution, prohibiting any state from passing any law impairing the obligations of contracts in that it gives to a subsequent purchaser of the property in Virginia a superior title to the holder in North Carolina of a prior lien. Laws which are in existence at the time a contract is made cannot be said to impair its obligation, since in such cases the contract is presumed to have been made with reference to existing law. The Virginia statute was enacted in 1894 and the chattel mortgage to the plaintiff was executed in 1929.

It is further contended by appellant that the statute impinges the provision of the 14th Amendment to the Federal Constitution in that it deprives the plaintiff of its property without due process of law. The validity of similar recording acts has been upheld by many of the state courts of last resort as well as by the Supreme Court of the United States. "The Legislature has power to pass, repeal, or modify registration laws from time to time. Over the subject of registration it has complete control, and the exercise of its power cannot be deemed an interference with vested rights." *Tatom v. White,* 95 N. C., 453 (459). And to the same effect is *Jackson v. Lamphire,* 28 U. S. (3 Peters), 280, 7 Law Ed., 679. See, also, 23 R. C. L., at p. 172.

But the appellant takes the position that since its chattel mortgage was recorded in Wilson County it was constructive notice to the world of its lien. *Whitehurst v. Garrett,* 196 N. C., 154. This is true so long as the property remained in North Carolina, and so long as it was elsewhere than in a jurisdiction whose law requires the registration of a mortgage there to give it validity when the property is removed thereinto. In 5 R. C. L., at p. 987, in speaking to the subject of the extraterritorial effect of recording, it is said: "If a chattel mortgage is valid where it is made, and is executed and recorded according to the laws of the state or country of its execution, as a general rule it will be enforced in the courts of another state or country as a matter of comity, although it is not executed or recorded according to the requirements of the law of the latter state. Where property is removed into a state other than in which the mortgage thereon was executed, ordinarily the rights of the mortgagee are protected under the general rule stated even though subsequent to its removal and without notice or knowledge of the mortgage others acquire rights or interests therein, unless there is in the state to which the property is removed a statute expressly requiring the filing or recording of mortgages upon property subsequently brought into the

state, in which case the statute is, of course, conclusive of the question under consideration."

In the note to *Mercantile Acceptance Co. v. Frank* (Cal.), 57 A. L. R., 696, at p. 722, the exception to the general rule is clearly stated as follows: "The general rule which protects the lien of a chattel mortgage duly filed and recorded in the state where it was executed and the property was then located, after its removal to another state without recording or filing in that state, is one of comity, and, of course, yields to a local statute which, by express terms or clear implication, requires such a mortgage to be recorded or filed within the state in order to protect the lien as against third persons."

It follows that since the chattel mortgage of the plaintiff was never recorded in Virginia, and since the defendant was a *bona fide* purchaser for value, without notice of any lien, and the sale was begun and completed in that state, that the defendant obtained a title to the property free from any lien of the plaintiff's mortgage.

While the forum of this action is a North Carolina court, the law of Virginia, the *lex loci contractus,* governs the issue. *Hall v. Telegraph Co.,* 139 N. C., 369; *Keesler v. Ins. Co.,* 177 N. C., 394; *Bundy v. Credit Co.,* 200 N. C., 511. The charge in the Superior Court was in accord with this law.

It should be noted that the statute under consideration refers to encumbrances on property "after it is removed" into the State of Virginia, which would indicate that it was not intended to include encumbrances on property which was only transitorily or temporarily in the state. The word "removed," as used, implies not only the taking of the property into Virginia, but also the allowing of the property to come to rest therein—the gaining a *situs* therein.

We have examined the exceptions taken to the evidence and find in them no prejudicial error.

No error.

THE FEDERAL LAND BANK OF COLUMBIA v. HENRY G. ROBERTSON ET AL.

(Filed 23 September, 1936.)

1. Evidence J a—Parol evidence held competent to explain or correct trustee's report of bid at foreclosure sale.

The *cestui que trust* in a second deed of trust bid in the land at the sale under its lien. In a later suit to foreclose the first deed of trust the *cestui que trust* in that instrument, the plaintiff in this action, claimed that the bid at the prior foreclosure was for "$5.00, plus present encum-

branees," and sought to hold the bidder liable for the debt secured by the first deed of trust. The trustee's deed made pursuant to the prior sale recited a bid of "$5.00," but plaintiff was allowed to introduce the "Report of Sale" by the trustee and "Order of Confirmation" by the clerk, which tended to establish the bid as contended for by plaintiff. The *cestui que trust* in the second deed of trust offered testimony that the trustee did not make or authorize the report, and that it only authorized a bid of "$5.00." *Held:* The parol evidence tending to establish the bid as being "$5.00," without assumption of prior debt, was erroneously excluded, the trustee's report, while competent in evidence, being subject to explanation, correction, or rebuttal, and the attack thereon not being collateral.

2. Same—

The recitation of the bid at the foreclosure sale contained in the trustee's deed to the purchaser is not conclusive, but the true terms of the bid may be established by parol.

3. Evidence D f—

Where a trustee testifies as to the amount of a bid made at a foreclosure sale conducted by him, his written report of the sale is competent for the purpose of impeaching or corroborating his testimony, the report being a declaration made by him as a party to the transaction.

4. Appeal and Error J g—

Where a new trial is awarded on appeal, matters that may not arise upon a second hearing need not be determined.

APPEAL by defendant, the Bank of Franklin, from *Alley, J.*, at April Term, 1936, of MACON.

Civil action to foreclose deed of trust and to recover deficiency judgment.

The facts are these:

1. On 1 September, 1924, Henry G. Robertson, then unmarried, executed mortgage or deed of trust to the Federal Land Bank of Columbia on lands in Macon County to secure a loan of $1,500.

2. On 11 March, 1932, Henry G. Robertson and wife executed deed of trust to H. W. Cabe, trustee, on the same lands, to secure notes and judgments held against him by the Bank of Franklin.

3. The other defendants are judgment creditors of the said Henry G. Robertson.

4. On 26 June, 1933, the trustee foreclosed the second deed of trust and the Bank of Franklin became the purchaser at said sale.

5. Upon issue joined, the jury found that the bid at said sale was "$5.00, plus present encumbrances." The trustee's deed recites a bid of "$5.00."

6. Over objection, the plaintiff was allowed to offer in evidence, as a public record, "Report of Sale" by trustee and "Order of Confirmation" by the clerk, which tend to support plaintiff's allegation as to terms of

the bid. Exception. There was no increased bid filed with the clerk. *Cherry v. Gilliam,* 195 N. C., 233, 141 S. E., 594.

7. The trustee offered to testify that he never made any report of the sale, and that his purported signature to said report was neither authorized nor genuine. Objection sustained; exception.

8. The Bank of Franklin then offered to show that it only authorized a bid of $5.00 for the equity of redemption; and that the assumption of prior encumbrances was not a part of the purchase price or bid. Objection sustained; exception. The plaintiff offered parol testimony as to the terms of the bid.

From a judgment on the verdict, the Bank of Franklin appeals, assigning errors.

Gray & Christopher for plaintiff, appellee.

George B. Patton for defendants Frank I. Murray, J. H. Stockton, J. E. Rickman, C. R. Zachary, trustee, and O. C. Corbin, appellees.

G. L. Houck and Jones & Ward for defendant Bank of Franklin, appellant.

STACY, C. J. Notwithstanding the trustee's deed recites a bid of $5.00, it is competent to show by parol, or otherwise, the real consideration or the true terms of the bid. *Pate v. Gaitley,* 183 N. C., 262, 111 S. E., 339. For this purpose, the report of the trustee (if, indeed, any were made), whether required to be filed by law or not, is competent as evidence, as the trustee was a party to the transaction. It is well settled in this jurisdiction that when a party to a transaction makes a statement as to its terms, orally or in writing, the declaration may be offered in evidence either to corroborate or to impeach his testimony. *Stott v. Sears, Roebuck Co.,* 205 N. C., 521, 171 S. E., 858; *Anderson v. Nichols,* 187 N. C., 808, 123 S. E., 86; *Allred v. Kirkman,* 160 N. C., 392, 76 S. E., 244. On the other hand, such report is not sacrosanct. It is subject to explanation, correction, or rebuttal, by other competent evidence. *Braddy v. Pfaff, ante,* 248; *Bean v. Bean,* 135 N. C., 92, 47 S. E., 232; *Allen v. Royster,* 107 N. C., 278, 12 S. E., 134; *Turner v. Turner,* 104 N. C., 566, 10 S. E., 606. Nor would such attack upon said report be regarded as collateral in the present proceeding. *Oliver v. Hood, Comr.,* 209 N. C., 291, 183 S. E., 657. The remark in *Bank v. Stewart,* 208 N. C., 139, 179 S. E., 463, relied upon by plaintiff, was in reference to the sale and not to the report. It was error, therefore, to exclude appellant's proffered testimony in regard to the terms of the bid, especially as plaintiff had offered parol evidence to the same point.

In this view of the matter, the principal question debated on argument and brief, *i.e.,* whether the doctrine of *Baber v. Hanie,* 163 N. C., 588,

80 S. E., 57, is controlling or applicable, becomes presently unnecessary to decide. Upon a full disclosure of the evidence, the facts may appear otherwise. The following citations, however, may be of interest on the second hearing: Annotation, 12 A. L. R., 1528; Wiltsie on Mortgage Foreclosures (4th Ed.), sec. 246; Decennial Digest (Mortgages), Key No. 282 (2).

For the error, as indicated, in excluding appellant's proffered testimony, a new trial must be awarded. It is so ordered.

New trial.

ISAAC MILLS ET AL. v. METROPOLITAN LIFE INSURANCE COMPANY.

(Filed 23 September, 1936.)

1. Insurance E b—

The effect of an incontestable clause in a policy of life insurance is to preclude insurer from attacking the validity of the policy after the stipulated time except for such causes as are specifically allowed in the incontestable clause itself.

2. Same—Incontestable clause held to apply to disability insurance rider attached to policy under the language of the policy in this case.

The policy in suit specifically excepted the rider providing disability insurance from the operation of the incontestable clause. The rider providing disability insurance stipulated that the incontestability provisions of the policy should apply thereto. *Held:* The ambiguity created by the conflicting provisions of the policy and the disability rider as to whether the incontestable clause should apply to the disability insurance, must be resolved in favor of the insured.

3. Same—Incontestable clause does not bar insurer from showing that disability originated prior to issuance of policy and was not covered.

The disability clause of the policy in suit provided benefits upon the total disability of insured by bodily injury or disease "occurring and originating after the issuance of the policy." The disability clause was subject to the incontestable clause of the policy. In a suit by insured upon the disability clause, insurer alleged that the disability insurance was procured by fraud and that the alleged disability resulted from a disease originating prior to the issuance of the policy and was not covered by the terms of the disability clause. *Held:* The incontestable clause precludes insurer from attacking the validity of the disability insurance on the ground of fraud, but does not preclude insurer from denying the genuineness of the disability claimed or asserting that the alleged disability is not covered by the terms of the policy.

APPEAL by defendant from *McElroy, J.*, at March Term, 1936, of BUNCOMBE.

Civil action to recover on total and permanent disability clauses in supplemental contracts attached to and made parts of two life insurance policies.

Upon the payment of the first annual premiums, the defendant, on 24 June, 1925, issued to the plaintiff two $5,000 life insurance policies, with riders or supplemental contracts attached, each providing for disability benefits in case of total and permanent disability, "as a result of bodily injury or disease occurring and originating after the issuance of said policy."

On the face of each policy is an incontestable clause in the following language:

"3. *Incontestability*:—This policy shall be incontestable after it has been in force for a period of two years from its date of issue, except for nonpayment of premiums, and except as to provisions and conditions relating to benefits in the event of total and permanent disability, and those granting additional insurance specifically against death by accident, contained in any supplementary contract attached to and made part of this policy."

Each rider or supplemental contract contains the following:

"The provision of the said policy as to incontestability shall apply hereto, but shall not preclude the company from requiring as a condition to recovery hereunder, due proof of such total and permanent disability as entitles him to the benefits hereof."

During the summer of 1927, plaintiff made claim for total and permanent disability benefits under the policies above mentioned, which was allowed by the defendant up to and including the month of August, 1932, when defendant notified plaintiff that no further payments would be made, contending that proof of claim was based upon false and fraudulent statements, which defendant had relied upon to its injury.

This suit was instituted 15 September, 1934, to recover alleged disability benefits accruing since August, 1932, under the supplemental contracts attached to the policies in suit.

Denial of liability interposed by the defendant upon the ground that plaintiff's disability was not the result of bodily injury or disease "occurring and originating after the issuance of said policies"; and counterclaim pleaded for amount of benefits already paid.

The defendant was not allowed to show its alleged defense and counterclaim because of the incontestable clauses contained in the policies. Exception.

Verdict and judgment for plaintiff, from which defendant appeals, assigning errors.

Joseph A. Patla and Johnston & Horner for plaintiffs, appellees.
Harkins, Van Winkle & Walton for defendant, appellant.

STACY, C. J. Do the incontestable clauses in the policies in suit preclude the defendant from showing that plaintiff's original claim for disability benefits was grounded on false and fraudulent statements, as alleged, and that a continuation of said claim—the gravamen of plaintiff's present complaint—does not fall within the terms of the supplemental agreements? This calls for an analysis and construction of the contracts.

With respect to the original policies, there are numerous decisions to the effect that an incontestable clause cuts off all defenses except those allowed *eo nomine* in the clause itself. *Trust Co. v. Ins. Co.*, 173 N. C., 558, 92 S. E., 706. Specifically, it has been held that an incontestable clause covers the defense of alleged bad health of the insured at the time of the delivery of the policy, as well as that of false and fraudulent statements alleged to have been made by the insured in his application and incorporated in the policy. *Wamboldt v. Ins. Co.*, 191 N. C., 32, 131 S. E., 395; *Hardy v. Ins. Co.*, 180 N. C., 180, 104 S. E., 166. The purpose of an incontestable clause is to set these matters at rest after the specified time mentioned therein. *Mauney v. Ins. Co.*, 209 N. C., 503, 184 S. E., 82.

It will be observed that the instant clauses contain exceptions "as to provisions and conditions relating to benefits in the event of total and permanent disability." If these exceptions stood alone, the decision in *Smith v. Ins. Co.*, 209 N. C., 504, 184 S. E., 21, would perhaps afford the defendant some comfort. But the incontestable clauses are brought forward by specific references and made parts of the supplemental contracts. Hence, to say the supplemental contracts are excepted from the incontestable clauses, while said clauses are specifically incorporated in the supplemental contracts, seems somewhat inconsistent. At any rate, the references are sufficiently uncertain in meaning to create an ambiguity. In this situation, the general rule is to adopt the construction more favorable to the insured (*Underwood v. Ins. Co.*, 185 N. C., 538, 117 S. E., 790; *Bank v. Ins. Co.*, 95 U. S., 673), which, in the instant case, would cut off the defense of alleged bad health of the insured at the time of the delivery of the policies, and also that of false and fraudulent statements alleged to have been made as inducements to delivery. The holding in *Smith's case, supra,* therefore may be put aside as inapposite.

With the view just expressed, the defendant says it has no quarrel. It is not contesting the validity of its contracts. Its contention is, that plaintiff's claim is a spurious one, and that it is not covered by the terms of the contracts, but expressly excluded thereby. The provisions in the supplemental contracts, making the incontestable clauses applicable thereto, do not preclude the defendant from requiring, as a condition

to recovery thereunder, "due proof of such total and permanent disability as entitles him (plaintiff) to the benefits hereof." *Carter v. Ins. Co.*, 208 N. C., 665, 182 S. E., 106.

We are aware of no decision which would deny to a defendant the right to dispute the genuineness of plaintiff's claim, or to controvert the question of liability under its contracts. *McCabe v. Casualty Co.*, 209 N. C., 577, 183 S. E., 743; *Jolley v. Ins. Co.*, 199 N. C., 269, 154 S. E., 400; *Scarborough v. Ins. Co.*, 171 N. C., 353, 88 S. E., 482. To contend for a limitation of the coverage clause in a policy of insurance is not to contest its validity. *Reinhardt v. Ins. Co.*, 201 N. C., 785, 161 S. E., 528; *Gilmore v. Ins. Co.*, 199 N. C., 632, 155 S. E., 566. This is all the defendant seeks to do in the instant case. Its defense is, that plaintiff's disability was not, and is not, the result of bodily injury or disease "occurring and originating after the issuance of said policies." Denial of coverage ought not to be confused with the defense of invalidity. *Ins. Co. v. Conway*, 252 N. Y., 447. The defendant is entitled to be heard on the issue of coverage and the genuineness of plaintiff's claim.

New trial.

MAX YERYS v. NEW YORK LIFE INSURANCE COMPANY.

(Filed 23 September, 1936.)

1. **Insurance E b—**

   Where a disability clause in a policy of life insurance is subject to the incontestable clause of the policy, insurer may not set up the defense of invalidity in a suit on the disability clause instituted after the time stipulated in the incontestable clause.

2. **Judgments L b—Federal judgment held to bar plaintiff from setting up in State court matters presented in the suit in Federal court.**

   Final judgment of the Federal court dismissing plaintiff insurer's suit to have the policies of insurance in question canceled for fraud and the disability provisions therein stricken out, and to recover disability benefits already paid, constitute a bar to plaintiff's right to set up such matters in insured's action instituted in a state court on the disability clauses of the policies.

3. **Insurance E b—**

   An incontestable clause in a policy of insurance made applicable to the disability provisions of the policy does not prevent insurer from setting up the defense that the disability sued on is not covered by the provisions of the disability clause, or that the claim for disability is not genuine.

4. **Appeal and Error A d—**

   An appeal from a judgment sustaining a plea in bar is not premature.

APPEAL by defendant from *McElroy, J.,* at April Term, 1936, of BUNCOMBE.

Civil action to recover on total and permanent disability clauses in two contracts of insurance.

On 23 May, 1927, and again on 22 June, 1927, upon the payment of the first annual premiums, the defendant issued to the plaintiff a $5,000 life insurance policy, each providing for disability in case of total and permanent disability, "provided such disability occurred after the insurance under this policy took effect and before the anniversary of the policy on which the insured's age at nearest birthday is sixty."

On the face of each policy is an incontestable clause in the following language:

"*Incontestability:*—This policy shall be incontestable after two years from its date of issue except for nonpayment of premiums and *except as to provisions and conditions relating to disability and double indemnity* benefits."

During the spring of 1929, plaintiff made claim for total and permanent disability benefits under the policies above mentioned, which was allowed by the defendant up to and including the month of July, 1933, when the defendant notified the plaintiff that no further payments would be made, contending that proofs of claims were based upon false and fraudulent statements, which the defendant relied upon to its hurt.

This suit was instituted 26 November, 1934, to recover alleged disability benefits accruing since July, 1933, under the policies in suit.

Whereupon, on 27 December, 1934, the defendant filed a bill in equity in the United States District Court for the Western District of North Carolina, asking (1) that the policies in suit be canceled for fraud in their procurement; (2) that the provisions relating to disability and double indemnity benefits be stricken out; (3) that defendant recover amount of benefits already paid; and (4) that the plaintiff here, defendant there, be enjoined from prosecuting this action in the State court. The bill was dismissed because of the incontestable clauses contained in the policies; and this was affirmed on appeal to the Circuit Court. *New York Life Ins. Co. v. Yerys,* 80 Fed. (2d), 264.

Thereafter, the defendant filed answer in the present action, setting up the defenses of invalidity and noncoverage, and pleaded counterclaim for benefits already paid.

Plaintiff filed reply contending that defendant was barred from setting up the defenses in its answer by reason of the incontestable clauses contained in the policies and the judgment of the Federal court.

From judgment sustaining the pleas in bar and striking out defendant's "First and Second Further Defenses and Counterclaims," the defendant appeals, assigning errors.

Joseph A. Patla and Johnston & Horner for plaintiff, appellee.
Johnson, Rollins & Uzzell for defendant, appellant.

STACY, C. J., after stating the case: The defense of invalidity is not available to the defendant in the present action. *Mauney v. Ins. Co.*, 209 N. C., 499, 184 S. E., 82; *Wamboldt v. Ins. Co.*, 191 N. C., 32, 131 S. E., 395; *Hardy v. Ins. Co.*, 180 N. C., 180, 104 S. E., 166; *Amer. Trust Co. v. Ins. Co.*, 173 N. C., 558, 92 S. E., 706. Neither is it entitled to be heard again on the question of reformation or cancellation, nor on the subject of its counterclaims. These matters were considered in a forum of its own choosing. They are now *res judicata*. *Bunker v. Bunker*, 140 N. C., 18, 52 S. E., 237; *Distributing Co. v. Carraway*, 196 N. C., 58, 144 S. E., 535; 15 R. C. L., 949, *et seq.*

"It is a familiar maxim that a man shall not be twice vexed for the same cause. If a final judgment or decree is rendered, the parties cannot again be heard upon any matter which was then litigated and determined, the controversy having passed *in rem judicatam* and become conclusive between the parties"—*Adams, J.*, in *Harvey v. Rouse*, 203 N. C., 296, 165 S. E., 714.

The two questions still open for determination are (1) coverage, and (2) genuineness of plaintiff's present claim. *Mills v. Ins. Co., ante*, 439.

The judgment below, as we understand it, is to this effect.

It is observed that the coverage clauses in the instant policies are not identical with those appearing in the *Mills case, supra*. Here, the disability must have "occurred" after the insurance took effect, while in the cited case the disability must have resulted from bodily injury or disease "occurring and originating" after the insurance became effective. However, as the issue of liability has not yet been determined, we refrain from further comment.

An appeal from a judgment sustaining a plea in bar is not regarded as premature. *Royster v. Wright*, 118 N. C., 152, 24 S. E., 746; *Bethell v. McKinney*, 164 N. C., 71, 80 S. E., 162.

Affirmed.

C. L. SHELTON AND HUSBAND, RALPH SHELTON, PLAINTIFFS, v. E. M. CODY AND J. COLEMAN RAMSEY, TRUSTEE, AND G. W. ARRINGTON, INTERVENER.

(Filed 23 September, 1936.)

Bills and Notes B b—Whether holder intended to sell notes to volunteer paying same after maturity held for jury under the evidence.

Husband and wife owning land by entireties and liable on a purchase money deed of trust thereon, paid one of the notes secured by the deed of

trust, and were thereafter divorced. Intervener, the father of the husband, paid the holder the amount due on the remaining notes after maturity. The wife subsequently remarried, and brought this action, with the joinder of her second husband, to have the notes marked paid and the deed of trust canceled. Intervener testified that he bought the notes from the holder and had demanded payment from his son, and the original holder of the notes testified that upon receipt of payment he turned the remaining notes over to intervener, except one of them, which he gave intervener's son to take to intervener, and that he endorsed intervener's name on the back of the deed of trust after all sums due had been paid. *Held:* While a person voluntarily paying notes after maturity cannot make himself the owner thereof without the consent of the holder, the evidence was sufficient to be submitted to the jury upon the question of whether the parties to the transaction intended the payment by intervener to constitute payment and discharge or a purchase of the notes.

APPEAL by G. W. Arrington, intervener, from *McElroy, J.*, at April Term, 1936, of MADISON. Reversed.

Action by plaintiffs against defendants Cody and Ramsey, trustee, to restrain a sale and to cancel a deed of trust on described land on the ground that the notes evidencing the debt secured had been paid. Upon his motion G. W. Arrington was allowed to intervene and allege that he was the owner and holder of the notes secured, and that same had not been paid, but had been sold and transferred to him by defendant Cody, and were still outstanding.

At the conclusion of the testimony offered by the intervener, the court sustained plaintiffs' motion for nonsuit, dismissed the interplea, and rendered judgment for the plaintiffs. From this judgment intervener G. W. Arrington appealed.

Carl R. Stuart for plaintiffs.
C. R. Edney and Ramsey & McLean for defendant, appellant.

DEVIN, J. The only question presented by this appeal is whether the intervener has offered sufficient evidence to be submitted to the jury that he was at the time the owner and holder of the notes secured by the deed of trust on the land.

The facts out of which this controversy arose were substantially these: The defendant E. M. Cody conveyed a tract of land to G. R. Arrington and his wife, Clyde L. Arrington, creating an estate by the entireties, and the said grantees executed and delivered, in part payment of the purchase price, a deed of trust on said land to defendant J. Coleman Ramsey, trustee, to secure the payment of four notes of one hundred dollars each, payable to E. M. Cody. This deed of trust was dated 12 January, 1929. Subsequently, G. R. Arrington and Clyde L. Arring-

ton were divorced from the bond of matrimony, and thereafter Clyde L. Arrington married Ralph Shelton, and she with her present husband, as parties plaintiffs, brought this action to restrain the sale under the power, alleging that the four notes had been fully paid. Thereupon G. W. Arrington, father of the former husband of the *feme* plaintiff, intervened, claiming to be the owner and holder of the four notes; that same had been purchased by him from the defendant Cody; that they had not been paid by the makers, and that the notes were still outstanding and the lien of the deed of trust subsisting.

On the trial the intervener, G. W. Arrington, testified in part as follows:

"I have lived on this land about four years. I recognize these papers (identifying the deed of trust and two of the one hundred dollar notes). That is the last notes. They have been in my possession. I bought them from E. M. Cody. I bought the papers from Mr. Cody last fall. Q. (by plaintiffs' counsel): 'What did you pay for the notes? A. Well, I paid him for them or he would not sell them. I paid him stock for them. The value of the mules the way I traded was $75.00.' I can't say which one of those notes I paid the mule on. I can't read or write, I don't suppose I bought but one note at a time. I did not keep a record of it. I just bought the deed of trust. I paid $75.00 and then I paid a cow and a calf, and then I paid off one note. . . . I bought four notes. I have four notes in my possession that I paid for the land. There are only two notes here. When I got these papers I told my son I would have to have my money, I had waited as long as I could, . . . and he said, 'You will have to get it the best way you can.' I know when Mrs. Shelton divided the land. It was last fall. I did not have the land advertised before she divided it." On the back of the deed of trust appeared the name "G. W. Arrington," in the handwriting of E. M. Cody. E. M. Cody testified that he sold the land to G. R. Arrington and his wife, who is now Mrs. Ralph Shelton; that they paid $200.00 and gave notes and deed of trust for $400.00; that G. R. Arrington "paid the first on the notes and G. W. Arrington finished paying them"; that neither G. R. Arrington's wife nor her present husband paid anything; that G. R. Arrington paid one note in full and fifty dollars on the second. "I swapped mules with G. W. Arrington and gave him seventy-five dollars to boot, and allowed it on the debt, and when he got the deed of trust from me there was still $27.00 behind, and I gave him the remainder for a cow and calf. I did not turn all the notes and deed of trust over to G. W. Arrington, only the last one. I let G. R. Arrington have one of the notes and told him I wanted him to take it to G. W. Arrington. I delivered the deed of trust to G. W. Arrington and made the entry on the deed of trust of G. W. Arrington's

name. G. R. Arrington left the notes with me. George (G. W. Arrington) stepped into the trade and I told him to take them over. G. W. Arrington got the last note from me."

Ordinarily, when a person volunteers to pay the note of another he cannot by such payment make himself the owner of the note without the consent of the holder thereof (*Bank v. Craig,* 63 Ohio St., 374). But an agreement to purchase the notes as between such third person and the holder will control. 8 C. J., 588; 3 R. C. L., 1287.

When a note is paid by a third party after maturity, whether it is to constitute a payment and discharge, or a purchase, is a question of intention to be determined as a fact from the acts and declarations of the parties and from the surrounding circumstances. *Wallace v. Grizzard,* 114 N. C., 488; *Wilcoxon v. Logan,* 91 N. C., 449; *Jones v. Bobbitt,* 90 N. C., 391; *Brem v. Allison,* 68 N. C., 412; *Purnell v. Gillespie,* 126 Miss., 60.

Here there was evidence sufficient to warrant submission to the jury that the notes, or some of them, were purchased by the intervener pursuant to an agreement with the defendant Cody, the holder thereof.

For the reasons herein set forth, the judgment of nonsuit as to the intervener, G. W. Arrington, must be stricken out, and the issue raised by the pleadings and supported by evidence submitted to a jury under appropriate instructions.

Reversed.

STATE v. W. C. GODWIN.

(Filed 23 September, 1936.)

Criminal Law K h—Judgment of the court is in fieri during term and may be modified upon evidence heard in open court.

Defendant was convicted of larceny and sentenced to four months imprisonment, to pay a fine and costs, and make restitution of the property. During the term, after defendant had paid the fine and costs but before he had complied with other terms of the judgment, the court found, after hearing evidence in open court, that defendant had had a physical altercation with prosecutrix, and modified the judgment by imposing a longer prison sentence. *Held:* The modification of the judgment was within the discretionary power of the trial court, the judgment being *in fieri* during the term and being subject to modification by the court in its discretion as the ends of justice may require upon evidence, heard in open court, either as to the facts of the case or the character and conduct of defendant, and no part of the prison term having been served prior to the modification, defendant's objection that the modification constituted a second punishment for the same offense is untenable.

APPEAL by defendant from *Small, J.*, at April Term, 1936, of TYRRELL. Affirmed.

The defendant W. C. Godwin was convicted of the larceny of two hogs, the property of Mrs. Della Furlough, and judgment was thereupon pronounced, imposing upon him four months prison sentence, "*capias* and commitment to issue at any time within two years on motion of the solicitor," and the defendant was also adjudged to pay a fine of fifty dollars and the costs, and required to make restitution of the stolen property. The defendant paid the fine and costs but did not comply with the other portions of the sentence.

During the same week and term, following an investigation in open court, and after hearing evidence of both the prosecuting witness and the defendant, the court entered the following judgment:

"It appearing to the court, and the court finding as a fact, that since passing sentence on W. C. Godwin on Tuesday, 21 April, he and Mrs. Della Furlough, the prosecuting witness in the case against him for larceny, have had a physical altercation, he being a man 46 years of age, weighing 223 pounds, and she a woman, 53 years of age, weighing 115 pounds; therefore, the judgment rendered on Tuesday, 21 April, in Minute Docket for Tyrrell County, labeled 'The Year 1924,' on p. 266, in the court's discretion, is set aside and judgment and sentence is passed as follows:

"The judgment of the court is, that the defendant be confined at the District Camp and assigned to work under the supervision of the State Highway and Public Works Commission for a term of six months.

"It is further ordered that the defendant pay a fine of $50.00 and cost and return to the sheriff of Tyrrell County the black hog in question, for Mrs. Della Furlough, and pay $10.00 for having the hog cared for while in the custody of the sheriff. It is further ordered that the defendant pay the clerk of the Superior Court, for the benefit of Mrs. Furlough, $6.50 for the sandy pig in question."

From the last quoted judgment the defendant appealed.

Attorney-General Seawell and Assistant Attorneys-General McMullan and Burton for State.

H. S. Ward and J. Ernest Norris for defendant.

DEVIN, J. The defendant has abandoned all other exceptions save the one with respect to the final judgment, and presents the single question as to the power of the court to change the original judgment and impose a longer prison sentence.

The general power of the court over its own judgments, orders, and decrees in both civil and criminal cases, during the existence of the

term at which they are first made, is undeniable. *Ex parte Lange,* 18 Wall., 163.

Until the expiration of the term the orders and judgments of the court are *in fieri,* and the judge has power, in his discretion, to make such changes and modifications in them as he may deem wise and appropriate for the administration of justice, and to this end he may hear further evidence, in open court, both as to the facts of the case and as to the character and conduct of the defendant. *In re Brittain,* 93 N. C., 587; *S. v. Manly,* 95 N. C., 661; *S. v. Stevens,* 146 N. C., 679; *Cook v. Tel. Co.,* 150 N. C., 428.

The defendant, however, contends that when a portion of the first judgment has been complied with, as by the payment of the fine imposed, a different rule should obtain, in accord with the just principle that no man should be twice punished for the same offense. 8 R. C. L., 244; *S. v. Crook,* 115 N. C., 760; *S. v. Warren,* 92 N. C., 825; *Ex parte Lange, supra.*

But here the court had power to punish by both fine and imprisonment. There was no modification of the sentence with respect to the payment of a fine and costs and restitution of the stolen property. Though the fine lawfully imposed in both judgments was paid, no part of the prison sentence had been served. In no view could the defendant be said to have been required to suffer twice for the same offense.

The modification of the judgment during the term was within the power and the sound discretion of the trial judge.

Judgment affirmed.

LEE WATKINS, DR. FRED HERBERT, A. M. SIMONS, J. C. TOWNSON, AND OTHERS, CITIZENS AND TAXPAYERS OF CHEROKEE COUNTY, v. JOSH JOHNSON, W. R. DOCKERY, AND W. P. ODUM, CONSTITUTING THE BOARD OF ELECTIONS OF CHEROKEE COUNTY.

(Filed 23 September, 1936.)

Counties B b—Legislature has power to provide that one county commissioner shall be elected from each of three districts of a county.

Ch. 526, Public-Local Laws of 1935, providing that Cherokee County should be divided into three districts and that one county commissioner should be nominated and elected by the qualified voters of each of the districts, is constitutional as a valid exercise of legislative power over municipal corporations, the General Assembly being given express power by Art. VII, sec. 14, to change and modify the provisions of Art. VII, sec. 1, relating to number and election of county commissioners.

APPEAL by the plaintiffs from judgment of *Harding, J.*, sustaining demurrer entered at Chambers in Waynesville, 16 July, 1936. From CHEROKEE. Affirmed.

Edwards & Leatherwood for plaintiffs, appellants.
J. D. Mallonee for defendants, appellees.

SCHENCK, J. This is an action brought by taxpayers of Cherokee County against the Board of Elections of said county to restrain the putting into effect the provisions of chapter 526, Public-Local Laws of 1935, upon the ground that said act is unconstitutional and void. The complaint alleges that the defendants "are proceeding to carry out and put in effect the provisions" of said act and pray judgment "that said chapter 526 of the Public-Local Laws of 1935 be declared unconstitutional and void," and that "the defendants and each of them be restrained and enjoined from in any manner putting into effect and carrying out the provisions" of said act.

The defendants demurred to the complaint upon the ground that "the act referred to . . . was duly and regularly passed in accordance with the Constitution of the State of North Carolina, Article VII, sec. 14, and is valid and within the legislative power," and for that reason the complaint "does not set forth facts sufficient to constitute a cause of action."

The act under consideration reads:

"*The General Assembly of North Carolina do enact:*"

"SECTION 1. That for the purpose of the nomination and election of the members of the Board of County Commissioners of Cherokee County the said county is hereby divided into three districts, one commissioner to be nominated and elected in and from each district, the districts to be numbered and designated as follows:

"District Number One to be composed of Valleytown Township; District Number Two to be composed of Tomotla Precinct, Murphy North Ward, Murphy South Ward, Brasstown Precinct, Peachtree Precinct, and Burnt Meeting House Precinct; District Number Three to be composed of all of the other precincts of Cherokee County.

"SEC. 2. That at the next primary or convention to be held in Cherokee County for the nomination of county officers, and every two years thereafter, there shall be nominated by each of the political parties of Cherokee County one commissioner for each of the three districts herein provided for in section one of this act and those participating in said primary or convention, both as candidates and voters, shall be restricted to the qualified voters of said district. The candidate so

nominated from his district shall be declared to be the candidate of his political party and duly nominated for the general election in his district.

"SEC. 3. That the candidates so nominated from the respective districts shall in the general election be voted on only by the qualified voters of each of said districts, and one commissioner from each of said districts shall be declared elected a county commissioner of Cherokee County.

"SEC. 4. That the three commissioners elected in and by said districts shall be and constitute the Board of County Commissioners of Cherokee County.

"SEC. 5. That all laws and clauses of laws in conflict with the provisions of this act are hereby repealed.

"SEC. 6. That this act shall be in full force and effect from and after its ratification.

"Ratified this the 10th day of May, A.D. 1935."

It is contended by the plaintiffs that this act is in contravention of section 1, Article VII, of the Constitution of North Carolina, which reads: "SECTION 1. *County Officers.* In each county there shall be elected biennially by the qualified voters thereof, as provided for the election of members of the General Assembly, the following officers: A treasurer, register of deeds, surveyor, and five commissioners."

The contention of the plaintiffs might be maintained but for section 14 of Article VII of the Constitution of North Carolina, which reads: "SEC. 14. *Powers of General Assembly Over Municipal Corporations.* The General Assembly shall have full power by statute to modify, change, or abrogate any and all of the provisions of this article, and substitute others in their place, except sections seven, nine, and thirteen."

Since the adoption of the aforesaid section 14, by the Constitutional Convention of 1875, there have been many decisions of this Court upholding legislation modifying, changing, and abrogating the provisions of Article VII. We are of the opinion, and so hold, that the act under consideration falls well within the full power given the General Assembly by section 14, Article VII of the State Constitution, and, therefore, that his Honor ruled correctly in holding that it was a valid and subsisting law, and in overruling the demurrer. See *Harriss v. Wright,* 121 N. C., 172; *Audit Co. v. McKenzie,* 147 N. C., 461; *Commissioners v. Commissioners,* 165 N. C., 632; *Woodall v. Highway Com.,* 176 N. C., 377; *Tyrrell v. Holloway,* 182 N. C., 64; *State ex rel. O'Neal v. Jennette et al.,* 190 N. C., 96; *Ellis v. Greene,* 191 N. C., 761.

Affirmed.

STATE v. L. A. YOUNG.

(Filed 23 September, 1936.)

1. Criminal Law G i—Handwriting expert should be allowed to give reasons for his opinion based upon comparison of writings.

Where the conclusion of a handwriting expert to the effect that the forgery in question was not executed by defendant is properly admitted in evidence, it is error for the court to exclude from the evidence the testimony of the expert as to the reasons upon which he based his conclusion, since such testimony tends to strengthen and enhance his testimony and afford the jury an opportunity to determine the soundness of his conclusion.

2. Criminal Law L f—

The admission in evidence of testimony of a handwriting expert as to some of the reasons for his conclusion that the forgery in question was not executed by defendant does not cure error in the exclusion of his testimony as to other reasons for his conclusion.

APPEAL by the defendant from *McElroy, J.*, at March Term, 1936, of BUNCOMBE. New trial.

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

F. E. Alley, Jr., and Jones & Ward for defendant, appellant.

SCHENCK, J. The defendant was convicted upon a two-count bill of indictment charging him with forging and uttering a forged check purporting to have been drawn on the account of the Asheville Construction Company with the First National Bank and Trust Company of Asheville, and, as is stated in appellant's brief, "there was no question but what the checks introduced by the State were forged. The only question was as to whether or not the defendant was the guilty party."

G. A. DeLand, introduced as a witness for the defendant, was found by the court to be a handwriting expert, and, after testifying that he had seen the defendant write and had examined checks admittedly signed by him, was asked the following question and made the following reply:

"Q. I wish you would state whether or not, in your opinion, having seen L. A. Young write his name and other instruments, whether or not the name, Raymond C. Williams, on the back of the alleged forged checks is in the handwriting of L. A. Young?

"A. It is not, because the writing on the back of the checks is a smooth, even, fast writing, and the endorsements on all these checks

show considerably more training in handwriting than L. A. Young could possibly exhibit at one time."

To the latter part of the answer, giving the reasons of the witness for his opinion, the court sustained an objection lodged by the State. And later in his testimony, in explaining why he was of the opinion that the endorsement of the check alleged to have been forged was not in the handwriting of the defendant, the witness testified: "I find that in the small letter 'a' there is a difference. It is written two ways, open at the top and closed at the top. There is a natural deviation. We find in specimen submitted that the 'a's' in practically every instance are closed. Once or twice we find a small opening at the top, but the tendency is toward closed. There is a certain set way of making those 'a's.'" The court likewise sustained the objection of the State to the foregoing testimony, and, upon motion of the State, struck from the record both of the quoted reasons given by the witness for his opinion. This action of the court is duly assigned as error by the defendant, and we are of the opinion, and so hold, that such assignment of error must be sustained.

Our holding is based upon the fact that the conclusion of a handwriting expert as to the authenticity or nonauthenticity of a signature, standing alone, might be of little or no probative force, but if his conclusion be supported by cogent reasons, it would be strengthened and its value as evidence correspondingly enhanced. When the reasons of the witness are given, the jury are afforded a better opportunity to determine the soundness of his conclusion.

In L. R. A., 1918-D, at page 647, it is written: "The evidence of an expert in handwriting is of two classes: (1) Where he simply gives his opinion—which necessarily has only the weight of his learning and character as recognized by the jury; (2) where he gives the reasons on which his opinion is based. An expert witness in handwriting may give the reasons on which he bases his opinion. It is reversible error to refuse to allow him to give the reasons for his opinion, or to conduct the trial in such a manner that he is unable to give connected reasons for his opinion." See, also, *People v. Molineux,* 58 N. Y. Supp., 155; *Venuto v. Lizzo,* 132 N. Y. Supp., 1066; *State v. Ryno,* 68 Kan., 348.

The fact that the witness was allowed, without objection, to explain to some extent how and why he reached the conclusion that the check alleged to have been forged was not endorsed by the defendant does not render harmless the striking from the record of a portion of his explanation or of some of the reasons given.

New trial.

THE TEXAS COMPANY v. CITY OF ELIZABETH CITY.

(Filed 23 September, 1936.)

1. **Taxation C b—Evidence held for jury on question of whether personalty of nonresident acquired situs here for purpose of taxation.**

The evidence on behalf of defendant city tended to show: Plaintiff, a nonresident corporation, purchased certain motor boats from a resident of this State who had theretofore listed and paid personal property taxes thereon to defendant city. After the purchase of said boats, plaintiff continued to use them on the sounds and rivers of this State and the State of Virginia in transporting and delivering goods of plaintiff, as they had been employed by plaintiff before their purchase under the terms of a contract with their former owner. Plaintiff did not remove the boats to the state of its incorporation or elsewhere, but continued to return them each week-end to defendant city and tie them up at its docks and wharves within the city. *Held:* In plaintiff's action to recover personal property taxes paid defendant city on said motor boats, the evidence was sufficient to be submitted to the jury on the question of whether said personal property acquired a *situs* within the city for the purpose of taxation, and were therefore subject to taxation by the city under the exception to the general rule that personal property is subject to taxation at the place of the domicile of the owner.

2. **Appeal and Error G c—**

Exceptions not discussed in appellant's brief are deemed abandoned. Rule 28.

APPEAL by plaintiff from *Small, J.*, at March Term, 1936, of PASQUOTANK. No error.

This is an action to recover the sum of $900.00 paid by the plaintiff to the defendant on 25 January, 1935, under protest, for taxes levied by the defendant for the year 1934, on certain motor boats or vessels owned by the plaintiff, on the ground that said taxes were unlawfully levied by the defendant, for the reason that the city of Elizabeth City was not the *situs* for purposes of taxation of said motor boats or vessels on 1 April, 1934.

At the trial it was admitted that the plaintiff is a corporation, organized under the laws of the State of Delaware, with its principal office in the city of Wilmington in said state, and that the defendant is a municipal corporation, organized under the laws of the State of North Carolina, with authority to levy and collect taxes for municipal purposes on property, real and personal, located within its corporate limits.

It was further admitted that the plaintiff was the owner on 1 April, 1934, of the motor boats or vessels which were assessed for taxation by the defendant for the year 1934; that the taxes levied on said motor boats or vessels by the defendant for the year 1934, amounting to the

sum of $900.00, were paid by the plaintiff on 25 January, 1935, under protest; that demand was duly made by the plaintiff for the refund by the defendant of the amount of said taxes; and that such demand was refused by the defendant prior to the commencement of this action.

Evidence was offered by both plaintiff and defendant tending to support their respective contentions with respect to the *situs* for purposes of taxation of the motor boats or vessels owned by the plaintiff on 1 April, 1934.

The issue submitted to the jury was answered as follows:

"Did the boats in question, for purposes of taxation for the year 1934, have their *situs* in Elizabeth City? Answer: 'Yes.'"

From judgment that it take nothing by its action against the defendant, the plaintiff appealed to the Supreme Court, assigning errors in the trial.

M. B. Simpson and R. Clarence Dozier for plaintiff.
J. W. Jennette and J. H. Hall for defendant.

CONNOR, J. On its appeal to this Court the plaintiff assigns as error the refusal of the trial court to instruct the jury, as requested by it, in writing and in apt time, that "if you believe all the evidence, and find the facts to be as the evidence tends to show, you will answer the issue 'No.'"

This assignment of error cannot be sustained.

There was evidence at the trial tending to show that on 28 February, 1934, the plaintiff, the Texas Company, a corporation organized under the laws of the State of Delaware, with its principal office in the city of Wilmington in said state, purchased from M. L. Clark, a resident of Elizabeth City, in the State of North Carolina, five motor boats, which had theretofore been used by the plaintiff, under a contract with the said M. L. Clark, in the conduct of its business in Elizabeth City, N. C. After their purchase, the plaintiff continued to use said motor boats in the conduct of its business in Elizabeth City, and was so using said motor boats on 1 April, 1934. The said motor boats had not been removed by the plaintiff from Elizabeth City, N. C., to the city of Wilmington, Del., or elsewhere. They made trips constantly from the date of their purchase to the time of the trial, on the sounds and rivers of North Carolina and Virginia, transporting and delivering for the plaintiff oils, gasoline, and other petroleum products, but returned each week to Elizabeth City, where they were tied up at the docks and wharves of the plaintiff in said city, during each week-end.

Prior to 28 February, 1934, M. L. Clark, as owner of said motor boats, listed the same for taxation by the defendant, the city of Eliza-

beth City, and paid the taxes levied on said motor boats annually by said city. On 1 April, 1934, the plaintiff listed for taxation by the defendant all its property, real and personal, located within the corporate limits of Elizabeth City, other than the motor boats which it had purchased from M. L. Clark on 28 February, 1934. The city of Elizabeth City listed or caused to be listed the said motor boats as the property of the plaintiff, at an assessed valuation of $60,000, and levied taxes for the year 1934 at the same rate as was levied by the said city on all property, real and personal, within its corporate limits.

The evidence tending to show that the actual *situs* for purposes of taxation on 1 April, 1934, of the motor boats owned by the plaintiff at said date, was Elizabeth City, in the State of North Carolina, was properly submitted to the jury, under a charge which correctly applied the law to the facts as they should be found by the jury from the evidence. See *Mecklenburg County v. Sterchi Bros. Stores, Inc., ante,* 79, 185 S. E., 454, and cases cited in the opinion in that case by *Clarkson, J.* See, also, *Johnson Oil Refining Co. v. State of Oklahoma,* 290 U. S., 158, 78 L. Ed., 238, and cases cited in the opinion in that case by *Hughes, C. J.*

The *situs* of personal property for purposes of taxation is ordinarily the domicile of the owner. Where, however, the owner maintains said property in a jurisdiction other than that of his domicile, in the conduct of his business within such jurisdiction, the *situs* of said property for purposes of taxation is its actual *situs,* and not that of his domicile. The exception to the general rule is now universally recognized by the courts, both Federal and state.

Assignments of error appearing on the record, although based upon exceptions duly taken at the trial, but not discussed in the brief of appellant, filed in this Court, are deemed to have been abandoned, and for that reason have not been considered by this Court. Rule 28.

The judgment in the instant case is affirmed.

No error.

R. O. MERCER, ADMINISTRATOR, v. ELLA K. WILLIAMS, EXECUTRIX, ET AL.

(Filed 23 September, 1936.)

1. Appeal and Error B b—

The theory of trial in the lower court is controlling on appeal.

2. Negligence A c—Ordinarily, lessor is not liable to lessee for injuries resulting from disrepair of premises.

The evidence tended to show that plaintiff's intestate, a lessee of the premises, was injured and killed when a part of a parapet wall on top of

the leased premises fell through the roof and the two intervening floors of the building and crushed intestate while he was on the first floor of the building, that the wall had been weakened by a fire which had destroyed the adjacent building 48 days previously, and that the wall was blown over in a severe windstorm. *Held:* In the absence of allegations and evidence that the lessors failed to give notice of known or latent defects, or that lessors failed to repair the premises in breach of a covenant to repair, defendants' motion to nonsuit was properly sustained.

3. Landlord and Tenant B c—

Under the common law rule obtaining in this jurisdiction, a lessor is under no implied covenant to repair the premises.

4. Negligence A c—

The general rule is that a landlord is not liable to his tenant for personal injuries sustained by reason of a defective condition of the demised premises unless the landlord contracts to repair and the tenant is injured as a result of work negligently done in the landlord's undertaking to repair.

APPEAL by plaintiff from *Cowper, Special Judge,* at May Term, 1936, of PASQUOTANK.

Civil action to recover damages for death of plaintiff's intestate, alleged to have been caused by the negligent failure of defendants to repair leased premises in breach of covenant to repair, or to give notice of known defects.

In September, 1933, plaintiff's intestate and D. D. Dudley leased from P. H. Williams and Mrs. Eldora Sharber a three-story brick building in Elizabeth City, known as the Kramer Building, for the purpose of conducting a retail hardware business therein, under the name of Carolina Hardware Company. "The contract was oral. They rented the building at $35.00 a month in advance and they were to do all the necessary repairs."

Adjoining and bounding the Kramer Building on the north was the Flora Building. The roof of the Flora Building was 10 or 12 feet higher than the roof of the Kramer Building, and, by permission of the owners, there was superimposed upon the top of the northern wall of the Kramer Building a "parapet wall" from 8 to 14 feet in height.

On 10 February, 1934, the Flora Building was destroyed by fire, and the parapet wall, above mentioned, was left standing in a weakened and damaged condition.

On 20 March, 1934, during a severe windstorm, a section of this parapet wall, near the center and approximately ten feet square, collapsed upon the roof of the Kramer Building, crashed through said roof and the two intervening floors, fell upon plaintiff's intestate and killed him, who, at the time, was on the first floor of the leased premises.

Shortly after the fire, and again fifteen or twenty days later, the chief of police and assistant building inspector of Elizabeth City, in the discharge of his duties, examined the parapet wall in question and reported to Mr. Williams that "the wall was all right and safe and there was not any danger in it." In the meantime, however, the defendants had filed claim with the insurance company for $700, contending that the parapet wall would have to come down. This claim was finally adjusted for $200.

From judgment of nonsuit entered at the close of all the evidence, plaintiff appeals, assigning errors.

MacLean, Pou & Emanuel, M. B. Simpson, and R. Clarence Dozier for plaintiff, appellant.

Thompson & Wilson and McMullan & McMullan for defendants, appellees.

STACY, C. J. In view of the trial theory of the case, which is controlling on appeal (*In re Parker,* 209 N. C., 693, 184 S. E., 532), it is not perceived, upon the allegations presently appearing, how the defendants can be held liable for plaintiff's intestate's death, unfortunate and distressing as it was. The allegation of negligent failure to repair the demised premises, in breach of a covenant to do so, is not made out. *Improvement Co. v. Coley-Bardin,* 156 N. C., 255, 72 S. E., 312. Nor is it established by the evidence that the defendants negligently omitted to give notice of known or latent defects. *Gaither v. Generator Co.,* 121 N. C., 384, 28 S. E., 546.

The plaintiff relies upon the unusuality of the situation and concedes that the general rule of liability as between landlord and tenant is not so favorable to a recovery. *Hudson v. Silk Co.,* 185 N. C., 342, 117 S. E., 165. Indeed, the cases of *Tucker v. Yarn Mill,* 194 N. C., 756, 140 S. E., 744, and *Fields v. Ogburn,* 178 N. C., 407, 100 S. E., 583, would seem to be sufficiently in point and illustrative of the principles involved to preclude a disturbance of the judgment of nonsuit.

At the common law, which obtains in this jurisdiction, a lessor is under no implied covenant to repair, or to keep in repair, the demised premises. *Improvement Co. v. Coley-Bardin, supra.* And even with an express agreement to repair, liability for personal injuries to the tenant, his family, servants, or guests, sustained by reason of its breach, is ordinarily held to be beyond the terms of such agreement and not within the contemplation of the parties. *Jordan v. Miller,* 179 N. C., 73, 101 S. E., 550. Damages arising from such injuries are usually regarded as too remote, whether the action against the landlord be in contract or in tort. 16 R. C. L., 1095. The general rule is, that a

landlord is not liable to his tenant for personal injuries sustained by reason of a defective condition of the demised premise, unless there be a contract to repair which the landlord undertakes to fulfill and does his work negligently to the injury of the tenant. *Fields v. Ogburn, supra; Colvin v. Beals,* 187 Mass., 250.

The facts alleged and shown are not sufficient to take the case out of the general rule, hence on the record as presented, we are of opinion the judgment of nonsuit was properly entered.

Affirmed.

STATE v. MARTIN MOORE.

(Filed 23 September, 1936.)

1. Criminal Law L e—

An appeal from a judgment in a criminal prosecution must be taken to the term of the Supreme Court commencing next after the rendition of the judgment, and the appeal docketed fourteen days before the call of the district to which it belongs.

2. Same—

Where, from lack of time or for other cogent reason, a case is not ready for hearing in accordance with the Rules of Court, appellant may, within the time prescribed, file the record proper and move for *certiorari*, which motion is addressed to the discretion of the Court.

3. Criminal Law L d—

Where the record and transcript are not docketed in the Supreme Court at the proper time, and no *certiorari* is allowed, the Superior Court, on proper notice, may adjudge the appeal abandoned on proof of such facts.

4. Criminal Law L e—

An order of the Superior Court enlarging the time for serving statement of case on appeal and exceptions thereto or countercase, C. S., 643, as amended by ch. 97, Public Laws of 1921, does not affect the Rules of Court prescribing the term to which the appeal must be taken and the time within which the appeal must be docketed.

5. Same—

The Rules of Court governing appeals are mandatory and must be uniformly enforced, and they may not be set at naught by act of the Legislature, order of the Superior Court, or by consent of litigants or counsel.

6. Same—Motion for certiorari allowed under the facts of this case.

Defendant, convicted of a capital crime at a term of court commencing two weeks before the next succeeding term of the Supreme Court, failed to docket his appeal within the time prescribed or to docket the record proper and move for *certiorari*. The State moved to dismiss, and defend-

ant entered a counter-motion for *certiorari.* *Held:* Although the appeal is subject to dismissal under the Rules of Court, the State's motion is held in abeyance and defendant's motion for *certiorari* allowed, since the life of defendant is at stake.

MOTION by State to docket and dismiss appeal.

Counter-motion by defendant for *certiorari* to have case brought up from Buncombe Superior Court and heard on appeal.

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

Sanford W. Brown for defendant.

STACY, C. J. At the August Term, 1936, of Buncombe Superior Court, which convened 17 August, the defendant herein, Martin Moore, was tried upon indictment charging him with the murder of one Helen Clevenger, which resulted in a conviction of murder in the first degree and sentence of death. From the judgment thus entered, the defendant gave notice of appeal to the Supreme Court, and by consent was allowed 45 days within which to make out and serve his statement of case on appeal, and the solicitor was given 30 days thereafter to prepare and file exceptions or countercase.

The Fall Term of this court commenced 31 August, and the call of the docket from the Nineteenth District, the district to which the appeal belongs, was scheduled for Wednesday, 9 September.

Observing that no appeal bond had been filed (Rule 6, sec. 1), that no application had been made by the defendant to appeal *in forma pauperis* (*S. v. Stafford,* 203 N. C., 601, 166 S. E., 734), and that the record proper had not been docketed as a basis for motion for *certiorari* to preserve the right of appeal as required by the rules (*S. v. McLeod,* 209 N. C., 54, 182 S. E., 713; *S. v. Harris,* 199 N. C., 377, 154 S. E., 628), the Attorney-General of the State and the solicitor of the district, on 5 September, supererogatorily notified counsel for defendant that motion to docket and dismiss the appeal would be made on 9 September, which was done. On the following day, 10 September, counsel for defendant appeared and moved for *certiorari.*

Under the settled rules of procedure, an appeal from a judgment rendered prior to the commencement of a term of the Supreme Court must be brought to the next succeeding term; and, to provide for a hearing in regular order, it is required that the appeal shall be docketed here fourteen days before entering upon the call of the district to which it belongs, with the proviso that appeals in civil cases (but not so in criminal cases) from the First, Second, Nineteenth, and Twentieth Districts, tried between the first day of January and the first Monday in

February, or between the first day of August and the fourth Monday in August, are not required to be docketed at the immediately succeeding term of this Court, though if docketed in time for hearing at said first term, the appeal will stand regularly for argument. Rule 5, Vol. 200, p. 816, as amended, Vol. 203, p. 856; *S. v. Trull,* 169 N. C., 363, 85 S. E., 133.

The single modification of this requirement, sanctioned by the decisions, is, that where, from lack of sufficient time or other cogent reason, the case is not ready for hearing, it is permissible for the appellant, within the time prescribed, to docket the record proper and move for a *certiorari,* which motion may be allowed by the Court in its discretion, on sufficient showing (*S. v. Angel,* 194 N. C., 715, 140 S. E., 727), but such writ is not one to which the moving party is entitled as a matter of right. *S. v. Farmer,* 188 N. C., 243, 124 S. E., 562. The issuance of a writ of *certiorari,* however, does not perforce change the time already fixed by agreement of the parties, or by order of court, for serving statement of case on appeal, and exceptions or countercase. *Smith v. Smith,* 199 N. C., 463, 154 S. E., 737.

If the record and transcript are not docketed here at the proper time and no *certiorari* is allowed, the court below, on proof of such facts, may, on proper notice, adjudge that the appeal has been abandoned, and proceed in the cause as if no appeal had been taken. *S. v. Taylor,* 194 N. C., 738, 140 S. E., 728; *Dunbar v. Tobacco Growers,* 190 N. C., 608, 130 S. E., 505; *Jordan v. Simmons,* 175 N. C., p. 540, 95 S. E., 919; *Avery v. Pritchard,* 93 N. C., 266.

Nor is the situation bettered when the time for serving statement of case on appeal and exceptions thereto or counter-statement of case is enlarged by order of the judge trying the case as he is authorized, in his discretion, under C. S., 643, as amended by chapter 97, Public Laws 1921, to do, for this statute gives him no more authority to abrogate the rules of the Supreme Court than litigants or counsel would have to impinge upon them by consent or agreement. *Waller v. Dudley,* 193 N. C., 354, 137 S. E., 149; *Cooper v. Comrs.,* 184 N. C., 615, 113 S. E., 569.

We have held in a number of cases that the rules of this Court, governing appeals, are mandatory and not directory. *Calvert v. Carstarphen,* 133 N. C., 25, 45 S. E., 353. They may not be disregarded or set at naught (1) by act of the Legislature (*Cooper v. Comrs., supra*), (2) by order of the judge of the Superior Court (*Waller v. Dudley, supra*), (3) by consent of litigants or counsel. *S. v. Farmer, supra.* The Court has not only found it necessary to adopt them, but equally necessary to enforce them and to enforce them uniformly. *Womble v. Gin Co.,* 194 N. C., 577, 140 S. E., 230. See *Porter v. R. R.,* 106 N. C., 478, 11 S. E., 515, for summary of the decisions.

In the case at bar, the defendant's appeal was due to be heard, or the Court informed as to why it was not ready for hearing, at the call of the Nineteenth District, which was on 9 September. The motion of the Attorney-General, therefore, is well advised and is supported by numerous authorities. *S. v. Crowder,* 195 N. C., 335, 142 S. E., 222; *S. v. Trull, supra; Pruitt v. Wood,* 199 N. C., 788, 156 S. E., 126; *Pentuff v. Park,* 195 N. C., 609, 143 S. E., 139; *Womble v. Gin Co., supra; Trust Co. v. Parks,* 191 N. C., 263, 131 S. E., 637; *Finch v. Comrs.,* 190 N. C., 154, 129 S. E., 195.

On the other hand, the defendant's life is at stake; he shows merit; and while he offers little or no excuse for his laches, still we are disposed to hold the State's motion in abeyance, and to grant him his writ. This will issue, and the cause will be set for hearing, tentatively at least, at the end of the call of the Seventh District at the present term.

Certiorari allowed.

M. G. WRIGHT, TRADING AS WRIGHT PURITY ICE AND FUEL COMPANY, v. D. PENDER GROCERY COMPANY.

(Filed 23 September, 1936.)

1. **Negligence D d—Instruction held for error in failing to charge that contributory negligence bars recovery if it concurs in producing injury.**

   An instruction that the burden was on defendant to prove that plaintiff's negligence was the proximate cause of the injury in order for defendant to sustain the defense of contributory negligence *is held* erroneous for failing to instruct on the element of concurring or coöperating negligence, it not being necessary that contributory negligence be the sole proximate cause of the injury in order to bar recovery, it being sufficient if such negligence is one of the proximate concurring causes of the injury.

2. **Appeal and Error J e—**

   An erroneous instruction upon a defense raised by the answer and supported by defendant's evidence cannot be held harmless upon defendant's appeal upon plaintiff's contention that the error was immaterial because defendant's evidence was insufficient to support the defense.

APPEAL by defendant from *Small, J.,* at March Term, 1936, of PASQUOTANK. New trial.

Action to recover damages for injury to plaintiff's truck, alleged to have been caused by the negligence of the defendant.

Upon allegations of negligence, contributory negligence, and damages, and the testimony in support thereof, appropriate issues were submitted to the jury and all answered in favor of the plaintiff, and from judgment in accordance therewith defendant appealed.

J. H. LeRoy, Jr., for plaintiff, appellee.
Worth & Horner for defendant, appellant.

DEVIN, J. The only assignment of error is to the judge's charge on the issue of contributory negligence. The defendant complains that the court below failed to properly instruct the jury on this phase of the case. It appears from the record that the court, after properly defining negligence and proximate cause, used this language with reference to the first issue: "If you are satisfied by the greater weight of the evidence, first, that the defendant was negligent, and, second, that the defendant's negligence was the proximate cause of the injury, you would answer the first issue 'Yes.' If not so satisfied, you would answer it 'No,'" and that he charged the jury on the second issue as follows: "The burden of that issue is on the D. Pender Company to satisfy you, by the greater weight of the evidence, the same degree of proof, that it was the plaintiff's negligence that caused the injury to plaintiff's truck. If you are satisfied, by the greater weight of the evidence, that the plaintiff's negligence was the proximate cause of plaintiff's injury to his truck, you will answer the second issue 'Yes.' If you are not so satisfied, you will answer the second issue 'No.'"

The defendant complains that the vice of this charge consisted in the failure to properly define contributory negligence and the omission from the instructions thereon of the element of concurring or coöperating negligence. And from the record before us we are constrained to the view that the learned judge inadvertently overlooked this material aspect of the case.

In *Moore v. Iron Works,* 183 N. C., 438, *Stacy, C. J.,* in accord with the uniform decisions of this Court, defined contributory negligence as follows: "Contributory negligence, such as will defeat a recovery in a case like the one at bar, is a negligent act of the plaintiff, which, concurring and coöperating with the negligent act of the defendant, thereby becomes the real, efficient, and proximate cause of the injury, or the cause without which it would not have occurred." *Boswell v. Hosiery Mills,* 191 N. C., 549; *Inge v. R. R.,* 192 N. C., 522.

The plaintiff's negligence need not have been the sole proximate cause of the injury. If his negligence was one of the proximate causes, the plaintiff would not be entitled to recover. To charge the jury that the burden was on the defendant to show that the plaintiff's negligence was the proximate cause of the injury would exclude the idea of the concurring negligence of both plaintiff and defendant proximately contributing to the injury. *Scott v. Tel. Co.,* 198 N. C., 795; *Lunsford v. Mfg. Co.,* 196 N. C., 510; *West Const. Co. v. R. R.,* 184 N. C., 179.

The injury complained of occurred in the State of Virginia, and the courts of that state have held instructions similar to those complained of

in the case at bar to be erroneous in the respects herein pointed out. *Powhatan Lime Co. v. Affleck's Administrator,* 115 Va., 643; *Norfolk & Western R. R. v. Cromer's Administratrix,* 99 Va., 763; *Richmond Traction Co. v. Martin's Administrator,* 102 Va., 209. As was said by *Keith, P. J.,* in *Norfolk & Western R. R. v. Cromer's Administratrix, supra:* "The very term 'contributory negligence' implies that it need not be the exclusive cause of the injury. It is enough if it contributes to the injury."

The plaintiff, however, argues that there was here no evidence of contributory negligence, and that any omission on the part of the judge in his charge on this issue was immaterial and harmless.

We cannot concur in this view. Contributory negligence was set up in the answer, and after the evidence was presented, the court submitted the proper issue addressed to the question thus raised. The evidence on this issue was sufficient to warrant its submission to the jury.

For the reasons herein set out, there must be a

New trial.

CITIZENS BANK OF MARSHALL v. GRADY GAHAGAN ET AL.

(Filed 23 September, 1936.)

1. **Executors and Administrators D h—Complaint declaring on note and maker's assignment of his interest in estate held insufficient to allege cause of action against executors of the estate.**

   Plaintiff brought this action against the maker of a note and against the executors of his father's estate, alleging that the maker had assigned his interest in his father's estate as collateral security for the note, and that the executors owed the maker a sum in excess of the note which had not been paid to plaintiff. *Held:* A motion to dismiss as to one of defendants on the ground that she had never qualified as an executrix should have been allowed, and the other executors' demurrers in their individual and representative capacities should have been sustained, the complaint stating no cause of action against them individually, and its allegations being insufficient to state a cause against them in their representative capacity, since plaintiff did not allege the facts upon which he concluded they owed the maker the sum alleged, or that the sum alleged was covered by the maker's assignment.

2. **Pleadings A a—**

   The complaint must state in a plain and concise manner all facts necessary to enable plaintiff to recover. C. S., 506, 535.

3. **Pleadings D e—**

   A demurrer admits facts properly pleaded, but not inferences or conclusions of law.

4. Pleadings E d—

Where it is determined on appeal that defendants' demurrers should have been sustained, plaintiff may ask to be allowed to amend its complaint. C. S., 515.

APPEAL by defendants, other than Grady Gahagan, from *McElroy, J.*, at March Term, 1936, of MADISON.

Civil action to recover $1,210, balance alleged to be due on promissory note, executed by defendant Grady Gahagan to plaintiff, and secured by assignment of maker's interest, as heir or legatee, in his father's estate.

The complaint declares upon the note and assignment. Grady Gahagan filed answer, and the cause is now pending between him and the plaintiff.

In respect to the other defendants, it is alleged that the said "defendants, executors of the last will and testament of Wade Gahagan, are now due and owing to the defendant, Grady Gahagan, and unpaid to this plaintiff, the sum of $1,697.33."

Motion lodged by Bonnie Gahagan to dismiss action as to her, or to strike out her name as defendant, because she had never qualified as executrix. Overruled; exception.

Demurrers interposed by the defendants, individually and as executors, on ground that complaint does not state facts sufficient to constitute cause of action as to them, either in their official capacity or as individuals. Overruled; exception.

Defendants appeal, assigning errors.

Don C. Young, John H. McElroy, and J. Coleman Ramsey for plaintiff, appellee.

Calvin R. Edney and James E. Rector for defendants, appellants.

STACY, C. J. The motion of Bonnie Gahagan that she be eliminated as a defendant seems well founded and should have been allowed. *Winders v. Southerland,* 174 N. C., 235, 93 S. E., 726; *Worth v. Trust Co.,* 152 N. C., 242, 67 S. E., 590. Indeed, it is not alleged in the complaint, other than inferentially perhaps, that any of the defendants ever qualified as executors under the will of Wade Gahagan, deceased.

The complaint alleges no cause of action against the defendants, individually. Hence, the demurrer thus interposed should have been sustained.

Nor is it thought that sufficient facts are stated to constitute a cause of action against the executors. The allegation of the amount "now due and owing the defendant Grady Gahagan" seems only a conclusion of the pleader. The facts upon which this conclusion rests are not stated.

It is not alleged how the indebtedness arose or that it is covered by plaintiff's assignment.

While "unnecessary repetition" is condemned by the statute, C. S., 506, and allegations of pleadings are to be construed liberally "with a view to substantial justice between the parties," C. S., 535, still it is a necessary requirement that the complaint shall contain "a plain and concise statement of the facts constituting a cause of action," C. S., 506, which means that it shall contain a plain and concise statement of all the facts necessary to enable the plaintiff to recover. *Comrs. v. McPherson,* 79 N. C., 524; *Ins. Co. v. Dey,* 206 N. C., 368, 174 S. E., 89.

A demurrer admits facts properly pleaded, but not inferences or conclusions of law. *Distributing Corp. v. Maxwell,* 209 N. C., 47, 182 S. E., 724; *Phillips v. Slaughter,* 209 N. C., 543, 183 S. E., 897; *Hussey v. Kidd,* 209 N. C., 232, 183 S. E., 355; *Phifer v. Berry,* 202 N. C., 388, 163 S. E., 119. The present complaint would seem to be bad as against the demurrers.

It is still open to the plaintiff, however, to ask to be allowed to amend its complaint, if so advised. C. S., 515; *Oliver v. Hood, Comr.,* 209 N. C., 291, 183 S. E., 657.

It should be observed that this is not an administration suit. *Rigsbee v. Brogden,* 209 N. C., 510, 184 S. E., 24.

Reversed.

MORGAN V. WALKER, ADMINISTRATOR, v. G. R. LOYALL ET AL.

(Filed 23 September, 1936.)

Torts B a—Held: Neither complaint nor answer alleged cause against party joined as codefendant on motion of original defendant.

Defendant had another party joined as codefendant, and filed answer denying negligence on his part and alleging that the negligence of his codefendant was the sole proximate cause of the injury in suit, but demanding no relief against his codefendant. *Held:* The demurrer of the party joined should have been sustained on authority of *Bargeon v. Transportation Co.,* 196 N. C., 776, neither the complaint nor the answer of the original defendant alleging any cause of action against him, and C. S., 618, permitting contribution among joint tort-feasors, being inapplicable since the answer of the original defendant alleges sole liability on the part of his codefendant and not joint tort-feasorship.

APPEAL by defendant administrator from *Grady, J.,* at February Term, 1936, of PASQUOTANK.

Civil action to recover damages for alleged wrongful death.

The original summons was not served on the receivers of the Norfolk Southern Railroad; whereupon the defendant administrator, upon motion, procured an order making the receivers parties, and summons was duly issued and served. The administrator filed answer denying liability and alleging that plaintiff's intestate's death was caused by the sole negligence of the receivers. No relief, however, is asked against the receivers by the defendant administrator.

The receivers demurred to the complaint and to the answer of the defendant administrator upon the ground that neither pleading states facts sufficient to constitute a cause of action against them. Demurrer sustained, from which ruling the defendant administrator alone appeals.

No counsel appearing for plaintiff.
John H. Hall for defendant, administrator, appellant.
Thompson & Wilson for defendants, receivers, appellees.

STACY, C. J. The judgment of the Superior Court must be affirmed on authority of *Bargeon v. Transportation Co.*, 196 N. C., 776, 147 S. E., 299, which is controlling upon the facts presently appearing of record. The two cases are not distinguishable by reason of the amendment to C. S., 618, enacted 27 February, 1929, permitting contribution between joint tort-feasors, because the allegation of the defendant administrator is one of sole liability on the part of the receivers, if any liability at all, and not one of joint tort-feasorship. *Ballinger v. Thomas*, 195 N. C., 517, 142 S. E., 761.

Nothing can be added to what was said in the *Bargeon case, supra,* where the late *Justice Brogden,* with his usual clarity and conciseness, covers the whole matter. The decision is directly in point and is decisive of the present appeal.

Affirmed.

FLOSS ALLISON v. H. GRADY REAGAN, HARRY L. PARKER, AND SAM A. JOHNSON, COMMISSIONERS OF BUNCOMBE COUNTY AND EX OFFICIO TRUSTEES OF THE SWANNANOA WATER AND SEWER DISTRICT, AND BUNCOMBE COUNTY.

(Filed 23 September, 1936.)

Drainage Districts B b—Owner of land within sanitary districts may not escape levy of tax on ground that his land cannot be benefited.

A special tax levied upon all property within the boundaries of a sanitary district under express statutory authority will not be declared invalid as to an owner of land within the district because the land of such

owner is not and cannot be benefited by water or sewer lines which have or may be constructed within the district because the topography of the land renders the construction of such lines to his land economically prohibitive.

APPEAL by plaintiff from *McElroy, J.*, at May Term, 1936, of BUNCOMBE. Affirmed.

This is an action to enjoin the collection of taxes levied by the defendants on property, real and personal, located within the boundaries of the Swannanoa Water and Sewer District in Buncombe County, and owned by the plaintiff, on the ground that said taxes are illegal for the reasons set out in the complaint.

At the trial it was agreed by and between the plaintiff and the defendants:

"1. That the plaintiff is a citizen and resident of the county of Buncombe and of the State of North Carolina, and that the individual defendants constitute the Board of County Commissioners of Buncombe County, and as such are *ex officio* trustees of the Swannanoa Water and Sewer District; that the defendants named as commissioners and *ex officio* trustees of the Swannanoa Water and Sewer District, as such, are charged with the duty of levying and collecting taxes due the county of Buncombe, and also the Swannanoa Water and Sewer District.

"2. That chapter 341 of the Public-Local Laws of North Carolina, Session 1923, is entitled 'An act to create sanitary districts in Buncombe County, and describing their purposes and powers'; and that the General Assembly of North Carolina, by chapter 249, Public-Local Laws of North Carolina, Session 1927, entitled 'An act to ratify and approve the incorporation of the Swannanoa Sanitary Sewer District, heretofore created by the Board of Commissioners of Buncombe County, under the provisions of chapter 341, Public-Local Laws of North Carolina, Session 1923,' authorized, ratified, and confirmed all the proceedings taken by the Board of County Commissioners of Buncombe County in creating the Swannanoa Water and Sewer District; and that thereafter the General Assembly of North Carolina by chapter 139, Public-Local Laws of North Carolina, Session 1931, entitled 'An act to amend chapter 249, Public-Local Laws of North Carolina, Session 1927,' authorized the Board of County Commissioners of Buncombe County to take over all properties of the trustees of the Swannanoa Water and Sewer District, and thereby vested in said Board of County Commissioners, as of 4 March, 1931, all the powers and duties of the trustees of said district, including specific powers and duties of maintaining and operating said district, and for the purpose of so maintaining and operating said district, to levy and collect taxes upon property within the territory of said water and sewer district; and that said Board of

County Commissioners are now operating and maintaining said district and have levied a tax upon the lands and premises of the plaintiff herein, and upon the lands of other persons located within said territory.

"3. That the defendants, as members of the Board of County Commissioners of Buncombe County, have included in their 1935-1936 budget a maintenance and a debt service tax, making a total levy of 31 cents on the one hundred dollars valuation on all property within said sanitary water and sewer district, and at the time of including the levy of the tax aforesaid the plaintiff was and is now the owner of property, real and personal, located within said water and sewer district, and defendants have levied upon said property of the plaintiff the tax as aforesaid.

"4. That pursuant to the acts of the General Assembly of North Carolina hereinbefore mentioned, the trustees of said district have constructed sewer lines under the provisions of the same; that the main sewer line, as constructed by the said trustees, is more than three miles from the lands of the plaintiff; and that said trustees endeavored to construct a branch or trunk line sewer and to service the lands and premises of the plaintiff, and other persons, approximately five years ago, but defendants do not now have any funds with which to complete said branch line and sewer.

"5. That the lands and premises of the plaintiff are located in a deep gorge or valley, surrounded by mountains, and by reason of its topographical situation, from an engineering standpoint, it will be practically impossible and prohibitive for financial reasons for the defendants, or their successors in office, ever to give sewer service to any of the lands of the plaintiff located within the boundaries of said water and sewer district."

On the foregoing agreed facts, the court was of opinion that the tax levied by the defendants on the property of the plaintiff is not illegal, and so adjudged.

From judgment denying the relief prayed for in his complaint, the plaintiff appealed to the Supreme Court.

W. G. Fortune and Sale, Pennell & Pennell for plaintiff.
Brandon P. Hodges and Clinton K. Hughes for defendants.

PER CURIAM. The validity of the special tax levied by the defendants on property, real and personal, located within the boundaries of the Swannanoa Water and Sewer District, under express statutory authority, is not challenged by the plaintiff. He contends that the tax levied on his property located within the boundaries of said district is illegal, because, on the facts admitted at the trial, his property is not and cannot be benefited by the water or sewer lines which have been or

which may hereafter be constructed within said district. This contention cannot be sustained. See *Valley Farms Co. v. Westchester County,* 261 U. S., 155, 67 L. Ed., 585. In that case it is held that "property may be included within a district for the construction of a sewer for house drainage, and assessed at its taxable value, although it can derive no benefit from the sewer without a large additional outlay not yet planned, without depriving the owner of the property without due process of law, in violation of the Federal Constitution." This principle is in accord with the decisions cited in the opinion by *Mr. Justice McReynolds.*

The judgment is
Affirmed.

FIRST AND CITIZENS NATIONAL BANK v. SUDIE TOXEY, W. C. LLOYD TOXEY, SARAH J. TOXEY, AND J. H. AYDLETT.

(Filed 23 September, 1936.)

1. **Bills and Notes H c—**

Where a party denies that he endorsed the note sued on or authorized his signature thereto, evidence that he endorsed the original note, and that the note sued on was executed in renewal of the original note, is competent on the issue.

2. **Evidence E d—**

Statements made by agents or employees after completion of the transaction in question are inadmissible against the principal.

3. **Appeal and Error A c—**

Where a party dies pending appeal, his personal representative will be made a party by order of the Court. Rule 37.

APPEAL by defendant J. H. Aydlett from *Small, J.,* at March Term, 1936, of PASQUOTANK. No error.

This is an action to recover on a note for $500.00, payable to the plaintiff. The note was due on 26 September, 1932. The action was begun on 9 September, 1935.

It is alleged in the complaint that the note sued on was executed by the defendants Sudie Toxey and W. C. Lloyd Toxey, as makers, and by the defendants Sarah J. Toxey and J. H. Aydlett, as endorsers.

Judgment by default for want of answers was rendered by the clerk of the Superior Court of Pasquotank County, in favor of the plaintiff and against the defendants Sudie Toxey, W. C. Lloyd Toxey, and Sarah J. Toxey.

The defendant J. H. Aydlett filed an answer in which he denied that he endorsed the note sued on, and alleged that he did not write or authorize anyone to write his name on the back of the note sued on.

At the trial the issues were answered by the jury as follows:

"1. Did the defendant J. H. Aydlett endorse the note sued on? Answer: 'Yes.'

"2. In what amount, if any, is the defendant J. H. Aydlett indebted to the plaintiff on the note sued on, dated 26 August, 1932? Answer: '$500.00, with interest from 26 September, 1932.'"

From judgment in accordance with the verdict, the defendant J. H. Aydlett appealed to the Supreme Court, assigning as errors rulings of the trial court with respect to evidence.

John H. Hall for plaintiff.
M. B. Simpson for defendant.

PER CURIAM. At the trial evidence was offered by the plaintiff tending to show that the note sued on was tendered to and accepted by the plaintiff in renewal of a note payable to the plaintiff, which was executed by the defendants Sudie Toxey and W. C. Lloyd Toxey, as makers, and by the defendants Sarah J. Toxey and J. H. Aydlett, as endorsers. The defendants' objection to this evidence was overruled. The evidence was competent as tending to show that the defendant had endorsed the note sued on, as the evidence for the plaintiff tended to show. The decision in *American Bank and Trust Co. v. Harris,* 180 N. C., 238, 104 S. E., 458, is not applicable in this appeal.

Evidence was offered by the defendant tending to show statements made by officers and employees of the plaintiff, subsequent to the acceptance by the plaintiff of the note sued on, to the effect that the name of the defendant appearing on the back of the note was not in his handwriting. This evidence was properly excluded. See *Hamrick v. Telegraph Co.,* 140 N. C., 151, 52 S. E., 232.

We find no error in the trial. The judgment is affirmed.

While this appeal was pending in this Court, the defendant J. H. Aydlett died. His administrator, Julian E. Aydlett, was duly made a party defendant by an order made by this Court. Rule 37.

No error.

ANDREW J. BLANKENSHIP v. THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES.

(Filed 23 September, 1936.)

Insurance R c—

Evidence that plaintiff, insured under an employee's group policy, was disabled as defined in the policy at the time he ceased to be an employee *held* sufficient to be submitted to the jury in this case.

APPEAL from *Oglesby, J.*, at January Term, 1936, of HAYWOOD. No error.

Chester A. Cogburn and Smathers, Martin & McCoy for plaintiff, appellee.
DuBose & Orr for defendant, appellant.

PER CURIAM. This is an action to recover for total and permanent disability upon a certificate issued to the plaintiff, as an employee of the Champion Fibre Company, to which the defendant had issued a group life, health, and accident insurance policy.

The defendant admitted that the group policy and certificate were in effect on and before 16 June, 1932, the date plaintiff ceased to work for the fibre company, but denied that the plaintiff was totally and permanently disabled at that time as contemplated by the policy and certificate, and on appeal contends that its demurrer to the evidence and motion for judgment of nonsuit should have been sustained.

The defendant contends that this case is governed by *Thigpen v. Insurance Co.,* 204 N. C., 551; *Boozer v. Assurance Society,* 206 N. C., 848, and similar cases. The plaintiff contends that the case falls within the principle enunciated in *Smith v. Assurance Society,* 205 N. C., 387, and *Fore v. Assurance Society,* 209 N. C., 548, and cases there cited.

The evidence tended to show that the plaintiff began work for the Champion Fibre Company on 1 December, 1931, and in December, 1931, he failed to work for several weeks on account of illness, but resumed work and continued it until 16 June, 1932, when he suffered a serious attack with his head and was forced to quit work; that he was unconscious for several days and was treated by a physician; that in 1934 for a month or two plaintiff worked on a PWA improvement project at Morning Star Schoolhouse, and in February, 1935, he worked awhile repairing sanitary privies, and later worked in a cannery project of the PWA at Waynesville; that while working at the Morning Star Schoolhouse the plaintiff was assigned to light work, using a small rake, but was sick off and on, and ofttimes had to lie down to prevent an attack with his head; that while working on the privies plaintiff used a saw and hammer, and later, because he could not do physical work without becoming ill, was put in charge of the crew and did a little work supervising the laying of a pipe line in West Canton; that the work he did at the cannery was carrying meat in a dishpan from one table to another, and that while performing this work he was taken with a severe attack with his head and was in the hospital several days, and when he went back to the cannery he was put to work stamping with a rubber stamp labels which went on the canned meat. The evidence further tended

to show that plaintiff tended a few acres of land at different times during 1932, 1933, 1934, and 1935, where his son and some hired help did the work, except some little plowing for an hour or two a day, which plaintiff undertook to do; and that the plaintiff was also the deputy sheriff of Haywood County, upon a fee basis without salary, for a year or two prior to the trial of this case, and has served a few civil papers, arrested one or two men, and had assisted other deputies in raiding one or two illicit liquor distilleries; that during the whole period of time from 16 June, 1932, when plaintiff ceased to work for the Champion Fibre Company to 6 January, 1936, the time of the trial of this case, the plaintiff had earned less than $150.00, and that while he worked for the fibre company prior to 16 June, 1932, he earned $1,000 per year; that on 16 June, 1932, and since that time, plaintiff has suffered from a cyst or tumor of the brain.

We think, and so hold, that the evidence, when considered in the light most favorable to the plaintiff, as it must be on a motion for nonsuit, justified the inference that the plaintiff was on 16 June, 1932, "totally and permanently disabled by bodily injury or disease so as presumably to be thereby continuously prevented for life from engaging in any occupation or performing any work for compensation of financial value," and for that reason the issue in the language of the certificate issued to the plaintiff by the defendant was properly submitted to the jury.

We have examined the exceptions to the evidence and to the failure to instruct the jury as requested, and find them without merit.

The jury having answered the issue in favor of the plaintiff, the judgment based upon the verdict must be affirmed.

No error.

STATE v. WATTS RHODES.

(Filed 23 September, 1936.)

Intoxicating Liquor G c—Evidence held sufficient, without regard to statutory presumption, on charge of possessing whiskey for sale.

Evidence that officers found a funnel, and a number of containers, and glasses smelling of whiskey, some of which had a small quantity of whiskey in them, in different places on defendant's premises, *is held* sufficient to be submitted to the jury in a prosecution of defendant on a charge of having possession of intoxicating liquor for the purpose of sale, although the amount of whiskey discovered on the premises was insufficient to invoke the presumption under the provisions of C. S., 3379 (2).

APPEAL by defendant from *Harris, J.,* at June Term, 1936, of MARTIN. *No error.*

The defendant was charged with the possession of intoxicating liquor for the purpose of sale, and from judgment pronounced upon a verdict of guilty as charged, defendant appealed.

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

H. L. Swain for defendant.

PER CURIAM. The only assignment of error is to the refusal of the court to allow defendant's motion for judgment as of nonsuit.

The evidence for the State was to the effect that the defendant was the proprietor of a small store, operated a pool table, and had groceries for sale; that upon a search of the premises the officers found two bottles with about a tablespoonful of whiskey and a glass jug with about a half pint of whiskey in it, two small glasses with odor of whiskey, and a small funnel with odor of whiskey. These bottles and jug were behind the counter. The glasses were on a shelf on the other side of the store. In addition, there were several fruit jars in one corner of the store which had odor of whiskey in them. Outside the back door at the end of a path about eight steps away were found six pints of whiskey, concealed in some weeds.

While the quantity of whiskey found was not sufficient to invoke the statutory provision making out a *prima facie* case under C. S., 3379, the various vessels in which the liquor was contained, the paraphernalia, location, and other surrounding circumstances, did constitute some evidence of the purpose and intent with which the whiskey was possessed by the defendant. As was said in *S. v. Langley,* 209 N. C., 178: "Without regard to the statutory presumption arising from the quantity of liquor in possession, under C. S., 3379 (2), . . . the facts and circumstances shown by the evidence were sufficient to justify the inference by the jury that the defendant had such liquor in his possession for sale."

The motion for judgment as of nonsuit was properly overruled. In the trial we find

No error.

CHARLES M. BRITT, PLAINTIFF, v. CHESTER R. HOWELL AND HARRIS-GIBSON-HOWELL COMPANY, INC., DEFENDANTS.

(Filed 23 September, 1936.)

Corporations G i—Evidence held insufficient to show corporation's liability for slanderous remarks uttered by alleged agent.

Plaintiff's evidence failed to show any organization of defendant corporation at the time the alleged slander was uttered, or that the individual defendant was an incorporator, officer, or stockholder, although it did appear that the certificate of incorporation had been filed in the office of the Secretary of State the day previous, C. S., 1116. Plaintiff's evidence also failed to show the character of the individual defendant's alleged agency, or that the corporation impliedly authorized him to utter the slanderous remarks or thereafter ratified same. *Held:* The corporate defendant's motion to nonsuit was properly allowed.

APPEAL by plaintiff from *McElroy, J.*, at March Term, 1936, of BUNCOMBE. Affirmed.

This was an action for damages for slander alleged to have been uttered by defendant Chester R. Howell, acting for himself and his codefendant, Harris-Gibson-Howell Company, Inc.

At the conclusion of plaintiff's evidence, motion for judgment of nonsuit as to the corporate defendant was sustained, and thereupon plaintiff submitted to voluntary nonsuit as to the individual defendant, and from judgment dismissing the action, appealed.

Lee & Lee for plaintiff, appellant.
Smathers, Martin & McCoy and Vonno L. Gudger for defendants, appellees.

PER CURIAM. The determinative question presented here is whether there was sufficient evidence to go to the jury on the question of the liability of the corporate defendant for words spoken by the individual defendant, Chester R. Howell.

The words complained of were spoken by defendant Howell 13 April, 1934. The certificate of incorporation was signed by James Monroe Harris, Mrs. Elizabeth Pierce Harris, and Claude Lester Gibson, as incorporators, 3 April, 1934. This certificate was filed in the office of the Secretary of State 12 April, 1934, and a certified copy thereof recorded in the office of the clerk of the Superior Court of Buncombe County 27 April, 1934. The principal business authorized was that of food brokers. There was in evidence a letter signed "Harris-Gibson-Howell Co., Inc.," dated 12 April, 1934, written on the stationery of Harris-

Davis Company, addressed to "Our Principals and Customers," advising them that they had that day formed an organization to be known as Harris-Gibson-Howell Co., Inc., and would occupy certain warehouses in Asheville, N. C., and giving the business records of J. Monroe Harris, "our President," and that of Claude L. Gibson, who would "continue to cover the same territory for the new company," and of Chester R. Howell, stated to have been formerly with the Asheville Grocery Company and Chas. M. Britt Company.

While the statute provides that the incorporators become a body corporate from the date of filing the certificate in the office of the Secretary of State (C. S., 1116; *Benbow v. Cook,* 115 N. C., 325; *Powell v. Lumber Co.,* 153 N. C., 52; *Wood v. Staton,* 174 N. C., 245), there was here no evidence of any organization of defendant corporation prior to 13 April, 1934, nor that Howell was at the time of the utterance complained of incorporator, officer, director, or stockholder, nor does the nature of his employment, if any, or character of his agency appear. There was no express authority to bind the corporation by his oral defamation of another, nor evidence sufficient to warrant the finding of implied authorization or ratification. *Sawyer v. R. R.,* 142 N. C., 1.

There was no error in sustaining the motion for nonsuit as to the corporate defendant.

Judgment affirmed.

CLAUDE LOVE, ADMINISTRATOR OF THE ESTATE OF LLOYD KUHN, DECEASED, v. CITY OF ASHEVILLE.

(Filed 23 September, 1936.)

Municipal Corporations E c—Evidence held insufficient to show that city negligently failed to keep street in reasonably safe condition.

Plaintiff's evidence tended to show that the concrete railing of a bridge in defendant city had been broken through and temporarily replaced with planks, that plaintiff's intestate, at a time when there was ice on the roadway, was seen to drive his car upon the bridge, was observed to skid, and was later found beneath his overturned car under the bridge. There was no eye-witness to what happened. *Held:* The evidence was insufficient to be submitted to the jury in plaintiff's action against the city, the burden being upon plaintiff to show that defendant city negligently failed to use due care to keep its streets in a reasonably safe condition for those having occasion to use them in a proper manner, and that such negligent failure proximately caused the injury, it not being the duty of the city to erect and maintain barriers proof against any degree of force, or to keep its streets entirely free from natural ice, and the happening of the injury raising no presumption of negligence.

APPEAL by plaintiff from *McElroy, J.,* at January Term, 1936, of BUNCOMBE. Affirmed.

This was an action to recover damages for wrongful death of plaintiff's intestate, alleged to have been caused by the negligence of the defendant in failing to provide proper guard rails on a bridge at a time when there was ice on the roadway.

There was evidence tending to show that the bridge was thirty feet wide and eight hundred feet long, with concrete panels or rails on either side; that about twelve feet of the barrier on the south side had been broken shortly before the injury and temporarily replaced by planks; that about eleven o'clock p.m., 13 February, 1933, a car resembling that of deceased was driven on the bridge and was observed to skid, and a noise was heard as if it hit something, and that later the dead body of plaintiff's intestate was found beneath his overturned automobile under the bridge; that the woodwork in the panel or barrier was knocked down; that the weather was cold and there was some ice on the driveway. There was no eye-witness to what happened. It appeared that other cars passed over this bridge about this time, without skidding or other incident.

At the conclusion of plaintiff's evidence the court sustained defendant's motion for judgment as of nonsuit, and from judgment dismissing the action the plaintiff appealed.

DuBose & Orr for plaintiff.
A. Hall Johnston and Philip C. Cocke, Jr., for defendant.

PER CURIAM. We concur in the ruling of the court below that the evidence fails to make out a case of actionable negligence against the defendant. While it was the duty of the city to exercise ordinary care to maintain its streets and bridges in a condition reasonably safe for those having occasion to use them in a proper manner, it must be made to appear not only that there was a failure of such duty, but that the negligent breach thereof was the proximate cause of the injury complained of. *Markham v. Improvement Co.,* 201 N. C., 121; *Pickett v. R. R.,* 200 N. C., 750.

It was not incumbent upon the city to erect and maintain barriers proof against any degree of force, nor to keep its streets and highways entirely free from ice resulting from natural causes. 7 McQuillan Mun. Corp. (2d Ed.), 2973.

The happening of an injury does not raise the presumption of negligence. There was no eye-witness as to how the death of plaintiff's

intestate occurred. The burden was on the plaintiff to show that the city of Asheville was negligent, and that its negligence was the proximate cause of the injury. This he has failed to do.

It is unnecessary to decide the other questions discussed in the briefs and oral arguments.

Affirmed.

W. L. SCOTT v. ROBERT E. BRYAN.

(Filed 14 October, 1936.)

1. **Torts C a—Tort-feasor fraudulently inducing injured party to proceed solely against other joint tort-feasor is estopped from setting up release of such other tort-feasor as defense.**

   Where one joint tort-feasor induces the injured party to proceed solely against the other joint tort-feasor by falsely representing himself to be insolvent and without liability insurance, he is estopped from setting up the release given such other tort-feasor after settlement as a defense to the injured party's suit thereafter instituted against him, nor may he successfully contend that the injured party must first rescind the release for fraud and return the consideration therefor, or that the injured party is relegated solely to an action against him for deceit.

2. **Pleadings I a—Motion to strike out held properly refused, the allegations objected to being material to right to recover.**

   In this suit against a tort-feasor, the defendant set up a release given his joint tort-feasor as a defense to the action. Plaintiff alleged in his reply that he was induced to proceed solely against such other tort-feasor and effect the settlement and release by defendant's fraudulent misrepresentations that he was insolvent and without liability insurance. *Held:* Defendant's motion that the allegations be stricken from the reply as irrelevant and prejudicial was properly refused, the allegations of the reply not constituting a repudiation of the release of the other tort-feasor, but being allegations of matters constituting an estoppel of defendant by misrepresentation from setting up the release as a defense to plaintiff's action. C. S., 537.

3. **Estoppel C b—Defendant held estopped from asserting defense acquired as result of his own misrepresentations.**

   Plaintiff alleged that defendant induced him to proceed solely against defendant's joint tort-feasor by falsely representing himself to be insolvent and without liability insurance. *Held:* The facts alleged constitute an estoppel of defendant from setting up a release given by plaintiff to the other joint tort-feasor after settlement as a defense to plaintiff's action against him, the principle that where a party induces another by false representations to change his position for the worse, the party making the misrepresentations will not be permitted to reap advantage from his own wrong, being applicable.

4. **Pleadings I a—Motion to strike out allegation that defendant carried liability insurance held properly denied, the allegation being material to right to recover under facts of the case.**

Defendant set up as a defense a release given by plaintiff to defendant's joint tort-feasor. Plaintiff filed a reply alleging that defendant fraudulently induced plaintiff to proceed solely against such other joint tort-feasor by falsely representing himself to be insolvent and without liability insurance. *Held:* The allegations in the reply referring to the liability insurance and naming the alleged insurer were material to plaintiff's right to recover, since they relate to matters estopping defendant from setting up the release as a defense, and defendant's motion to strike out the allegations as irrelevant and prejudicial was properly refused, the facts of the case taking it out of the general rule that matters relating to liability insurance are irrelevant and should not be allowed to prejudice the jury, and it being the duty of the trial court to prevent unfairness or prejudice to the rights of any party in determining matters presented upon the trial. C. S., 537.

5. **Same: Appeal and Error J a—**

Ordinarily, the refusal of a motion to strike out will not be disturbed on appeal when the questions involved can be better determined on the trial by rulings on the evidence. C. S., 537.

APPEAL by defendant from *Cowper, Special Judge,* at March Term, 1936, of WAYNE. Affirmed.

Defendant's motion to strike out certain portions of plaintiff's reply was denied and defendant appealed.

Kenneth C. Royall for plaintiff, appellee.
Smith, Leach & Anderson for defendant, appellant.

DEVIN, J. Plaintiff set out in his complaint a cause of action for negligence on the part of the defendant in the operation of a motor vehicle on the highway, whereby he alleged a serious personal injury was inflicted upon him.

The circumstances of the injury as stated in the complaint are substantially these: That on 24 January, 1933, defendant was driving his truck northward along a highway two and a half miles south of Goldsboro, immediately preceding the oil truck of Thompson-Wooten Oil Company; that approaching plaintiff's filling station, situated on the west side of the highway, where plaintiff was standing, the defendant, suddenly and without warning, turned to the left across the highway directly in front of the Thompson-Wooten Oil Company's truck, thereby causing the truck of the Oil Company to swerve to the left to avoid a collision, and to strike and injure the plaintiff, to his damage in the alleged sum of fifty thousand dollars.

Defendant filed answer in which he denied the allegations of the negligence on his part, and alleged that plaintiff's injury was due solely to the negligence of the Oil Company, and he set up the additional defense that the plaintiff had made demand upon the Oil Company for compensation for his alleged injury and had affected a settlement and satisfaction for his damages in the sum of $6,500, and had in consideration thereof executed and delivered to said Oil Company a written release and discharge of said Oil Company from all liability to the plaintiff for the injuries received on this occasion, and the defendant pleaded such release from an alleged joint tort-feasor as a bar and defense to this action.

The plaintiff, replying to the defendant's plea that the plaintiff's release of the Oil Company, a joint tort-feasor, discharged the defendant, alleged that the settlement with and release of the Oil Company was brought about and induced by the fraud of the defendant in that he falsely and fraudulently represented to the plaintiff that he (the defendant) was insolvent, and that he carried no liability insurance out of which any recovery could be collected, whereas in truth and in fact defendant did carry liability insurance in the sum of ten thousand dollars; that plaintiff regarded the negligence of the Oil Company, if any, as slight compared with that of the defendant, and that the amount received from the Oil Company was a comparatively small part of the damages recoverable for his injury.

The defendant moved that certain portions of the allegations of the reply, particularly those containing references to misrepresentation as to liability insurance, be stricken from said pleading on the ground that same were irrelevant and prejudicial. C. S., 537.

The motions to strike these allegations from the reply were denied by the court below, and the correctness of this ruling is the single question presented by this appeal.

It is not controverted that, under the pleadings here, the defendant and the oil company were joint tort-feasors, and this invokes the application of the pertinent principle that the release of one of two joint tort-feasors discharges the other, the law allowing but one compensation for the injury. *Howard v. Plumbing Co.,* 154 N. C., 224; *Sircey v. Hans Rees' Sons,* 155 N. C., 296; *Braswell v. Morrow,* 195 N. C., 127.

The defendant contends that plaintiff in his reply should not be permitted to repudiate the release and settlement alleged in the answer without asking for the rescission of the release or returning the consideration therefor, and that, at most, plaintiff is relegated to an action against the defendant for deceit. But plaintiff's allegations of defendant's misrepresentation inducing the settlement with the oil company are set up for another purpose. Plaintiff here invokes the principle of

estoppel by misrepresentation. He alleges the defendant practiced a fraud upon him and by false representations induced him to change his position for the worse; that having a good cause of action against an insured and indemnified party he was by that party's misrepresentation led to make a settlement for a comparatively small amount with another whose negligence was minor, thereby discharging the principal tort-feasor, who was in position to compensate him in larger measure for his injury, and that in equity the defendant should now be estopped to set up the release and settlement as a defense to plaintiff's action.

The principle of estoppel by misrepresentation is stated by *Walker, J.*, in *Boddie v. Bond,* 154 N. C., 359, as follows: "Estoppel by misrepresentation, or equitable estoppel, grows out of such conduct of a party as absolutely precludes him, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person who in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right of contract or of remedy."

The doctrine is based upon the manifest inequity of permitting a person to reap advantage from his own wrong.

"If one person is induced to do an act prejudicial to himself in consequence of the acts and declarations of another on which he had a right to rely, equity will enjoin the latter from asserting his legal rights against the tenor of such acts or declarations." *Branson v. Wirth,* 17 Wall., 32. "Equity will step in and protect the party thus misled to his prejudice, and will forbid the other to speak and assert his former right, when every principle of good faith and fair dealing requires that he should be silent." *Wells v. Crumpler,* 182 N. C., 350. "The fundamental principle is that a party may be estopped by the false representation of a material fact, which he knew was calculated to deceive and which has deceived another, causing him to suffer loss." *Bank v. Clark,* 198 N. C., 169; *Oliver v. Fidelity Co.,* 176 N. C., 598; *Tomlinson v. Bennett,* 145 N. C., 279; *Haymore v. Commissioners,* 85 N. C., 268; *Seymour v. Oelrichs,* 156 Cal., 782; *Dowling v. Wood,* 125 Ia., 244.

It is further contended by the defendant that the references in the reply to liability insurance and to the name of defendant's alleged insurer should be stricken out as irrelevant and incompetent and as tending to prejudice the defendant and his insurer.

It has been uniformly held in this jurisdiction that the liability insurer (where the contract is one of indemnity only) is not a proper party to the action (*Clark v. Bonsal,* 157 N. C., 270), and that evidence that indemnity insurance is carried is incompetent (*Luttrell v. Hardin,* 193 N. C., 266), and that in the trial of an action against an insured

tort-feasor it is the duty of the presiding judge to guard against prejudicial references to liability insurance. *White v. McCabe,* 208 N. C., 301; *Fulcher v. Lumber Co.,* 191 N. C., 408; *Bryant v. Furniture Co.,* 186 N. C., 441. But here the offending portions of the plaintiff's reply allege fraudulent misrepresentations with respect to liability insurance as the basis of an equitable estoppel to prevent defendant from setting up the release of a joint tort-feasor as a defense to his action. The allegations in the reply objected to contain statements of facts material to plaintiff's right of action, and not mere collateral or evidential facts. *Revis v. Asheville,* 207 N. C., 237; McIntosh, Prac. & Proc., p. 388. On the trial below it must be left to the presiding judge, upon the matters there presented for judicial determination, to prevent unfairness or prejudice to the rights of any party whose interests may be affected.

While an appeal will ordinarily lie from the denial of a motion to strike from the pleadings material allegations of matters which are incompetent or irrelevant and prejudicial, it has been well said in recent opinions by this Court that the questions involved could be better determined by rulings upon the competency of the evidence, if and when offered, than by undertaking to chart the course of the trial by passing upon allegations as yet undenied. *Hardy v. Dahl,* 209 N. C., 746; *Pemberton v. Greensboro,* 205 N. C., 599.

While nothing ought to remain in a pleading, over objection, which is incompetent to be shown in evidence, the matter can be determined with greater certainty after consideration of all the pleadings and the evidence adduced on the hearing. *Pemberton v. Greensboro,* 203 N. C., 514.

We find no error in the ruling of the court below denying defendant's motion to strike out certain portions of the reply.

Affirmed.

MRS. V. E. WOODLEY v. S. M. COMBS AND D. G. COMBS.

(Filed 14 October, 1936.)

1. Pleadings A f—Recovery may not be defeated for failure of plaintiff to pray for relief to which facts alleged entitle him.

Where plaintiff prays for relief to which he is not entitled upon the facts alleged, but the facts alleged are sufficient to entitle plaintiff to other relief, defendant's motion to nonsuit upon plaintiff's evidence tending to establish the facts alleged is improperly granted, since the court may grant the relief to which plaintiff is entitled upon the facts under the general prayer for such other and further relief as the facts entitle

him to, a party being entitled to recover judgment for any relief to which the facts alleged and proven entitle him, whether demanded in the prayer for judgment or not.

2. **Mortgages H h—Trustee held without power to foreclose upon application of only one of the two cestuis que trustent.**

The deeds of trust in question provided that upon default the trustee might advertise and sell the property "on application of V. E. W., S. M. C. (the *cestuis que trustent*) or assignee." *Held:* The provisions for the execution of a power of sale must be strictly complied with for the protection of all the parties to the instrument, and the instrument does not authorize the trustee to advertise and sell the property on the sole application of one *cestui que trust* without the consent of the other *cestui que trust.*

3. **Mortgages H p—Complaint held to allege cause of action in favor of one cestui to upset foreclosure had on sole application of other cestui.**

The deed of trust in question authorized the trustee to advertise and foreclose the property upon the joint application of both the *cestuis que trustent.* Plaintiff *cestui* brought this suit, alleging that the trustee's foreclosure of the property upon the sole application of the other *cestui* was without the consent of plaintiff, that the bid at the sale was transferred to such other *cestui,* and that he became the owner of the lands at a price greatly less than the amount of the debt secured by the instrument, and introduced evidence sustaining the allegations. Plaintiff prayed judgment for the amount of the notes held by her which were secured by the deed of trust, but filed an amended complaint stating that she did not ratify the foreclosure sale but had not prayed that it be set aside because she was informed and believed that her only practical and available remedy was to demand one-half the value of the land bought in by the other *cestui. Held:* It was error for the court to grant defendant *cestui's* motion to nonsuit because plaintiff is not entitled to the relief demanded, since upon the allegations and evidence plaintiff is entitled to have the foreclosure set aside for failure of the trustee to observe the provisions of the power of sale.

APPEAL by plaintiff from *Small, J.,* at April Term, 1936, of TYRRELL. Reversed.

The complaint of plaintiff, in part, is as follows:

"That heretofore, on 1 December, 1931, one Walter Holloway and wife, of said county and State, made and executed a deed of trust to the defendant D. G. Combs, trustee, to secure twenty negotiable promissory notes, each in the sum of $100.00, payable to plaintiff and defendant S. M. Combs, the interest of the said *cestuis que trustent* being equal and each holding ten of the said notes, the first two being due and payable one year after date, to wit, 1 December, 1932, and two thereafter, one year after date, until and including 1941; the said deed of trust containing the following clause as the only one determinative and having direct reference to the power of the said trustee to make sale of the said

lands, to wit, 'If the said Walter Holloway and wife shall fail or neglect to pay interest on said bonds as the same may hereafter become due, or both principal and interest at the maturity of the bonds, or any part of either, *then on application of said V. E. Woodley, S. M. Combs, or assignee, or any other person, who may be entitled to the moneys due thereon, it shall be lawful for and the duty of the said D. G. Combs to advertise,'* etc.

"That on 21 December, 1931, T. F. Brickhouse and wife made and executed deed of trust to defendant D. G. Combs, trustee, to secure a debt of $500.00 to V. E. Woodley and S. M. Combs, executing twenty notes in the sum of $25.00 each, the first two payable 1 July, 1932, sixteen other notes in the sum of $25.00 each due on 1 January and July of the years 1933, 1934, 1935, and 1936, and two notes in the sum of $25.00 each due 1 January, 1937, payable semiannually, with the provision, as to the powers of said trustee, that '. . . on application of said V. E. Woodley and S. M. Combs or assignee, or any other person who may be entitled to the moneys due thereon, it shall be lawful for and the duty of the said D. G. Combs, to advertise,' etc."

The "Brickhouse tract" was sold by D. G. Combs, trustee, on Tuesday, 6 December, 1932, at 12 o'clock noon, at the courthouse in Columbia, N. C. A. W. Brickhouse was the last and highest bidder at the price of $150.00, and transferred his bid to defendant S. M. Combs. Report to the clerk was duly made and confirmed and deed executed. The other tract ("Holloway tract") was sold by D. G. Combs, trustee, on Monday, 2 January, 1933, at 12 o'clock noon, at the courthouse in Columbia, N. C., and defendant S. M. Combs became the last and highest bidder at the price of $500.00. Report to the clerk was duly made and confirmed and deed executed.

The plaintiff alleges: "9. That it would be inequitable and unlawful for the said S. M. Combs to control the trustee, who was under his control, and direction, in her absence and without her knowledge, and thereby gain an undue advantage of her, and notwithstanding the wrong of the defendants in making said sale without her knowledge, and without her participation in the request to the trustee and her inability well known to the defendants to attend the sale, she hereby waives the said wrong and calls upon the defendant S. M. Combs as the pretended purchaser of the said land, who now holds the title to the same, to pay her $1,250, representing her one-half interest in the true value of the said lands. Wherefore, she prays that she recover of the defendant S. M. Combs the sum of $1,250, and interest, and the cost of this action, and for such rights at law and equity as the allegations of this complaint may entitle her to, and for costs and for general relief."

The following amendment was allowed by the court below: "Amend section 9 of the complaint by adding thereto the following: But in alleging that she waives the said wrong does not intend to say that the sale is in any respect ratified, but being unable to ascertain that she would be able to conduct a resale or to control the trustee and cause him to resell, and being without remedy to recover her rights to have and receive one-half the value of the notes secured, she alleges that she is informed and believes that her only practical and available means of recovering same is to call upon the defendant S. M. Combs to pay her one-half the value of the land to which he asserts title by such sale and purchase by him, which amount she alleges to be not less than $1,250."

At the close of plaintiff's evidence and at the close of all the evidence, the defendants in the court below made motions for judgment as in case of nonsuit. C. S., 567. The court below, at the close of all the evidence, rendered judgment as of nonsuit against the plaintiff. The plaintiff excepted, assigned error, and appealed to the Supreme Court.

S. S. Woodley and H. S. Ward for plaintiff.
J. C. Meekins, Jr., and McMullan & McMullan for defendants.

CLARKSON, J. The defendants contend that plaintiff is suing for $1,250—one-half of the principal of the notes in controversy, which she owned but has elected to ratify the sale, and by so doing she can recover only her part of what the sale brought, and this amount has been placed in the clerk's office for her. Therefore, the judgment of nonsuit is correct. But the amendment goes further and says: "But in alleging that she waives the said wrong, does not intend to say that the sale is in any respect ratified," etc. In plaintiff's prayer she says: "And for such rights at law and equity as the allegations of this complaint may entitle her to and for costs and for general relief." We think, under the allegations of the complaint, she is entitled to relief, that the conveyances must be set aside, as the trustee, under the clear language of the deeds of trust, had no right to sell without plaintiff making application, or her assignee, or any person entitled to the money due thereon. There is no evidence that the terms of the deed of trust were complied with in this respect or that there was a ratification.

It is well settled that a complaint will be liberally construed so as to do substantial justice, and will be sustained when, from its general scope it appears that the plaintiff has a cause of action, although not stated with technical accuracy. It is also well settled that a party can recover judgment for any relief to which the facts alleged and proven entitle him, whether demanded in the prayer for judgment or not. *McNeill v. Hodges,* 105 N. C., 52; *Hendon v. North Carolina R. Co.,*

127 N. C., 110. The facts set forth in the complaint, and not the prayer, ordinarily determine the basis of plaintiff's relief.

The deeds of trust provide: "If the said Walter Holloway and wife shall fail or neglect to pay interest on said bonds as the same may hereafter become due, or both principal and interest, at the maturity of the bonds, or any part of either, *then on application of said V. E. Woodley, S. M. Combs, or assignee, or any other person, who may be entitled to the moneys due thereon, it shall be lawful for and the duty of the said D. G. Combs to advertise*," etc.

On the entire record there is no evidence that plaintiff, or any assignee, or any other person who may be entitled to the moneys due thereon, made application to defendant D. G. Combs, trustee, to sell the lands. The provision is important and material and put in, no doubt, to protect plaintiff from the very thing which happened.

"The courts look with jealousy on the power of sale contained in mortgages and deeds of trust, and the provisions are strictly construed." *Alexander v. Boyd,* 204 N. C., 103 (108).

In *Ins. Co. v. Lassiter,* 209 N. C., 156 (159), it is said: "The trustee in a deed of trust is usually selected to act for both the owner and holder of the indebtedness. As trustee he acts in a dual capacity to carry out the provisions of the deed of trust. . . . All parties of a trust deed are entitled to have the power of sale carried out as written. *Mitchell v. Shuford,* 200 N. C., 321. Power of sale in mortgages or deeds of trust is strictly construed. *Alexander v. Boyd, supra; N. C. Mortgage Corp. v. Morgan,* 208 N. C., 743."

For the reasons given, the judgment of the court below is

Reversed.

G. G. HYDER v. MARY J. HYDER.

(Filed 14 October, 1936.)

Divorce A d—Where husband abandons wife, he is not entitled to divorce on ground of two years separation.

In a suit under N. C. Code, 1659 (a), for divorce on the ground of two years separation, plaintiff is entitled to relief only if there has been a legal separation, which depends upon a voluntary separation under an agreement, express or implied, and where defendant alleges that plaintiff had unlawfully abandoned her, it is error for the trial court to rule that evidence in support of such allegation is irrelevant, or to refuse to submit an issue tendered by defendant upon this question, since plaintiff is not entitled to the relief prayed if the parties had lived separate and apart as the result of plaintiff's unlawful abandonment of defendant.

STACY, C. J., concurs in result.

APPEAL by defendant from *McElroy, J.*, at April Term, 1936, of BUNCOMBE. New trial.

This is an action for the dissolution of the marriage of plaintiff and defendant, and the divorce of plaintiff from defendant, under the provisions of chapter 72, Public Laws of North Carolina, 1931, as amended by chapter 163, Public Laws of North Carolina, 1933. (N. C. Code of 1935, section 1659 [a].)

The action was begun in the Superior Court of Buncombe County on 27 November, 1934.

It is alleged in the complaint and admitted in the answer (1) that plaintiff is now and has been for more than forty years a resident of the State of North Carolina; (2) that defendant is a resident of Mecklenburg County, in said State; and (3) that plaintiff and defendant were married to each other on 25 December, 1900.

In his complaint the plaintiff alleges that "on or about the latter part of November, 1928, the plaintiff and defendant separated from each other, and since said time have lived separate and apart."

In her answer the defendant admits that "the plaintiff and defendant were separated during the latter part of November, 1928, and that they have lived separate and apart since that time." She further alleges that "the plaintiff herein, Govan G. Hyder, and the defendant Mary J. Hyder were separated in 1928, due to the wrongful acts and conduct of the plaintiff herein, in that he took the defendant to her original home in Mecklenburg County, and there deserted and abandoned her. The said desertion and abandonment was due to no fault known to this defendant, but solely to the wrongful and unlawful conduct of the plaintiff." In his reply, the plaintiff denies this allegation of the answer.

When the action was called for trial, the plaintiff tendered the following issues for submission to the jury:

"1. Were the plaintiff and defendant married, as alleged in the complaint?

"2. Has the plaintiff resided in North Carolina for a period of one year?

"3. Has there been a separation of husband and wife, and have they lived separate and apart for two years, as alleged in the complaint?"

The defendant made no objection to the foregoing issues, but tendered the following as an additional issue:

"4. Has the said separation of husband and wife been due to the criminal and unlawful acts of the husband, as alleged in the answer?"

The court declined to submit the issue tendered by the defendant, and the defendant excepted.

At the trial, the plaintiff, as a witness in his own behalf, testified as follows:

"I am the plaintiff in this case. I am a resident of the State of North Carolina, and have been all my life. I am 59 years of age. The defendant in this case is my wife. We were married in 1900, but we are not living together as husband and wife now. We were separated in 1928, I believe in November of that year, and have continuously lived separate and apart from each other since 1928."

On his cross-examination the witness was requested by counsel for the defendant to explain the facts surrounding the separation in 1928, and to tell the jury why he and the defendant were separated in 1928. The objection of the plaintiff was sustained, and the defendant excepted.

The court ruled that no evidence tending to show the facts and circumstances under which the plaintiff and defendant were separated in 1928 was competent, and in deference to this ruling, to which the defendant duly excepted, the defendant offered no evidence in support of the allegations of her answer.

Each of the issues submitted to the jury was answered "Yes."

From judgment dissolving the bonds of matrimony between the plaintiff and defendant, and divorcing the plaintiff from the defendant, the defendant appealed to the Supreme Court, assigning as error the refusal of the trial court to submit to the jury the issue tendered by the defendant and the ruling of said court that no evidence tending to support the allegations of her answer was competent or admissible at the trial of the action.

Sale, Pennell & Pennell and G. C. Franklin for plaintiff.
Mark W. Brown for defendant.

CONNOR, J. Chapter 72, Public Laws of North Carolina, 1931, as amended by chapter 163, Public Laws of North Carolina, 1933 (N. C. Code of 1935, sec. 1659 [a]), reads as follows:

"SECTION 1. Marriages may be dissolved and the parties thereto divorced from the bonds of matrimony, on the application of either party, if and when there has been a separation of husband and wife, either under a deed of separation or otherwise, and they have lived separate and apart for two years, and the plaintiff in the suit for divorce has resided in the State for a period of one year.

"SEC. 2. That this act shall be in addition to other acts and not construed as repealing other laws on the subject of divorce.

"SEC. 3. That this act shall be in force from and after its ratification."

This act was in full force at the date of the commencement of this action. The plaintiff relies upon its provisions for the relief prayed for in his complaint. He does not rely upon the provisions of subsection 4 of C. S., 1659. For that reason, he does not allege, nor was he required

to prove, that "he is the injured party," as would have been the case had he relied upon its provisions. *Sanderson v. Sanderson,* 178 N. C., 339, 100 S. E., 590.

Construing the statute applicable to this action, it was said in *Parker v. Parker, ante,* 264, 186 S. E., 346:

"This statute authorizes a divorce on the application of either the husband or the wife, without regard to whether or not the applicant is the injured party (*Long v. Long,* 206 N. C., 706, 175 S. E., 85; *Campbell v. Campbell,* 207 N. C., 859, 176 S. E., 250), when there has been a voluntary separation, under a deed of separation or otherwise, of husband and wife, and after such separation they have lived separate and apart from each other for two years. It does not authorize a divorce when the husband has separated himself from his wife, or the wife has separated herself from her husband, without cause and without an agreement, express or implied, although, after such separation, he or she has lived separate and apart from the abandoned wife or husband for two years."

In the instant case, the defendant in her answer denied that there had been a separation of plaintiff and defendant in 1928. She alleged that plaintiff had wrongfully and unlawfully abandoned and deserted her. If such be the case, the plaintiff is not entitled to a dissolution of the marriage, and a divorce from the bonds of matrimony between him and the defendant in this action. *Parker v. Parker, supra; Reynolds v. Reynolds,* 208 N. C., 428, 181 S. E., 338.

There was error in the refusal of the trial court to submit the issue tendered by the defendant, and in its ruling that evidence tending to show that plaintiff wrongfully and unlawfully abandoned and deserted the defendant was not admissible at the trial of this action. The defendant is entitled to a new trial. It is so ordered.

New trial.

STACY, C. J., concurs in result.

J. T. OLLIS AND WIFE, DELZIE OLLIS, v. BOARD OF EDUCATION OF AVERY COUNTY, COMPOSED OF H. B. BURLESON, DR. R. H. HARDIN, AND CARL WISEMAN.

(Filed 14 October, 1936.)

1. Reformation of Instruments C d—Evidence held sufficient to overrule nonsuit in this action for reformation of deed.

Evidence that the draftsman was instructed by the grantee in a deed to insert a clause therein providing that the land should revert to the

grantors if it should cease to be used by the grantee for school purposes. that the draftsman thought and represented to the grantors that the deed contained such clause, and that the grantors signed same, relying upon the representation, *is held* sufficient to be submitted to the jury in an action by the grantors to reform the deed by inserting the reversionary clause left out by mistake of the draftsman, it being for the jury to say whether the evidence satisfies them by clear, strong, and convincing proof of the facts constituting plaintiffs' cause of action.

2. **Limitation of Actions B b—Registered deed held not notice of cause of action for reformation for mistake in omitting clause therefrom.**

Plaintiff grantors instituted this action to reform their deed by inserting a reversionary clause therein, which was omitted therefrom by the mistake of the draftsman. Defendants contended that the registration of the deed constituted notice that the clause had been omitted therefrom, and that the action was barred, since more than three years had elapsed since the registration of the deed. *Held:* The registration of the deed is insufficient to constitute notice to plaintiffs, and the action was not barred until three years after plaintiffs discovered, or should have discovered, the mistake in the exercise of due diligence. C. S., 441 (9).

3. **Evidence D b—Draftsman held not "interested party" in action between grantors and grantees for reformation of deed.**

In this action for reformation of a deed to a county board of education for mistake of the draftsman in failing to insert a reversionary clause therein in accordance with the agreement between the grantors and grantee, testimony of the draftsman relating to declarations of a deceased member of the board and of the superintendent of schools, tending to show that it was agreed that the reversionary clause should be inserted, *is held* not precluded by C. S.. 1795, the draftsman not being a party interested in the event as contemplated by the statute.

4. **Evidence J d—In action for reformation, parol evidence, tending to show real agreement of parties at the time, is competent.**

In an action for reformation of a deed to a board of education for mistake of the draftsman in failing to insert a reversionary clause therein in accordance with the agreement of the parties, parol evidence that a member of the board, and the superintendent of schools, instructed the draftsman to insert the reversionary clause, and had agreed that the reversionary clause should be inserted when signed by the grantors, *is held* competent as tending to show the real agreement of the parties, and not objectionable as being hearsay or as varying the terms of the written instrument into which all prior negotiations were merged.

APPEAL by the defendant from *Sink, J.*, at April Term, 1936, of AVERY. No error.

This is a civil action wherein the plaintiffs are asking for the reformation of a deed executed by them to the Board of Education of Mitchell County on 27 December, 1904, and wherein it is alleged by the plaintiffs that at the time said deed was executed the draftsman, through mistake, failed to insert a clause providing for the land to revert to the grantors in the event it ceased to be used for school purposes.

It is conceded that the title of the Board of Education of Avery County is that title vested in the Board of Education of Mitchell County by said deed, Avery County having been created in 1911 in part from that portion of Mitchell County wherein the land described in said deed is situated; and it is further conceded that said land is not now used for school purposes.

The issues submitted to and answers made by the jury were as follows:

"1. Was the provision that the lands in controversy in this action should revert to the plaintiffs when the property ceased to be used as public school property, left out of the deed by the mistake of the draftsman, as alleged in the complaint? Answer: 'Yes.'

"2. Is the plaintiffs' cause of action barred by the statute of limitations, as alleged in the answer? Answer: 'No.' "

From judgment declaring the plaintiffs to be the owners of the land and reforming the deed as prayed for in the complaint the defendants appealed, assigning errors.

Watson & Fouts for plaintiffs, appellees.
Charles Hughes for defendant, appellant.

SCHENCK, J. The defendant assigns as error the ruling of the court in denying its motion for judgment as in case of nonsuit lodged when the plaintiffs had introduced their evidence and rested their case. C. S., 567. This assignment of error cannot be sustained.

The plaintiffs' evidence tends to show that J. T. Ollis offered to give to the Board of Education the land described in the deed as long as the board would keep a school on it, "but it was to revert back to him when the school was abandoned," and that one R. L. Wiseman was appointed by the board to survey the land and draw the deed with reversionary clause. The evidence further tends to show that Wiseman thought the reversionary clause was in the deed, and that he represented to the grantors at the time they signed the deed that such a clause was contained therein, and that the grantors signed the deed relying upon the representation that Wiseman, the draftsman, made to them that the reversionary clause was therein contained.

This evidence made out a *prima facie* case, and his Honor correctly submitted the case to the jury, charging them that the burden was upon the plaintiffs to satisfy them by evidence clear, strong, and convincing that the first issue should be answered in the affirmative. Our decisions have established the principle that where there is any evidence to go to the jury on the question of mistake in the drafting of a bond or deed that the jury are to determine under proper instructions whether the evidence is of the character required. *King v. Hobbs,* 139 N. C., 170.

The defendant also assigns as error the ruling of the court in denying its motion for judgment as in case of nonsuit upon the ground that the evidence showed that the deed in question had been of record since 1907, and that such registration was notice to the plaintiffs of the provisions of the deed, and for this reason the plaintiffs' alleged cause of action was barred by the three-year statute of limitations. C. S., 441. This position is untenable.

In *Modlin v. R. R.,* 145 N. C., 218 (227), which was an action to recover damages for deceit growing out of drawing a deed for timber so as to include certain timber not included in the contract of sale, it is written: "Defendant assigns for error, further, that on the issue as to the statute of limitations the judge below declined to charge, as requested, that the registration of defendant's deed was in itself such a notice of the alleged fraud as would put the statute in motion for the defendant's protection and in bar of plaintiff's claim; but the point has been resolved against the defendant. The statute applicable (Revisal, sec. 395, subsec. 9) (now C. S., 441-9), provides that actions of the present kind are barred in three years after the discovery by the aggrieved party of the facts constituting the fraud, and, construing this subsection, the Court has decided that the statute commenced to run when the aggrieved party first discovered the facts, or could have discovered them by the exercise of proper effort and reasonable care, and that the registration of the deed, or knowledge of its existence, by which the fraud was accomplished, was not of itself sufficient notice of such facts. *Peacock v. Barnes,* 142 N. C., 215; *Stubbs v. Motz,* 113 N. C., 458."

The evidence in the instant case tended to show that the first knowledge the plaintiffs had that the deed did not contain the reversionary clause was gained by them the first of November, 1933, and that summons in this case was issued 5 October, 1935. His Honor's ruling that the registration of the deed did not constitute notice to the plaintiffs that the reversionary clause had been omitted therefrom was in accord with the decisions of this Court.

Defendant also assails by exceptive assignments of error the rulings of the court in admitting over its objection certain testimony of the draftsman of the deed, R. L. Wiseman, in regard to communications between himself and J. M. Parsons, deceased member of the Board of Education of Mitchell County, the grantee in the deed, and in regard to communications between himself and Dock Green, deceased superintendent of schools. These assignments of error, based upon the theory that such testimony was in violation of C. S., 1795, cannot be sustained for the reason that it nowhere appears that the witness Wiseman was "a person interested in the event, or a person from, through, or under whom such a party or interested person derives his interest or title by

assignment or otherwise." Nor are such assignments tenable upon the theory that the testimony of the witness Wiseman was hearsay evidence. The testimony objected to was to the effect that Wiseman was instructed by J. M. Parsons, a member of the Board of Education, and Dock Green, superintendent of schools, to place the reversionary clause in the deed. This was competent to show that the draftsman in drawing the deed failed, through mistake, to carry out his instructions from the grantee in the deed, as well as from the grantors, namely, to put in the deed the reversionary clause. "While negotiations leading up to the execution of the contract are merged in it at law, they are competent in equity to show what was the real agreement, for the purpose of correcting the instrument and doing justice." *Potato Co. v. Jeanette,* 174 N. C., 236 (242).

We have examined each of the assignments of error not abandoned in the brief of the appellee and find

No error.

W. W. DUNN ET AL. v. W. W. WILSON ET AL.

(Filed 14 October, 1936.)

1. Judgments K f—Where officer's return shows service, defendant may attack judgment for nonservice by motion in the cause.

Where it appears from the face of the record or the papers in the case that service of summons or original process was not had, nor waived, a judgment *in personam* rendered in this action may be treated as a nullity, vacated on motion, or collaterally attacked, since voluntary appearance or service of process is necessary to give the court jurisdiction, but where the officer's return shows service it is deemed *prima facie* correct, C. S., 921, and the remedy of defendant asserting nonservice is by motion in the cause upon a showing of nonservice by clear and unequivocal proof.

2. Appeal and Error F b—Presumption that court found facts to support judgment does not prevail in face of court's refusal to find facts.

In this action certain defendants moved to set aside the judgment for nonservice of summons upon their evidence that in fact no service had been had, although the officer's return showed service, and defendants requested the court to find the facts. The court denied the request, and refused the motion of such defendant to set aside the judgment. *Held:* The presumption that the court found facts sufficient to support his judgment does not prevail in the face of a request for findings refused by the court, and the cause will be remanded for findings of fact sufficient to enable the Supreme Court to review the questions of law involved.

APPEAL by defendants W. W. Wilson and Drucilla Wilson from *Cranmer, J.,* at March Term, 1936, of VANCE.

Civil action to recover for parent's loss of services and injury to minor child, alleged to have been caused by the negligence of the defendants in the operation of an automobile.

No answer having been filed and no appearance made by any of the defendants, there was a verdict and judgment for plaintiffs, entered at the October Term, 1929, Vance Superior Court. Execution issued 27 September, 1935.

Thereupon, motions were lodged by the defendants to vacate verdict and to set aside judgment for want of any previous knowledge of the proceeding, it being alleged that no summons was ever served upon the defendants, or any of them, and that no appearance was ever made by any of the defendants in the action. Motion allowed as to Plummer, Minnie, and Arnie Wilson, and overruled as to the other defendants.

The record discloses that "the defendants W. W. Wilson and Drucilla Wilson asked the court to find the facts; request denied; defendants except," and appeal.

Kittrell & Kittrell and A. A. Bunn for plaintiffs, appellees.
Julius Banzet and Frank Banzet for defendants, appellants.

STACY, C. J. Service of summons or original process, unless waived, is a jurisdictional requirement. *Stancill v. Gay,* 92 N. C., 462. Hence, a judgment *in personam* rendered against a defendant without voluntary appearance or service of process is void. *Guerin v. Guerin,* 208 N. C., 57, 181 S. E., 274; *Harrell v. Welstead,* 206 N. C., 817, 175 S. E., 283; *Armstrong v. Harshaw,* 12 N. C., 187. If the defect appear on the face of the papers, or is discernible from an inspection of the record, the judgment may be treated as a nullity, vacated on motion, or attacked collaterally. *Graves v. Reidsville,* 182 N. C., 330, 109 S. E., 29; *Stocks v. Stocks,* 179 N. C., 285, 102 S. E., 306; *McKee v. Angel,* 90 N. C., 60.

On the other hand, if the officer's return show service, as here, which under the statute, C. S., 921, is deemed *prima facie* correct or "sufficient evidence of its service," *Caviness v. Hunt,* 180 N. C., 384, 104 S. E., 763; *Burlingham v. Canady,* 156 N. C., 177, 72 S. E., 324; *Marler-D-G. Co. v. Shoe Co.,* 150 N. C., 519, 64 S. E., 366, when in fact no such service has been had, the fact of nonservice or "false return" may be established by clear and unequivocal proof, *Comrs. v. Spencer,* 174 N. C., 36, 93 S. E., 435; McIntosh N. C. P. and P., sec. 316, p. 313, and upon such showing the party affected may have the judgment set aside on motion duly entered in the cause. *Long v. Rockingham,* 187 N. C., 199, 121 S. E., 461; *Herndon v. Autry,* 181 N. C., 271, 107 S. E., 3; *Stocks v. Stocks, supra; Johnson v. Whilden,* 171 N. C., 153, 88 S. E., 223; *Massie v. Hainey,* 165 N. C., 174, 81 S. E., 135; *Flowers v. King,* 145 N. C., 234, 58 S. E., 1074.

Speaking to the point in *Chadbourn v. Johnston,* 119 N. C., 282, 25 S. E., 705, *Furches, J.,* delivering the opinion of the Court, said:

"They were made defendants in the summons issued in the case, which was returned executed, though in truth and in fact it was not executed on Rebecca A. Watkins and W. J. Johnston. This, *prima facie,* gave the court jurisdiction and authorized it to proceed to judgment. But this presumption might be rebutted by showing that in fact it had not been served. And, if nothing more had occurred, upon the court's finding this fact it would have been the duty of the court to set aside the judgment."

When considering such motion, upon request duly made, it is the duty of the judge to find the facts, so that his ruling upon the motion may be reviewed, and his refusal to accede to such request is reversible error. *S. v. Harris,* 204 N. C., 422, 168 S. E., 498; *Holcomb v. Holcomb,* 192 N. C., 504, 135 S. E., 287; *McLeod v. Gooch,* 162 N. C., 122, 78 S. E., 4; *Norton v. McLaurin,* 125 N. C., 185, 34 S. E., 269. Compare *Hardware Co. v. Buhmann,* 159 N. C., 511, 75 S. E., 731.

True, in the absence of such request, it will be presumed that sufficient facts were found to support the judgment. *Com. of Revenue v. Realty Co.,* 204 N. C., 123, 167 S. E., 563; *S. v. Harris, supra; Holcomb v. Holcomb, supra; Gardiner v. May,* 172 N. C., 192, 89 S. E., 955. But the presumption may not be indulged in the face of a refusal to find the facts. This is the rationale of the decisions on the subject. *McLeod v. Gooch, supra; Smith v. Whitten,* 117 N. C., 389, 23 S. E., 320; *Carter v. Rountree,* 109 N. C., 29, 13 S. E., 716; *Albertson v. Terry,* 108 N. C., 75, 12 S. E., 892.

Speaking to the matter in *Clegg v. Soapstone Co.,* 66 N. C., 391, *Reade, J.,* delivering the opinion of the Court, said:

"It is, however, insisted that it ought to be presumed that his Honor found such a state of facts as would justify his conclusion of law. This would be the same as to say that his Honor could not err in his conclusion of law upon a given state of facts, and would make his judgment final. For, we repeat, how can we determine whether his law is right unless we know the facts? *Hudgins v. White,* 65 N. C., 393; *Powell v. Weith, post,* 423."

Until the facts are determined, the question as to what constitutes service, debated on argument and brief, is not presently presented for decision. However, as the question will perforce arise on the further hearing, the following statutes and authorities may prove helpful: C. S., 479 and 489; *Bank v. Wilson,* 80 N. C., 200; *Godwin v. Munds,* 106 N. C., 448, 10 S. E., 1044; *Bernhardt v. Brown,* 118 N. C., 700, 24 S. E., 527; *Williamson v. Cocke,* 124 N. C., 585, 32 S. E., 963; *Woodley v. Jordan,* 112 Ga., 151, 37 S. E., 118.

Error.

STATE v. EVANS MACKLIN.

(Filed 14 October, 1936.)

1. Criminal Law I j—

On motion to nonsuit in a criminal prosecution, the evidence must be considered in the light most favorable to the State.

2. Homicide H b—Evidence held sufficient for jury on question of defendant's guilt of murder in the first degree.

The evidence favorable to the State tended to show that deceased, a chief of police, was shot from ambush with a shotgun and instantly killed, that defendant had been arrested several times by the chief, and on the last occasion had been released about 7:00 o'clock, that after his release defendant went to his room and procured a single barrel shotgun, took it to another's house and hid it underneath the steps, that he went into the house and drank some whiskey and then left, stating he was going to kill the chief, that he was seen to get the gun from under the steps and start in the direction of the scene of the crime some two miles distant, that the killing took place some two hours and forty-five minutes thereafter, at about 3:00 o'clock in the morning, that after the crime was committed officers found a single barrel shotgun in defendant's room which defendant said he was keeping, and that defendant stated to a witness after the commission of the crime that he had told him he was going to kill the chief. *Held:* The evidence made out a case of willful, deliberate, and premeditated killing, and the evidence tending to identify defendant as the perpetrator of the crime was sufficient to be submitted to the jury and overrule defendant's motion to nonsuit.

3. Homicide G d—Gun found in defendant's possession held properly exhibited in evidence upon testimony tending to identify it as fatal weapon.

It was established deceased was killed with a shotgun. After the crime was committed, a single barrel shotgun was found in defendant's room, and there was testimony that the gun was like the one defendant was seen carrying the night deceased was shot. *Held:* Defendant's exception to the exhibition of the shotgun in evidence cannot be sustained.

APPEAL by defendant from *Cranmer, J.*, at April Term, 1936, of HALIFAX. No error.

The defendant was convicted of murder in the first degree, and from judgment imposing sentence of death, the defendant appealed.

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

W. B. Allsbrook for defendant.

DEVIN, J. The defendant bases his appeal from the judgment pronounced upon two assignments of error, one to the court's refusal to

allow defendant's motion for judgment of nonsuit, and the other to the court's action in permitting the State to offer in evidence as an exhibit the shotgun with which the State contended the deceased was slain.

The motion for judgment of nonsuit invokes the rule laid down in *S. v. Beal,* 199 N. C., 278, and other cases, that the evidence must be considered in its most favorable light for the State. Succinctly stated, the evidence disclosed that about 3:00 a.m., 16 February, 1936, the deceased, A. P. Moore, then chief of police of Scotland Neck, North Carolina, was shot down and almost instantly killed; that this occurred in front of the bank on a principal street in Scotland Neck; that the weapon used was a shotgun, fired from a distance of eight or ten inches, penetrating the right collar bone of deceased and severing his jugular vein; that there was an open vestibule at the entrance to the bank building, two steps up; that the course of the shot appeared to be slightly downward, indicating that deceased was shot from the ambush of the bank vestibule; that deceased had with him a dog, and that the sound of the fatal shot was followed by the howling of the dog.

It was further in evidence that the defendant had been arrested Saturday, 15 February (the day preceding the homicide), and released about 7:00 o'clock p.m.; that deceased as chief of police had arrested defendant two or three times, the last time two or three weeks before; that later, on the night of the 15th, about 11:00 or 12:00 o'clock, defendant went to his room at the house of a man named Dancy and got a single-barreled shotgun and six shells; that he then went to the home of a man named Williams, put the gun under the steps, and procured and drank some whiskey; that he left there about 2:15 a.m., the 16th, with the gun, fired it twice, and left, going in the direction of Scotland Neck, some two miles distant, saying he was going to kill Mr. Moore that night; that he also said, "I am not only going to kill Mr. Moore but Sheriff Johnson if I see him"; that on Tuesday following the homicide he told witness Augborn, "I told you I was going to kill that ———" (referring to deceased), "and I would have killed his dog but he ran. I did it, and you better not tell it either"; that about 5:00 a.m. (the 16th) defendant went into the house of one Idell Jones, and when asked about having been arrested the previous evening, said, "The ——— that locked me up will not lock me up any more"; that about the same hour another witness, who lived close by, testified she saw a shotgun under the house, a gun like the one exhibited at the trial; that she did not see the defendant put it there, but that she saw him go and get the gun and carry it away from there when he went; that defendant said to another witness, referring to deceased, "I made up my mind he would not arrest me any more"; that an officer went to the room of defendant on Thursday following the shooting and found a single-barreled shotgun; that he

showed the gun to the defendant and he said it was a gun he had been keeping. This gun was produced in court and offered as an exhibit.

The evidence made out a case of willful, deliberate, and premeditated killing, and there was evidence, sufficient to warrant its submission to the jury, identifying the defendant as the perpetrator. *S. v. Ammons,* 204 N. C., 753; *S. v. Marion,* 200 N. C., 715; *S. v. Lawrence,* 196 N. C., 562.

The only other exception was to the admission of the shotgun as an exhibit in the case. It was competent to show the possession of a shotgun by defendant about the time of the homicide, and it was testified that the one found in his room was like the one with which he had been seen on the night the deceased was shot. This exception cannot be sustained. *S. v. Burno,* 158 N. C., 632; *S. v. Vann,* 162 N. C., 534. The charge of the court was free from error.

There were no other exceptions noted to the ruling of the court, but we have examined the record with care in view of the gravity of the result to the defendant, and in the trial we find

No error.

J. H. WORTHY v. R. R. KNIGHT.

(Filed 14 October, 1936.)

1. **Damages D a—**

   Punitive damages are allowable only in cases of malicious, wanton, and reckless injury, and may be awarded plaintiff in his suit only if a cause of action exists in his favor which entitles him to nominal damages, at least.

2. **Damages D c—**

   The awarding of punitive damages and the amount to be allowed, if any, rests in the sound discretion of the jury within the limitation that the amount shall not be excessively disproportionate to the circumstances of contumely and indignity present in each particular case.

3. **Damages D b—Where evidence shows willful, malicious injury, it is error for court to refuse to submit issue of punitive damages.**

   Where punitive damages are sought, the trial court is limited to a determination of whether the evidence is sufficient to support the issue and whether the amount awarded by the jury is excessive, and where there is evidence of an aggravated, criminal assault by defendant on plaintiff, it is error for the trial court to refuse to submit the issue of punitive damages to the jury.

APPEAL by plaintiff from *Cranmer, J.,* at July Term, 1936, of LEE.

Civil action to recover damages for alleged willful and malicious assault.

Plaintiff's evidence tends to show that on 11 January, 1936, he was opening a road on his own land, under order of court, east of the dividing line between his land and the adjoining land of the defendant. "Mr. Knight came up and wanted it laid off so the whole road would be east of the line claimed by him before we agreed on the line."

An argument ensued, and when plaintiff's back was turned, the defendant grabbed him by the arm and plaintiff fell, his feet having become entangled in some wire fencing. Plaintiff got up and ran about seventy-five yards, when he was overtaken by the defendant, struck 20 or 25 times, knocked down, and his nose broken. Plaintiff testified: "I was doing nothing to Mr. Knight when he assaulted me. Made no fight at him at all. It all occurred on my land."

The defendant's version is slightly different. He first fancied some provocation, then said: "I chased him across the muddy field about 75 yards. Worthy fell and I struck him once and possibly twice, not more than twice. He was kicking and fighting at me. I hit him with my fist."

The jury awarded the plaintiff compensatory damages in the sum of $40.00. The court declined to submit an issue as to punitive damages (exception), and charged the jury that in no event would they award the plaintiff more than compensatory damages. Exception.

Plaintiff appeals, assigning errors.

K. R. Hoyle for plaintiff, appellant.
Gavin & Jackson for defendant, appellee.

STACY, C. J. The doctrine of punitive damages occupies a rather anomalous position in our law.

In the first place, such damages are not recoverable as a matter of right. *Hodges v. Hall,* 172 N. C., 29, 89 S. E., 802. They are allowable only in cases of malicious, wanton, and reckless injury; and, even then, they go to the plaintiff merely because they are assessed in his suit. *Cotton v. Fisheries Co.,* 181 N. C., 151, 106 S. E., 487; *Osborn v. Leach,* 135 N. C., 628, 47 S. E., 811; *Waters v. Lumber Co.,* 115 N. C., 648, 20 S. E., 718.

Second: Punitive damages may not be awarded unless otherwise a cause of action exists and at least nominal damages are recoverable by the plaintiff. *Saunders v. Gilbert,* 156 N. C., 463, 72 S. E., 610; *Blow v. Joyner,* 156 N. C., 140, 72 S. E., 319. In other words, a civil action may not be maintained *merely* to inflict punishment or to collect punitive damages. *Saunders v. Gilbert, supra.* Compare *Gray v. Lentz,* 173 N. C., 346, 91 S. E., 1024 (statutory penalty).

Third: Both the awarding of punitive damages and the amount to be allowed, if any, rest in the sound discretion of the jury, *Cobb v. R. R.,*

175 N. C., 130, 95 S. E., 92, albeit, the amount assessed is not to be excessively disproportionate to the circumstances of contumely and indignity present in each particular case. *Ford v. McAnally,* 182 N. C., 419, 109 S. E., 91; *Blow v. Joyner, supra; Billings v. Observer,* 150 N. C., 540, 64 S. E., 435; *Webb v. Tel. Co.,* 167 N. C., 483, 83 S. E., 568; *Gilreath v. Allen,* 32 N. C., 67.

Primarily, then, the court is concerned with only two questions: (1) Whether there is any evidence to be submitted to the jury; and (2) whether the award is excessive. The balance is for the twelve. *Tripp v. Tob. Co.,* 193 N. C., 614, 137 S. E., 871.

The foregoing epitome of the law, as it obtains in this jurisdiction, may be gleaned from the following authorities: *Lay v. Pub. Co.,* 209 N. C., 134, 183 S. E., 416; *Bonaparte v. Funeral Home,* 206 N. C., 652, 175 S. E., 137; *Perry v. Bottling Co.,* 196 N. C., 690, 146 S. E., 805; *Ferrell v. Siegle,* 195 N. C., 102, 141 S. E., 474; *Picklesimer v. R. R.,* 194 N. C., 40, 138 S. E., 340; *Tripp v. Tob. Co., supra; Baker v. Winslow,* 184 N. C., 1, 113 S. E., 570; *Hodges v. Hall, supra; Saunders v. Gilbert, supra; Brame v. Clark,* 148 N. C., 364, 62 S. E., 418; *Ammons v. R. R.,* 140 N. C., 196, 52 S. E., 731; *Jackson v. Tel. Co.,* 139 N. C., 347, 51 S. E., 1015; *Osborn v. Leach, supra; Chappell v. Ellis,* 123 N. C., 259, 31 S. E., 709; *Remington v. Kirby,* 120 N. C., 320, 26 S. E., 917. Whether this is the result of a consistent or satisfactory philosophy, we need not now pause to debate. 8 R. C. L., 579; 17 C. J., 968. It would serve no useful purpose. Suffice it to say, it is thoroughly established by the pertinent decisions, though the doctrine may be repudiated in some jurisdictions. 17 C. J., 969.

In the case at bar, there is evidence of an aggravated, criminal assault. This calls for an issue of punitive damages to be submitted to the jury. *Saunders v. Gilbert, supra; Sowers v. Sowers,* 87 N. C., 303; *Pendleton v. Davis,* 46 N. C., 98; *Causee v. Anders,* 20 N. C., 388.

New trial.

MRS. NANNIE DRAPER PETTY v. PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA.

(Filed 14 October, 1936.)

1. Pleadings I c—

Upon plaintiff's motion for judgment on the pleadings, defendant's answer must be given the most favorable interpretation and every intendment taken against the plaintiff.

2. **Insurance I b—Complaint held to sufficiently allege fraud in procuring reinstatement of policy within provisions of C. S., 6460.**

Defendant insurer's answer alleged that insured signed a written statement and certificate of health to secure a reinstatement of his policy in which insured stated he was in good health and had not been attended by physicians for the year previous, whereas, in fact, defendant was suffering with ulcer of the stomach, and had been so informed by physicians which attended him less than one year prior to the application, that the application stated that the representations therein were made as a consideration for the reinstatement of the policy, that insurer did rely upon the representations and was induced thereby to reinstate the policy, which it would not have otherwise done, and that insured died from an operation for the ulcer performed less than ninety days after the application for reinstatement of the policy. *Held:* Even conceding that the application for reinstatement was governed by the provisions of C. S., 6460, that policies issued without a medical examination shall not be avoided for misrepresentations as to physical condition except in cases of fraud, insurer's answer sufficiently alleged fraud, and plaintiff beneficiary's motion for judgment on the pleading was erroneously granted, insurer being entitled to a day in court to prove the allegations if it can.

3. **Fraud B b—**

In alleging fraud it is not necessary that the word "fraud" appear in the pleading, it being sufficient if it is alleged that the opposite party knowingly made a material misrepresentation with intent that the pleader should rely thereon, and that the pleader did rely thereon to his damage.

APPEAL by defendant from *Cranmer, J.,* at June Term, 1936, of VANCE. Reversed.

Action by the plaintiff beneficiary upon a policy of insurance issued upon the life of Ira Moody Petty.

Judgment upon the pleadings for the amount demanded in the complaint was entered by the court below. Defendant appealed.

J. P. and J. H. Zollicoffer for plaintiff, appellee.
J. M. Broughton for defendant, appellant.

DEVIN, J. A judgment for the plaintiff upon the pleadings has the same effect as sustaining a demurrer to the answer, and requires that the defendant's pleading shall be given the most favorable interpretation and every intendment taken against the plaintiff. *Barnes v. Trust Co.,* 194 N. C., 371; *Pridgen v. Pridgen,* 190 N. C., 102.

It is necessary, therefore, to examine the allegations of the answer in accord with this rule.

After admitting the issuance of the policy sued on and the death of the insured, the defendant interposed the defense that the policy had lapsed for failure to pay the premiums due thereon, and that subsequently the insured made written application for reinstatement with a certificate

of health, wherein certain representations as to his then physical condition and previous requirement of medical services were made, concluding with the following language: "I hereby declare that the foregoing statements and certifications are made by me as a consideration for the acceptance by the company of the premium now in default and for the reinstatement of the above numbered policy as of the due date of said premium and are complete, true, and correct, and I understand that the company, believing the same to be such, will rely and act on them."

It is particularly alleged in the answer that, in response to the question, "Are you now in good health?" the insured replied, "Yes": "Whereas, in truth and in fact, the said insured was not at such time in good health, but, on the contrary, had at such time an ulcer of the stomach, among other ailments, of which condition the insured had previous thereto been informed and advised by one or more physicians, and for which condition a diet had been prescribed by physicians, and that said condition of ulcer of the stomach was such as to necessitate an operation of said insured, which was performed less than ninety days after the date of said certificate of health, pursuant to which operation, the death of the insured occurred a few days thereafter."

It was further alleged in defendant's answer that, in response to the question, "Have you during the past year had any injury, sickness, or ailment of any kind, or required the services of a physician or other practitioner?" the insured replied, "No": "Whereas, in truth and in fact, the insured within less than a year of the date of the said certificate of health had had sickness or ailments, including said condition of ulcer of the stomach, and had required and obtained the services of one or more physicians in connection therewith, and had within said period of less than one year previous to the date of said certificate of health been treated by one or more physicians, and had been informed by such physicians of the said condition of ulcer of the stomach; that the insured, by his answer, represented to the defendant that during the year previous to the date of said certificate, he had not had any injury, sickness, or illness of any kind, or required the services of a physician or any other practitioner, whereas, in truth and in fact, the insured had experienced sickness, as herein set forth, and had required and obtained the services of one or more physicians."

It was further alleged that the defendant relied upon the representations contained in the application for reinstatement and certificate of health and was induced thereby to reinstate said policy, which it would not otherwise have done.

In support of the ruling of the court below, the plaintiff contends that the provisions of C. S., 6460, apply to applications for reinstatement of policies unaccompanied by medical examination, and that the defendant

may not now resist payment of the amount of the insurance "on account of any misrepresentation as to the physical condition of the applicant except in cases of fraud," and that having failed to allege fraud, allegations of mere misrepresentation do not constitute a defense to a suit on the policy. Conceding, without deciding, that the provisions of the statute, C. S., 6460, are broad enough to cover an application for reinstatement of a lapsed policy as well as the initial contract where no medical examination was required, we are of opinion, and so decide, that the answer in the instant case does set out all the elements of fraudulent misrepresentation, sufficient to raise an issue.

It is not necessary that the word "fraud" be used in the pleading, nor that it be alleged in direct terms, if the facts averred contain all the essential elements of fraud. *Colt v. Kimball,* 190 N. C., 169; *S. ex rel. Worth v. Stewart,* 122 N. C., 263; 27 C. J., 30; 12 R. C. L., 417.

In *Whitehurst v. Ins. Co.,* 149 N. C., 273, defining the necessary elements to constitute fraud in the representation, it was held that as to the statement the following conditions must occur: (1) That it be untrue; (2) that the person making the statement either knew it to be untrue or was culpably ignorant whether it be true or not; (3) that it was material to the transaction and was made with intent that the other party should act upon it; (4) that the other party does act in reliance on the statement in the manner contemplated, and thereby suffers loss. *Stone v. Milling Co.,* 192 N. C., 585; *Plotkin v. Bond Co.,* 204 N. C., 508; *Ghormley v. Hyatt,* 208 N. C., 478.

The falsity and the *scienter* of the representation that the insured was in good health and had not required the services of a physician, as well as the other elements of fraudulent misrepresentation, affirmatively appear from the allegations of the answer.

Whether the defendant can make good its allegations by competent proof is another matter. At least, it is entitled to a day in court. *Abernethy v. Burns,* 206 N. C., 370.

The judgment on the pleadings must be

Reversed.

SHERMAN OWENS AND WIFE, G. L. OWENS; ROSA OWENS ANDERS AND HUSBAND, CAP ANDERS; DELIA OWENS; W. L. OWENS AND WIFE, DESSIE OWENS; ROXIE OWENS McCALL AND HUSBAND, GARLAND McCALL; SUSIE OWENS McCALL AND HUSBAND, ELBERT McCALL; DORA OWENS McCALL AND HUSBAND, J. P. McCALL; CANNIE OWENS GOLDEN AND HUSBAND, REAL GOLDEN; FRED OWENS AND WIFE, OTHA OWENS; AVERY OWENS AND WIFE, CASSIE OWENS; SPURGEON OWENS AND J. T. OWENS, SOLE AND ONLY HEIRS AT LAW OF SHERMAN OWENS, DECEASED, v. BLACKWOOD LUMBER COMPANY, INC., AND CANEY FORK LOGGING RAILWAY COMPANY.

(Filed 14 October, 1936.)

1. Trial D a—

Upon motion as of nonsuit, all the evidence which tends to support plaintiff's cause of action is to be considered in its most favorable light for plaintiff, and he is entitled to every reasonable intendment thereon and every reasonable inference therefrom. C. S., 567.

2. Adverse Possession C b—Evidence that plaintiffs had been in possession for twenty years adversely to defendant held for jury.

Plaintiffs' evidence tended to show that they and those under whom they claimed by inheritance and *mesne* conveyances had been in possession of the *locus in quo* continuously for over twenty years, claiming to known and visible lines and boundaries coextensive with the calls in the State grant of their original predecessor in title, that they had used the land by cultivating, clearing, pasturing, fencing, building houses, planting an orchard, such acts constituting the usual and customary use of like lands in the community. *Held:* The evidence was sufficient to be submitted to the jury on the issue of plaintiffs' actual, open, continuous, notorious, and adverse possession of the lands sufficient to ripen title in plaintiffs under the provisions of C. S., 430, and defendants' motion to nonsuit in plaintiffs' action to recover damages for the wrongful cutting and removal of timber from the tract was erroneously granted.

3. Adverse Possession A d—Where dower is not allotted, widow's registered deed in fee is sufficient ouster and notice to heirs.

Plaintiffs claimed the lands in question by over twenty years adverse possession, plaintiffs' ancestor having gone into hostile and exclusive possession under a deed in fee from the widow of the grantee in a State grant. No dower was allotted to the widow. Defendants claimed that plaintiffs' possession was not adverse to the heirs at law until the widow's death and the termination of her dower rights. *Held:* Defendants' contention is untenable, since no dower had been allotted to the widow, and her registered deed was sufficient ouster and notice to the heirs of plaintiffs' adverse claim.

4. Adverse Possession A f—Rule that tenant in common cannot hold adversely to cotenants held inapplicable to facts of this case.

Plaintiffs' ancestor went into possession of the *locus in quo* under a deed in fee from the widow of the grantee in a State grant, no dower

having been allotted to the widow. Thereafter, the heirs at law executed a deed to plaintiffs' ancestor, but the deed was void as to some of the heirs at law for defect in their acknowledgment. Defendants contended plaintiffs' possession was not adverse to the heirs at law whose deed was defective, since under the deed plaintiffs' ancestor took only the title of those heirs whose acknowledgment was not defective and held as tenant in common with the other heirs. *Held:* The widow's deed was sufficient ouster as to all the heirs, and defendants' contention cannot be sustained, and the deeds from the widow and heirs at law, even if insufficient to constitute color of title, are competent evidence under the ancient document rule under plaintiffs' claim of adverse possession for over twenty years.

APPEAL by plaintiffs from *Oglesby, J.*, at May Term, 1936, of JACKSON. Reversed.

This is a civil action, instituted by Sherman Owens and wife, G. L. Owens, on 14 August, 1930, against the defendants for the recovery of damages for the wrongful cutting and removal of the timber on Grant No. 1155, calling to contain 100 acres of land, and for the wrongful construction over said lands of a logging railroad and other acts of trespass and damage thereto by the defendants over the objection and notice not to do so by plaintiffs; and for the recovery of said tract of land embraced in said grant. Pending the action and before the trial of same, the plaintiff Sherman Owens died and his heirs at law and children were made parties plaintiff and adopted the complaint as filed theretofore herein.

The plaintiffs allege that they are the owners in fee of said tract of land covered by State Grant No. 1155, from which said timber was cut and removed and the railroad constructed by the defendants; that they, and those under whom they claimed title, had been in adverse possession thereof for more than 50 years under color of title connected with said grant and other muniments of title and actually using and occupying the same for farming purposes and other uses to which they were capable of being used; that their title to said lands had ripened by the required adverse possession under color, the source of which was State Grant No. 1155, a junior grant, but issued and granted 18 February, 1878, recorded in Jackson County on 15 February, 1879; and that even without color of title plaintiffs claim to be the owners in fee of said lands by reason of adverse possession thereof for the required time by them and their deceased father, Sherman Owens, for more than 20 and 30 years, so the plaintiffs claim they are the lawful owners of said lands and that their title thereto has ripened by the required adverse possession thereof under color or without color. The plaintiffs contended and offered evidence to show that Sherman Owens moved on the tract of land with his family in May, 1909, and that he and family or his

tenants lived on the said lands and have been in the adverse possession of same until the action was brought on 14 August, 1930, and that prior to the year 1909, Sylvester Galloway and a Mr. Ellenburg built a house on said lands in the year 1904 and lived thereon; and that Sylvester Galloway is the grantee in State Grant No. 1155, and that the heirs of Sylvester Galloway by deed dated 30 September, 1907, conveyed the lands embraced in said grant to Sherman Owens, and that Sue E. Booker, née Sue E. Galloway and husband, William Booker, and Rhoda E. Fisher, attorney in fact, conveyed the lands to A. S. (Sherman) Owens by deed dated 14 December, 1903.

The defendant Blackwood Lumber Company alleges that it is the owner in fee of the lands described in the complaint and had a lawful right to cut and remove the timber therefrom and construct said railroad over same, under Grant No. 251, issued in 1796 to David Allison, assignee of John Gray Blount and William Cathcart, the same being dated 29 November, 1796, and registered in the Jackson County Public Registry, in Book H-8, page 346, *et seq.*, on 16 October, 1882, and said grant containing 250,240 acres, and embracing and covering the lands described in the complaint, and a chain of title connecting it with the title of Grant No. 251 aforesaid; that it was admitted or agreed by plaintiffs and defendants as appears in the record that said Grant No. 251 covers the lands described in the complaint and claimed by the plaintiffs, and that the defendants have a chain of title connecting them with the title of said grant, a senior grant to Grant No. 1155, the latter being the base of title claimed by the plaintiffs, and that said chain of title need not be introduced except the deeds from Highland Forest Company to Jackson Lumber Company and from Jackson Lumber Company to Blackwood Lumber Company, said agreement being subject to the conditions therein stated.

The defendant Blackwood Lumber Company further alleges and contends that it is the owner in fee of said lands described in the complaint on the ground that it, and those under whom it claims title, have been in the adverse possession thereof for more than 100 years, and pleads as defenses to the action and the right of the plaintiffs to recover herein the following: (1) Adverse possession of the lands in question for 30 years, subdivision 1 of sec. 425 of C. S.; (2) adverse possession under color of said lands for more than 21 years, subdivision 2 of sec. 425 of C. S.; (3) adverse possession of said lands for more than 20 years, sec. 430 of C. S.; and (4) adverse possession of said lands under color for more than 7 years, sec. 428 of C. S., and that such adverse possession was under known and visible lines and boundaries and ripened its title to said tract of land in controversy.

The defendants, over objection by plaintiffs, claimed title to the lands described in the complaint or an interest therein under purported deeds dated 20 July, 1908, from some of the heirs at law of Sylvester Galloway to R. M. Galloway and from R. M. Galloway and wife on same date to Highland Forest Company, as set forth in the record.

The court below signed the judgment of nonsuit appearing in the record. Plaintiffs excepted and assigned error, and appealed to the Supreme Court.

W. R. Sherrill and E. P. Stillwell for plaintiffs.

R. L. Phillips and F. E. Alley, Jr., for defendant Blackwood Lumber Company.

CLARKSON, J. At the close of plaintiffs' evidence and at the close of all the evidence the defendants made motions in the court below for judgment as in case of nonsuit. C. S., 567. The court below granted the motion at the close of all the evidence. We do not think the judgment of nonsuit in the court below, at the close of all the evidence, can be sustained. Upon a motion as of nonsuit, all the evidence which makes for plaintiff's claim or tends to support his cause of action is to be considered in its most favorable light for plaintiff, and he is entitled to every reasonable intendment thereon and every reasonable inference therefrom.

There are a great many questions set forth in the briefs of litigants which we do not think necessary now to consider.

The plaintiffs allege: "That, in addition to having a regular paper title or muniments of title with State Grant No. 1155 aforesaid, dated 18 February, 1879, as the base or source, from the State down to Sherman Owens, the plaintiffs and those through, by, and under whom they claim title have had open, continuous, notorious, and adverse possession under colorable title and under known and visible lines and boundaries, for many years, to wit, more than fifty years."

N. C. Code 1935 (Michie), sec. 425, is as follows: "The State will not sue any person for, or in respect of, any real property, or the issue or profits thereof, by reason of the right or title of the State to the same—(1) when the person in possession thereof, or those under whom he claims, has been in the adverse possession thereof for thirty years, this possession having been ascertained and identified under known and visible lines or boundaries; which shall give a title in fee to the possessor."

Section 426: "In all actions involving the title to real property title is conclusively deemed to be out of the State, unless it is a party to the action, but this section does not apply to the trials of protested entries

laid for the purpose of obtaining grants, nor to actions instituted prior to 1 May, 1917."

Section 430: "No action for the recovery of possession of real property, or the issues and profits thereof, shall be maintained when the person in possession thereof, or defendant in the action, or those under whom he claims, has possessed the property under known and visible lines and boundaries adversely to all other persons for twenty years; and such possession so held gives a title in fee to the possessor, in such property, against all persons not under disability." *Johnson v. Fry,* 195 N. C., 832; *Dill-Cramer-Truitt Corp. v. Downs,* 201 N. C., 478; *Reid v. Reid,* 206 N. C., 1.

In *Locklear v. Savage,* 159 N. C., 236, at pp. 237-8, it is said: "What is adverse possession within the meaning of the law has been well settled by our decisions. It consists in actual possession, with an intent to hold solely for the possessor to the exclusion of others, and is denoted by the exercise of acts of dominion over the land, in making the ordinary use and taking the ordinary profits of which it is susceptible in its present state, such acts to be so repeated as to show that they are done in the character of owner, in opposition to right or claim of any other person, and not merely as an occasional trespasser. It must be decided and notorious as the nature of the land will permit, affording unequivocal indication to all persons that he is exercising thereon the dominion of owner," citing numerous authorities. *Shelly v. Grainger,* 204 N. C., 488.

What is the evidence that plaintiffs have "possessed the property under known and visible lines and boundaries adversely to all other persons for 20 years"? The source of plaintiffs' title to said lands is State Grant No. 1155, issued to Sylvester Galloway by the State of North Carolina on 18 February, 1878, recorded in Jackson County, in Book G-7, at page 195, on 15 February, 1879, and described therein by metes and bounds is the 100-acre tract of land in question in this action. The *mesne* conveyances connecting the plaintiffs with said State Grant No. 1155, the source of their title, are as follows:

1. Power of attorney, dated 14 November, 1903, from Sue E. Booker, née Sue E. Galloway (Sue E. Galloway was the widow of Sylvester Galloway, deceased, who is the grantee in Grant No. 1155), to Rhoda E. Fisher, giving her full and complete power and authority to sell and convey lands and real estate, which was recorded on 8 September, 1905, in Book 23, at page 73.

2. On 14 December, 1903, Sue E. Booker, née Sue E. Galloway, and her then husband, William Booker, and Rhoda E. Fisher, attorney in fact, executed and delivered to A. S. (Sherman) Owens a warranty deed

in proper form with full covenants and warranty, conveying to him in fee simple the lands embraced in said Grant No. 1155, and with full description by metes and bounds as the same appear in said grant, which said deed was filed 12 October 1905, and duly recorded in Jackson County on 14 October, 1905, in Book JJ, at page 31.

3. Deed dated 30 September, 1907, from Sylvanus Galloway, Salina McCall, Jackson McCall, Garland McCall, Rufus Galloway, and others, heirs at law of Sylvester Galloway, to Sherman Owens, conveying to him all their right, title, claim, and interest in the tract of land in controversy and describing the same by metes and bounds and expressly in the premises call attention to the fact that Sue E. Booker and husband, William Booker, for a consideration of $200.00, had conveyed said lands to Sherman Owens by a "certain deed of absolute conveyance, with full covenants of warranty, duly executed—recorded in Jackson County, in Book JJ, page 31," and this last deed to Sherman Owens was filed on 8 October, 1907, and recorded in Jackson County, on 26 October, 1907, in Book NN, at page 489, *et seq.*

The plaintiffs offered evidence tending to show that they, and those under whom they claim title, have been in the actual, open, continuous, notorious, and adverse possession of the lands in question and as described in the complaint for more than forty years, and that possession has been ascertained and identified under known and visible lines and boundaries coextensive with the lines of Grant No. 1155 and the lines of the description in the two deeds to Sherman Owens for said tract of land.

The plaintiffs offered evidence tending to show that this possession of the land in question began about 40 years ago, when a man by the name of Mr. Ellenburg (now dead) went on the land for Mr. Owens, helped build the house, cleared up some of the land, and worked and stayed there for Mr. Owens; that in 1904 Sherman Owens and his son, W. L. Owens, went on the tract of land and went around the lines of the entire tract; that Sherman Owens could not read and he took his son and deeds and had his son read the calls, and they went around the land; that Sherman Owens and family moved on the land in May, 1909, and lived in the house and cultivated some of the lands, and, following this possession and occupancy by Sherman Owens and family of the tract of land, the plaintiffs offered the evidence of numerous witnesses who, as the tenants and lessees of Sherman Owens or his wife and heirs at law, actually lived on the land and possessed and occupied the same for the plaintiffs, beginning in 1910, when Sherman Owens and family moved, and continued thereafter until the year 1930, when the defendants went on the land and commenced cutting timber.

That this possession and occupancy of the land was continuous for more than 30 years by the successive tenants and lessees of the plaintiff, and evidenced by such use of the land as it was capable of at the time, that is, farming, cultivating, clearing, using firewood, pasturing, fencing, building houses and outhouses, sowing grass and planting trees for orchard, and making such use of the same as is or was usual and customary for farmers on mountain farms in the community.

The land in controversy was surveyed by one H. R. Queen, an expert surveyor. The beginning corner of Grant 1155, which covers the *locus in quo,* was well known to him and was a marked chestnut standing in Rocky Knob Gap, about thirty years ago (now down). There were marked trees on the first line and other marks. The 100 acres had visible lines and boundaries. These were known to Sherman Owens and his son, W. L. Owens.

Fred McCall testified, in part: "Sherman Owens is my uncle. I was looking after this property for Mr. Owens, when they sent him off he got me to look after it and take care of it for him, from 1919 to 1930. I rented it to Lawton McCall in 1919 and he went into possession of the land in 1919 and left in 1922, I think; Mr. McCall was to go there and take care of the place for me and look after it and keep people out from ranging, hunting, and fishing, and he lived on the property three years; he was the first renter I put there. During this period from 1919 to 1930 I kept the fences up on the place the best I could, ranged it and farmed it until the Blackwood Lumber Company drove on it. I kept 6 or 7 head of cattle on the property; yes, my brother had some and I got him and he helped me look after the cattle and to look after the place; this is my brother Charley and he is here. Charley and I would go over the property to look after it once and twice a week. The house burned down shortly after Lawton McCall moved away after 1922. Yes, Charley McCall had live stock on this land, five or six head, in addition to mine. I went ahead and looked after this property, kept up the fences the best I could and ranged my stock and did that each year, and also my brother, Charley McCall, helped me look after it each year and pastured his cattle there."

The land was suitable for pasturing, and that was one of the uses for which it was adapted. This evidence was competent, in fact, it was not objected to.

Then, again, the defendant Blackwood Lumber Company, Inc., recognized that Sherman Owens owned the land. On 10 April, 1928, James E. Walker wrote T. S. Fortner, in part, as follows:

BLACKWOOD LUMBER CO., INC.
MANUFACTURERS
HARDWOOD AND SPRUCE LUMBER.

EAST LAPORTE, N. C., April 10, 1928.

T. S. FORTNER,
Argura, N. C.

DEAR SIR: There is a piece of land on Tennessee Creek belonging to Sherman Owens. Some say it is about 100 acres and some say about 80 acres. . . .

Yours truly,
BLACKWOOD LUMBER CO.,
(Signed) By JAS. E. WALKER.

Fortner, who for 20 years patrolled the land for defendant and its predecessors in title, testified, in part: "Mr. Walker was president of the Blackwood Lumber Company; his letters and checks said that he was president, I got a check once a month and it was signed by Mr. Davison. Mr. Walker sent me up there and he said him and Mr. Sherman Owens was on a trade about the land and he wanted me to go and see if the timber was any account and it was good looking timber, such as spotted oak and maple and I went and saw it. Mr. Walker said he was going to buy this land from Sherman Owens, that they were on a trade. . . . My duties were to travel over the land, keep down fires and cutting of timber and trespassing, put out fires and keep people from destroying timber. I patrolled 14,000 acres of them; yes, this Sherman Owens tract lies in this 14,000 acres. . . . Sherman Owens showed me where his line was. No, this letter of 10 April, 1928, from the president of the Blackwood Lumber Company was not the first I knew about the Sherman Owens tract. I had no instructions to patrol the Owens tract, I never told a man to get off of that property because it was Sherman Owens' land."

Ralph Rigdon testified, in part: "I was carrying the mail to Tuckaseigee in 1928 and 1929. I knew Sherman Owens at that time and James E. Walker, president of the Blackwood Lumber Company. I saw Sherman Owens and James E. Walker up at East LaPorte in the fall of 1928. Sherman Owens came and got me to bring him to East LaPorte and when he got there he run into Mr. Walker at the office and told him he had come to sell him that land and old man Walker told him all right, and asked him what he wanted for it and Sherman Owens said $15.00 an acre, and Mr. Walker told him he wouldn't buy it that way, that he would give him $15.00 an acre for it and run it out. (The

court restricted this evidence and permitted only for the purpose of showing Sherman Owens' possession of the property at that time and not as to the measure of damage.) This conversation took place out in the yard and when we first came down there Mr. Owens and Mr. Walker went in the office. Mr. Walker said he would have the land run out and pay him for whatever there was of it, and Sherman Owens claimed there was 100 acres and Walker said he understood there was about 80 acres. . . . Later on, two or three months after that first conversation, Sherman Owens came back again with me and when we drove up Mr. Walker came from the store and Sherman Owens and I got out and shook hands with Mr. Walker. Mr. Walker said at that time he wouldn't consider buying that land at all now, that he understood he had the oldest title to it, and that it belonged to the Blackwood Lumber Company."

There was plenary evidence to be submitted to the jury that plaintiffs "have possessed the property under known and visible lines and boundaries, adversely to all other persons, for 20 years," at least. If this be true, plaintiffs have a "title in fee." Section 430, *supra.*

It was contended by defendant that Sue E. Booker, née Sue E. Galloway, who was the widow of Sylvester Galloway, died in California in 1924, and the possession was not adverse until the date of her death. We cannot so hold. The record discloses that no dower was ever laid off to her.

In the record we find: (1) Deed dated 14 December, 1903, from Sue E. Booker, née Sue E. Galloway, and her then husband, William Booker, and Rhoda E. Fisher, attorney in fact, to A. S. (Sherman) Owens conveying to him in fee, with full covenants of warranty, the land in question. (2) Deed dated 30 September, 1907, from Sylvanus Galloway and others to Sherman Owens conveying to him the land in question, referring to above deed and reciting the conveyance. There is a slight defect in the acknowledgment as to part of the grantors in the deed of 30 September, 1907.

In *Whitten v. Peace,* 188 N. C., 298 (302-3), citing numerous authorities, it is said: "This Court has held, in *Norwood v. Totten,* 166 N. C., 649, that a deed executed by a wife, conveying land to her husband, void for failure of the probate officer to comply with C. S., 2515, is, nevertheless, color of title, and that adverse possession by the husband under such deed for seven years will ripen into a perfect title."

In *Graves v. Causey,* 170 N. C., 175, it is held (1st headnote): "Where the deceased owner of lands leaves a widow, who, without allotment of dower, remains on the lands until her marriage, and then conveys them, with her husband, in fee, for a valuable consideration, and the grantee has his deed recorded and enters into possession and

builds upon and exclusively uses the lands, the registration of the deed and the occupancy of the lands put the heir at law of the original owner upon notice of the act of ouster and hostile possession, and the continuous possession by the grantee, or those claiming under him, for seven years, under the deed as color, will ripen the title."

We do not think the contention of defendant can be sustained. The deeds, if not color, are at least some evidence, under the ancient document rule, to be submitted to the jury on adverse possession for 20 or 30 years, under statutes before set forth. *Thompson v. Buchanan,* 195 N. C., 155 (160-1); *Sears v. Braswell,* 197 N. C., 515.

For the reasons given, the judgment of the court below is

Reversed.

DR. T. A. ALLEN v. DR. H. C. CARR, DR. W. F. BELL, DR. R. F. JARRETT, DR. E. B. HOWLE, DR. C. E. MINGES, AND DR. C. C. POINDEXTER, INDIVIDUALLY, AND AS NORTH CAROLINA BOARD OF DENTAL EXAMINERS.

(Filed 14 October, 1936.)

1. **Constitutional Law C c: Physicians and Surgeons A b—State may regulate practice of dentistry in exercise of police power.**

   Public Laws of 1935, ch. 66, sec. 11, providing that a licensed dentist who shall have retired, or who shall have moved to another state and thereafter returned to this State, shall stand and pass an examination by the State Board of Dental Examiners as to his proficiency in the profession of dentistry, and shall show good moral character, before issuance of license to resume practice in this State, *is held* constitutional and valid as an exercise of the police power of the State for the good and welfare of the people.

2. **Constitutional Law G a: G d—Act requiring second examination before issuance of license to resume practice of dentistry held not to deny equal protection of laws or to confer exclusive privileges.**

   Plaintiff was licensed by the State Board of Dental Examiners. Thereafter, plaintiff moved from the State and failed to renew his license here, but practiced his profession successively in two other states after having been examined and licensed by them. Plaintiff then returned to this State, but license to resume practice here was refused after examination by the State Board of Dental Examiners for plaintiff's failure to show the required proficiency in the profession of dentistry. Plaintiff sought *mandamus* to compel the issuance of license, contending that ch. 66, sec. 11, Public Laws of 1935, under which the second examination was required, was unconstitutional in that it denied plaintiff the equal protection of the laws (Fourteenth Amendment to the Federal Constitution), abridged the privileges and immunities of plaintiff as a citizen of the United States (Federal Constitution, Art. IV, sec. 2), and conferred

exclusive emoluments and privileges in violation of Art. I, sec. 7, of the State Constitution, it appearing that plaintiff had continuously practiced his profession since his first license was issued, and plaintiff contending that to require a second examination of him while no second examination is required of those practicing the profession continuously within the State, violated his constitutional rights. *Held:* Plaintiff's contentions cannot be sustained, since the act bears alike upon all classes referred to therein and does not discriminate against plaintiff.

3. **Physicians and Surgeons A b—Licensed dentist who moves from State must obtain license to resume practice upon return to this State.**

A dentist licensed by the State Board of Dental Examiners, who thereafter moves from this State and practices his profession successively in other states, upon examination and license by them, and then returns to this State, must obtain a license to resume practice here by passing a second examination by the State Board of Dental Examiners, although such dentist has continuously practiced dentistry since he was first licensed by the State Board. Ch. 66, sec. 11, Public Laws of 1935.

4. **Same: Mandamus A d—While mandamus will lie to compel exercise of discretionary power, it does not lie to control course of action.**

Plaintiff sought to compel defendant Board of Dental Examiners to issue license to him to resume the practice of dentistry. The court found as a fact that the board had refused to issue such license upon its finding after examination that plaintiff had failed to show satisfactory proficiency in the profession of dentistry, and had refused to issue the license in the exercise of its judgment and discretion, and had not arbitrarily abused its discretion. Ch. 66, sec. 11, Public Laws of 1935. *Held: Mandamus* will not lie to control the decision of the board in the exercise of its discretionary power, the extent of *mandamus* in such cases being limited to compel the exercise of the discretionary power, but not to control the decision reached in its exercise.

APPEAL by plaintiff from *Sink, J.,* 2 September, 1936. From HENDERSON. Affirmed.

This was an application for writ of *mandamus,* commenced by plaintiff against defendants, members of the N. C. Board of Dental Examiners, requiring and compelling them to issue a renewal of plaintiff's license to practice dentistry in North Carolina.

The court below found the following facts, and rendered judgment thereon:

"1. That summons herein was issued on 18 August, 1936, and served upon each of the members of the North Carolina State Board of Dental Examiners.

"2. That the plaintiff, upon the completion of a three-year period, graduated with the degree of Doctor of Dental Surgery from the Atlanta Dental College, of Atlanta, Ga., on 23 April, 1897.

"3. That on 11 May, 1897, the plaintiff, having taken the prescribed examination of the defendant board, and having been found proficient and fit, was granted license No. 95 on 11 May, 1897, and soon thereafter

began the practice of dentistry in Haywood County, where, on 1 July, 1897, his license No. 95 was recorded in Book of Licensed Dentists, page 11.

"4. That in the year 1899 the plaintiff gave up his practice in Haywood County, North Carolina, and went to the State of Colorado, where he appeared before the dental examiners of that State, from which he procured license under which he practiced dentistry in the State of Colorado until the year 1910.

"5. That in the year 1910 the plaintiff gave up his practice in the State of Colorado and removed to the State of Tennessee, where he applied to the State Board of Dental Examiners of Tennessee for license, and having taken and successfully passed the examination prescribed on 7 June, 1910, he was issued a license to practice the profession of dentistry in the State of Tennessee, where he practiced his profession until February, 1936.

"6. That in February, 1936, the plaintiff returned to the State of North Carolina and made inquiry of the defendant board as to the steps he should take to have his North Carolina dental license of 1897 renewed, and was advised that it would be necessary for him to appear before said board and stand an examination, as required by section 11, chapter 66, Public Laws of 1935; that certain forms were furnished to the plaintiff, which he properly executed and returned to the secretary of the board, together with the sum of $10.00, being the fee required by said board upon his application.

"7. That the plaintiff was advised to appear before the defendant board on 22 June, 1936, upon which day he did appear for the purpose of submitting to the examination prescribed by the board; that the board gave to the plaintiff a clinical examination; that is, an examination in the mechanics of dentistry, and upon the examination the plaintiff did not make a satisfactory showing to said board of his proficiency in the profession of dentistry.

"8. That upon the failure of the plaintiff, upon the examination on 22 June, 1936, to make a satisfactory showing to the defendant board of his proficiency in the profession of dentistry, the said defendant board, by official action, upon vote of the entire membership, denied the application of the plaintiff for the issuance of a license to resume the practice of dentistry in North Carolina; and said plaintiff received due notice of said denial.

"9. That at the time the plaintiff undertook the clinical examination prescribed for him by the defendant board, and at the time it denied to the plaintiff license to resume the practice of dentistry in North Carolina, the defendant board did not give any consideration as to the moral character of the plaintiff.

"10. That the plaintiff has not, at any time, renewed his license under section 11, chapter 178, Public Laws of 1915, and has paid no fee and made no application for the restoration of his license as required by said section.

"11. That the plaintiff has practiced his profession continuously and without interruption from 1 July, 1897, to 1 February, 1936, and upon examination was granted license by the North Carolina Board of Dental Examiners in 1897; by the Board of Dental Examiners of the State of Colorado in 1899; and by the Board of Dental Examiners of the State of Tennessee in 1910, and that the license issued to him by the Board of Dental Examiners of the State of Tennessee has been renewed and is in full force and effect until 30 June, 1937.

"12. That section 11, chapter 66, Public Laws of 1935, required the plaintiff to apply to the defendant board for a license to resume the practice of dentistry in North Carolina, and authorized the defendant board to grant such license upon a satisfactory showing to said board of his proficiency in the profession of dentistry, and his good moral character during the period of his retirement; that said examination was duly given and the defendant board, within its authority and power and in the proper exercise of the duties and obligations imposed upon it by law, and in the exercise of its discretion, found that the plaintiff has not made, upon his examination, a satisfactory showing of his proficiency in the profession of dentistry; that without considering further facts as permitted under the act, said defendant board, in the proper exercise of its duties and obligations under said act, and pursuant to its judgment and discretion, denied to the plaintiff a license to resume the practice of dentistry in North Carolina.

"Upon the foregoing facts, it is the judgment of this court that the plaintiff is not entitled to the relief sought herein, and, upon motion of the defendants, the application of plaintiff for *mandamus* is denied, and this action is dismissed. This 2 September, 1936.

H. HOYLE SINK, *Judge,*
Holding the Courts of the 18th Judicial District."

To the signing of the foregoing judgment denying the application for the writ of *mandamus,* the plaintiff, in apt time, excepted, assigned error, and appealed to the Supreme Court.

R. L. Whitmire for plaintiff.
I. M. Bailey for defendants.

CLARKSON, J. The facts found by the court below fully set forth this controversy, and on them we think plaintiff's application for *mandamus* to renew his license to practice dentistry properly denied.

Public Laws 1935, ch. 66, sec. 11, is as follows: "Any person who shall have been licensed by the North Carolina State Board of Dental Examiners to practice dentistry in this State who shall have retired from practice or who shall have moved from the State and shall have returned to the State, may, upon a satisfactory showing to said board of his proficiency in the profession of dentistry and his good moral character during the period of his retirement, be granted by said board a license to resume the practice of dentistry upon making application to the said board in such form as it may require and upon the payment of the fee of ten dollars. The license to resume practice, after issuance thereof, shall be subject to all the provisions of this act."

The plaintiff contends that the above section is unconstitutional, on the following grounds: "That in requiring this plaintiff, who has been duly licensed to practice dentistry in North Carolina, to take a second examination while all other dentists in the State are required to take only one examination, section 11 of the Act of 1935 is unconstitutional, in that it denies the plaintiff the equal protection of the laws of North Carolina and is in direct conflict with the 14th Amendment of the Constitution of the United States. Said section of said act is also unconstitutional, in that it abridges the privileges and immunities of the citizens of the United States and is in direct conflict with the 14th Amendment to the Constitution of the United States, and is further in conflict with section 2, Article IV, of the Constitution of the United States. That section 11 of the Act of 1935, which authorizes the defendant board to require two examinations of this plaintiff while all other dentists are only required to undergo one examination is void and unconstitutional, in that it confers upon other dentists exclusive emoluments and privileges, and is, therefore, forbidden by section 7, Article I, of the Constitution of North Carolina. Said act of the Legislature and said act of defendant board is also unlawful and void, in that the plaintiff is deprived of a substantial property right other than by the law of the land, and is, therefore, in conflict with section 17, Article I, of the Constitution of the State of North Carolina. Said act of the Legislature and said act of the defendant board are likewise in conflict with sections 30 and 31 of the Constitution of the State of North Carolina."

Plaintiff also contends: "That if it should be decided that section 11 of the Act of 1935 is not in conflict with those sections of the Constitution of the United States and the Constitution of North Carolina, as hereinbefore alleged, then said section of said act has no application to plaintiff, in that he has never retired from the practice of dentistry, but has been engaged in said practice continuously and without interruption since he was first licensed by the defendant board in the year 1897."

We do not think that either of plaintiff's contentions can be sustained. The act is, we think, constitutional in all respects. The plaintiff was

duly licensed to practice dentistry on 11 May, 1897. In 1899 plaintiff left this State and did not return to North Carolina until about 1 February, 1936. He is now residing in Henderson County, N. C. Plaintiff has failed to renew his license as required by Public Laws 1915, chapter 178, sec. 11, he does not now hold any license to practice dentistry in North Carolina, and the Act of 1935 provides the process by which he may be granted license to resume the practice of dentistry in North Carolina. *Mann v. N. C. State Board of Examiners in Optometry et al.*, 206 N. C., 853.

The Supreme Court of the United States, in *Graves v. State of Minn.*, 272 U. S., 425 (427), citing numerous authorities, says: "It is well settled that a state may, consistently with the 14th Amendment, prescribe that only persons possessing the reasonably necessary qualifications of learning and skill shall practice medicine or dentistry."

The principle is well settled in this jurisdiction by a wealth of authorities. *S. v. Van Doran*, 109 N. C., 864; *S. v. Call*, 121 N. C., 643; *S. v. Lockey*, 198 N. C., 557 (Barber's Act). The plaintiff, in conformity with the act of the General Assembly of 1935, filed his application to renew his license, and stood the examination required of him by the act. In doing this, we think, from his leaving the State and returning, that the construction he put on the act was correct and his complaint now is no defense. The court below found: "That said examination was duly given and the defendant board, within its authority and power and in the proper exercise of the duties and obligations imposed upon it by law, and in the exercise of its discretion, found that the plaintiff has not made, upon his examination, a satisfactory showing of his proficiency in the profession of dentistry; that without considering further facts, as permitted under the act, said defendant board, in the proper exercise of its duties and obligations under said act, and pursuant to its judgment and discretion, denied to the plaintiff a license to resume the practice of dentistry in North Carolina."

In *S. v. Hicks*, 143 N. C., 689, it is held (1st headnote): "The Legislature has constitutional authority to regulate the practice of dentistry under Revisal, sec. 4468, forbidding any person to practice who has not graduated at a reputable dental school and received a certificate of proficiency or qualification from the Board of Dental Examiners, etc.; under section 4470, making the requirements inapplicable to any person who was a dental practitioner in this State before 7 March, 1879, if or before 25 February, 1890, he should file a verified statement with the Board of Dental Examiners showing his name, residence, date of diploma or license, and date of commencing practice here; under section 3642, making it a misdemeanor to practice dentistry without first having passed the required examination and received the certificate."

The provisions of section 11, chapter 66, Public Laws 1935, bear alike upon all classes of persons referred to therein, and the requirement made by the board that the plaintiff make to it a satisfactory showing of his proficiency in the profession of dentistry is no discrimination against the plaintiff. We think that the facts bring plaintiff in the clear language of the act, and the act is constitutional and within the police power of the State to enact for the good and welfare of the State.

There is no finding of fact that the defendants, N. C. Board of Dental Examiners, arbitrarily abused its discretion, or in bad faith exercised its discretion, but refused the plaintiff license on the ground that plaintiff had not shown his proficiency in the profession of dentistry.

We do not think that the writ of *mandamus* should issue, and we think the case of *Ewbank v. Turner,* 134 N. C., 77 (83), is in point, as follows: "The law-making power having entrusted such examination to the board thus constituted, and required that the examination shall be satisfactory to them, and such requirements being reasonable and in violation of no constitutional provision, the courts cannot intervene and direct the board to issue a certificate to one who the majority of the board have held has not passed a satisfactory examination because upon the examination of experts the court or jury might think the examination of the plaintiff ought to have been satisfactory to the board. This is a matter resting in the conscience and judgment of the board, under the provisions of the law, and the courts cannot by a *mandamus* compel them to certify contrary to what they have declared to be the truth. Had the board refused to examine the applicant upon his compliance with the regulations, the court could by *mandamus* compel them to examine him, but not to issue him a certificate when the preliminary qualification required by law, that the applicant shall be found proficient and competent by the examining board, is lacking. *Burton v. Furman,* 115 N. C., 166; *Loughran v. Hickory,* 129 N. C., 281." *Barnes v. Comrs.,* 135 N. C., 27; *Edgerton v. Kirby,* 156 N. C., 347.

In 18 R. C. L., "*Mandamus,*" part sec. 38, page 124, we find: "It is a well recognized rule that where the performance of an official duty or act involves the exercise of judgment or discretion, the officer cannot ordinarily be controlled with respect to the particular action he will take in the matter; he can only be directed to act, leaving the matter as to what particular action he will take to his determination. Therefore, where an officer, in the exercise of a discretionary power, has considered and determined what his course of action is to be, he has exercised his discretion, and his action is not subject to review or control of *mandamus.*"

For the reasons given, the judgment of the court below is

Affirmed.

EMERY L. MILLER AND CHARLIE MILLER v. S. P. WOOD, TRADING AS WOOD GROCERY COMPANY.

(Filed 14 October, 1936.)

1. **Automobiles E b—Evidence held for jury on issue of whether employee was acting within scope of employment at time of accident.**

Plaintiffs' evidence tended to show that defendant's employee, who was driving his own car at the time of the accident in suit, was employed as mechanical superintendent of defendant's six cotton gins, located at different places, that the employee frequently used his own car in getting from one gin to another and in transporting machinery parts in the performance of his duties, and that other employees also used his car when none of the defendant's trucks were available, and that defendant was present on occasions when the employee's car was thus used in furtherance of defendant's business, that the employee would take gasoline from defendant's pump before going to a distant gin, and that on the occasion in question the employee was driving his own car, had gotten some parts from one gin to take to another, and at the time of the accident, which occurred during regular working hours, had the parts in his car. *Held:* The evidence was sufficient to be submitted to the jury on the issue of whether the employee was authorized to use his own car in the performance of his duties, and at the particular time in question was acting within the scope of his employment and in furtherance of his master's business.

2. **Appeal and Error E b—**

Where the charge of the lower court is not in the record, it will be presumed that the court correctly charged the law applicable to the facts in the case.

3. **Trial D a—**

On motion to nonsuit, the evidence which tends to sustain plaintiff's cause of action is to be taken in the light most favorable to plaintiff, and he is entitled to every reasonable intendment thereon and every reasonable inference therefrom. C. S., 567.

APPEAL by defendant from *Sinclair, J.,* at June Term, 1936, of HARNETT. No error.

This is an action for actionable negligence, brought by plaintiffs against the defendant to recover damages for a collision between the plaintiff Emery L. Miller and one Emmit Neighbors, alleged by plaintiffs to be a servant of defendant and acting in the scope of his employment and about his master's business, when he was injured in consequence of the collision, on 20 September, 1935, about 6 o'clock in the afternoon. Charlie Miller owned the automobile which Emery L. Miller was driving at the time of the collision. The defendant denied negligence, set up the plea of contributory negligence, and denied that Emmit

Neighbors was acting in the scope of his employment and about his master's business, when the collision took place.

The facts: Emmit Neighbors at the time of the trial was dead. Prior to the collision Neighbors had worked at the plant of defendant in Benson for more than five years. He lived about three miles from the plant. In connection with the Wood Grocery Company, he used his individual car and the defendant's trucks. Sometimes when the trucks were not busy he would use them, if they were busy he used his own car. His working hours were from 7 a.m. to 7 p.m., and during ginning seasons he worked overtime. His duties took him to other plants of Wood Grocery Company. The collision took place on 20 September, 1935, about 6:15 to 6:30 o'clock in the evening. The collision took place on the streets in Benson and at the intersection of the street that turns as one goes into the property of the defendant, where Neighbors was working, the office of defendant being about 60 feet away. On the occasion he was driving his automobile for the Wood Grocery Company. The collision occurred immediately opposite the mill, during working hours. Neighbors was superintendent of the mechanical line, a machinist, fixing the machinery, parts of the gins and mills, and having it done, this included all of the mills of the Wood Grocery Company, numbering six, located at different places.

W. H. Brown testified, in part: "I was at Wood Grocery Company's plant at the time of the wreck. Mr. Neighbors had been doing some work in the mill, and we had to get up some parts to send them to Princeton to Mr. Wood's gin there. Mr. Phail is foreman. Mr. Neighbors was directing me. We were to get some iron bolts and seven-tooth sprocket. We had all of it except the sprocket and Mr. Neighbors had been looking for that, and I helped him. We could not find it at the plant. . . . Mr. Wood had a gin at Peacock's Crossroad that was not running. Mr. Neighbors went down there to get the sprocket; he left in the afternoon. I did not see him again until after the wreck. . . . Mr. Neighbors was up there at the gin and he asked me if I would wait around, and I went to the Neighbors car and got the 7-tooth sprocket and three little set-screws that he got at Peacock's Crossroad. . . . Mr. Neighbors took the sprocket to Princeton to Mr. Phail. I know this is the sprocket that came from Peacock's Crossroad because I have been down there and saw right where it came from. Mr. Neighbors left the plant to go to Peacock's Crossroad to get the sprocket. I don't recall any time Mr. Wood was present when Neighbors used his own automobile, but know a time or two Mr. Wood came to the plant when Mr. Neighbors was gone with it. The hands would use Mr. Neighbors' car when we did not have anything else to drive. . . . I have made trips in Mr. Neighbors' car in which he carried tools and ap-

pliances. The last trip we took was to carry a fan shaft and other materials to Pine Bottom gin, and put it on the gin. The distance from Benson to Spivens Corner is about 25 miles, to Pine Bottom and Graydon Johnson's, about 12 miles each, and the Crossroads about 6 miles. . . . Some of the time all other conveyances would be out and we would get a call to go to some other plant and Mr. Neighbors would say, 'Get the tools and let's go.' And we would take the tools and go on Mr. Neighbors' car. I have known this to happen when Mr. Burgess was there. . . . Just about everybody down there that drove a car used Mr. Neighbors' car at times, during the time I was there. Sometimes to go up town and get parts in that car. I have seen the bookkeeper use it."

Nelson Stuart testified, in part: "Mr. Neighbors would go on his own car to the gin and up town for parts; sometimes to the gin in Selma, and sometimes to a gin in Sampson County. Most of the time he would go on his own car and sometimes he went on the company truck. Mr. Burgess was present on some of these occasions. Mr. S. P. Wood would come to the plant every evening during the week days in the fall. I don't know whether Mr. Wood knew he was using his own car in connection with Wood's business, but he was present where he could see him doing it. I do not know of any order that was given before the wreck about employees driving their individual cars in connection with Mr. Wood's business. I didn't have any such order. I have seen Neighbors get gasoline from the company pump when he would go to a gin some distance away. The company has a gasoline tank on the premises."

Robert Jernigan testified, in part: "Mr. Burgess was superintendent of the Wood Grocery Company at the time Emery L. Miller was injured and had been for a number of years. Emmit Neighbors was a mechanic working for Wood Grocery Company. He had the power to hire and discharge employees, and did do so. W. H. Brown was employed by the Wood Grocery Company as a mechanic at the time Miller was injured. Mr. Neighbors would give Brown instructions as what to do. I was working at the cotton gin at the time. I knew of one occasion when Neighbors went on his car to the gin below Dunn and got a saw file for the Wood Grocery Company, and have known him to go up town and get parts to work around the gin. I know of no occasion when he went off and did any work and used his car. In connection with his mechanical duties, his work required him to visit other plants and mills of Mr. Wood. Q. While you were there, did Mr. Neighbors turn his car over to you to go after anything; materials or things for the Wood Grocery Company? Ans.: Yes, sir. Mr. Wood was present at the mill at that time. This was at least a year before the wreck. Mr. Neighbors

kept his car on the mill yard most of the time, where it could be seen by other employees. On the occasion when Mr. Wood was at the mill, I went to Princeton on the car for a distributor belt for the gin. Mr. Wood was where he could see me using the car."

There was other evidence introduced by plaintiffs to like effect. The defendant denied that Neighbors was authorized to drive his own car in the business of defendant, and a rule was verbally promulgated that none of defendant's employees should do so.

The issues submitted to the jury and their answers thereto were as follows:

"1. Was Emmit Neighbors, at the time referred to in the complaint, operating his automobile as the employee of the defendant and within the scope of his authority as such employee? Ans.: 'Yes.'

"2. Was the plaintiff Emery L. Miller injured by the negligence of the defendant, as is alleged in the complaint? Ans.: 'Yes.'

"3. If so, did the said Emery L. Miller, by his own negligence, contribute to his injury, as is alleged in the answer? Ans.: 'No.'

"4. Was the plaintiff Charlie Miller's automobile damaged by the negligence of the defendant, as alleged in the complaint? Ans.: 'Yes.'

"5. What damage, if any, is the plaintiff Emery L. Miller entitled to recover of the defendant? Ans.: '$550.00.'

"6. What damage, if any, is the plaintiff Charlie Miller entitled to recover of the defendant as damages to his automobile, as alleged in the complaint? Ans.: '$50.00.' "

Judgment for plaintiffs was rendered on the verdict by the court below. At the close of plaintiffs' evidence and at the close of all the evidence the defendant in the court below made motions for judgment as in case of nonsuit. C. S., 567. The court below denied these motions. Defendant excepted, assigned error, and appealed to the Supreme Court.

Claude C. Canaday and Larry F. Wood for plaintiffs.
L. L. Levinson for defendant.

CLARKSON, J. The record discloses that "Witness then describes how collision occurred, indicating that Neighbors was negligent in the operation of his car. No point could be made by including all this testimony, for the reason that defendant is basing his appeal on account of the failure of the presiding judge to grant his motion for judgment of nonsuit upon plaintiffs' failure to show defendant to be master of Neighbors at the time of the injury."

It is admitted on the record, and in defendant's brief, that "The sole question presented by this appeal is whether there was sufficient evidence

to take the case to the jury that the employee was acting within the scope of his employment at the time and in respect to the very transaction out of which the injury arose." The defendant contends that there was not sufficient evidence, but we cannot sustain his contentions. We think there was sufficient evidence, if not direct, at least circumstantial, to be submitted to the jury, that Emmit Neighbors was a servant of defendant and acting in the scope of his employment and about his master's business when the collision took place which injured the plaintiff Emery L. Miller and the car belonging to Charlie Miller, which he was driving at the time.

The evidence succinctly tends to show that Neighbors was superintendent of the mechanical line, in the employ of defendant—fixing the machinery in all of the mills of defendant (some 6 in all), located at different places. That he had a car which he used in carrying out defendant's business; that defendant Wood saw, or in the exercise of due care could have seen, him using it at different times for the defendant company. His duties took him to other plants of the Wood Grocery Company, and on the occasion when the collision occurred he was using his car during working hours. (1) He had to get parts to send to defendant's gin at Princeton—iron bolts and seven-tooth sprocket. He went to Peacock's Crossroad to a gin of defendant which was not running, and got the sprocket and some set-screws, and they were in the car when the collision occurred, the sprocket was afterwards taken to the Princeton gin. (2) The hands would use Neighbors' car when they did not have anything else to drive, and trips were made in Neighbors' car when he carried tools and appliances. (3) The Neighbors' car was used by everyone at times to go up town and get parts, and the bookkeepers used it. (4) Neighbors would use it to go up town for parts, sometimes to the gin in Selma and Sampson County. (5) Neighbors would get gasoline from the company pump on the premises when he would go to a gin some distance away. (6) He turned his car over to an employee to go for materials or things for the Wood Grocery Company. There was other evidence to like effect.

The charge of the learned judge in the court below is omitted from the record, and the presumption of law is that he charged correctly the law applicable to the facts in the case.

On motion to nonsuit, the evidence which tends to make for plaintiff is to be taken in the light most favorable to him, and he is entitled to the benefit of every reasonable intendment thereon and every reasonable inference to be drawn therefrom.

On the facts above stated, the court below, in a charge free from error, submitted the following issue to the jury: "Was Emmit Neighbors, at the time referred to in the complaint, operating his automobile as the

employee of the defendant and within the scope of his authority as such employee?" The jury answered "Yes." The evidence was plenary to be submitted to the jury.

In *Dickerson v. Refining Co.,* 201 N. C., 90 (97), quoting from Tiffany on Agency, p. 270, it is said: "A servant is acting in the course of his employment when he is engaged in that which he was employed to do, and is at the time about his master's business. He is not acting in the course of his employment, if he is engaged in some pursuit of his own. Not every deviation from the strict execution of his duty is such an interruption of the course of employment as to suspend the master's responsibility; but, if there is a total departure from the course of the master's business, the master is no longer answerable for the servant's conduct."

In *Robertson v. Power Co.,* 204 N. C., 359 (360), citing numerous authorities, is the following: "The modern tendency is to give the rule a liberal and practicable application, especially where the business of the master, entrusted to his servants, involves a duty owed by him to the public or to third persons." *Jones v. Trust Co.,* 206 N. C., 214; *Lertz v. Hughes Bros., Inc.,* 208 N. C., 490; *West v. Baking Co.,* 208 N. C., 526.

In the judgment below we find

No error.

D. M. GLENN, JR., AND WIFE, ANNIE GLENN, v. THE BOARD OF EDUCATION OF MITCHELL COUNTY AND THE TOWN OF SPRUCE PINE.

(Filed 14 October, 1936.)

1. Statutes A b—Statute closing certain specified roads held void as being special act in violation of Art. II, sec. 29.

Part of land in a private development was added to the playground of a public school. The General Assembly, by private act (ch. 72, Private Laws of 1933), declared that certain roads dedicated in the registered plot of the development were no longer needed, and declared that the roads should be closed and added to the playground space for the school. *Held:* The act is void as being a private or special act inhibited by Art. II, sec. 29, of the State Constitution.

2. Estoppel B a—

Defendant town relied upon a private act closing certain streets because they were "no longer needed for public purposes," as the basis for its demurrer. *Held:* Defendant is estopped from maintaining its conflicting contention that the streets in question had never been opened.

3. Eminent Domain C a—

Owners of land having an easement over contiguous streets or roads cannot be deprived of their easement, even for a public purpose, without the payment of just compensation.

4. Constitutional Law B c—

The courts have the power and duty to declare an act of the General Assembly unconstitutional when the question is properly presented and the act is clearly unconstitutional.

5. Statutes A e—

An act will not be declared unconstitutional unless it is clearly so, and all reasonable doubt will be resolved in favor of its validity.

APPEAL by plaintiffs from *Sink, J.*, at Spring Term, 1936, of MITCHELL. Reversed.

This was an action brought by plaintiffs against defendants in which they allege that defendants have closed up certain streets in the town of Spruce Pine, N. C., used by the public and over which they have a right of ingress and egress to certain property owned by them. Plaintiffs further allege: "That by reason of said wrongful obstruction of said streets by the defendants, as hereinbefore alleged, the plaintiffs have been put to great inconvenience in passing to and from their home and property in going and returning from the business section of Spruce Pine and other sections of said town, and thereby hindered (and to a great extent, denied) the full and usual enjoyment of their home and property, and thereby greatly damaged, to wit, in the sum of $500.00. Wherefore plaintiffs pray judgment against the defendants in the said sum of $500.00 as damages for the injury caused plaintiffs as above alleged; that said defendants be required to open said streets for public use, and to put same in as good condition for travel as when obstructed, as hereinbefore alleged; that said defendants be perpetually enjoined from further obstructing said streets, or any other streets in said 'South Spruce Pine,' and for such other and further relief as to the court the plaintiffs may seem entitled, together with the cost in this behalf expended."

The defendant town of Spruce Pine demurred to the complaint. The defendant, the Board of Education of Mitchell County, denied the material allegations of the complaint. "And as a further defense to this action, this answering defendant says and alleges, that the Riverside Drive and extensions of Tappan and Peterson streets coming within the boundary of the Harris High School property were closed by act of the Legislature of North Carolina, chapter 72, Private Laws of 1933, which act is hereby pleaded in bar of plaintiffs' right of action."

The act in question, chapter 72, Private Laws 1933, is as follows: "*Whereas,* a large portion of the school grounds of Harris High School,

comprising the northwestern section of the campus and including the present athletic field and the adjacent playgrounds, was originally a portion of a subdivision, and as such was composed of certain lots, streets, and extension of a road known as Riverside Drive; and *whereas,* later this portion was added by purchase to the original campus of Harris High School, for the purpose of enlarging play facilities and for the children attending said school; and *whereas,* the sections of the street extending from Peterson Street and Tappan Street to the original campus road and line are no longer needed for public purposes, a new roadway having been constructed from the school buildings to the State Highway on the southwestern side of the campus; and *whereas,* Riverside Drive, after a period of more than ten years, has not been officially laid off and opened up to the public; and *whereas,* only one property holder could have any personal interest in the opening of this road, and an adequate roadway can be secured for him on the southern side of the campus: *Therefore, the General Assembly of North Carolina do enact:* Section 1. That Riverside Drive and extensions of Peterson and Tappan streets on the campus of said school are hereby declared closed and the area which would be occupied by them is hereby reserved for playground space for the children attending said school. Sec. 2. That all laws and clauses of laws in conflict with this act are hereby repealed. Ratified this the 20th day of March, A.D. 1933."

The judgment of the court below is as follows: "The above entitled action coming on for hearing and being heard before his Honor, H. Hoyle Sink, Judge presiding, on a demurrer filed by the defendant town of Spruce Pine, and on a motion to dismiss the action, filed by the defendant, the Board of Education of Mitchell County, by virtue of the special act of the General Assembly set up in the answer of the defendant, to wit: Chapter 72, Private Laws of 1933, and it having been admitted in the argument on the hearing of said demurrer and motion that if said act is valid that same constitutes a bar to plaintiffs' cause of action, as alleged in the complaint, and the court being of the opinion that said act is valid, and a bar to plaintiffs' cause of action, it is therefore considered, ordered, and adjudged by the court that the demurrer of the defendant town of Spruce Pine, and the motion of the defendant Board of Education of Mitchell County, be and the same is hereby sustained, and this action dismissed. It is further ordered that the cost of this action be taxed against the plaintiffs. (Signed) H. Hoyle Sink, Judge presiding."

To the foregoing judgment the plaintiffs in apt time excepted, assigned error, and appealed to the Supreme Court.

J. W. Ragland for plaintiffs.
McBee & McBee and M. L. Wilson for defendants.

CLARKSON, J. The court below held the act in controversy valid and sustained the contentions of defendants, and dismissed the action. We cannot so hold.

Article II, sec. 29, of the Constitution of North Carolina, in part, is as follows: "The General Assembly shall not pass any local, private, or special act or resolution, . . . changing the names of cities, towns, and townships; authorizing the laying out, opening, altering, maintaining, or discontinuing of highways, streets, or alleys; relating to ferries or bridges," etc.

In *Day v. Comrs.*, 191 N. C., 780 (783-4), it is said: "The first section of the act before us commands the commissioners of Surry and Yadkin counties to construct one bridge across the Yadkin River at a place which is pointed out and particularly defined; it is direct legislation addressed to the accomplishment of a single designated purpose at a 'specific spot'; it is therefore a local and special act, and as such is expressly prohibited by Art. II, sec. 29, of the Constitution. In further elucidation of this provision the following additional cases may be consulted: *Trustees v. Trust Co.,* 181 N. C., 306; *Sechrist v. Comrs., ibid.,* 511; *Robinson v. Comrs.,* 182 N. C., 590; *Galloway v. Board of Education,* 184 N. C., 245." *Sanitary Dist. v. Pruden,* 195 N. C., 722 (727).

The town of Spruce Pine contends that "the said Riverside Drive and Tappan Street, authorized to be closed by chapter 72, had never been accepted by the town of Spruce Pine and had never been opened by anyone and existed only on the map of said subdivision, and was of no use to the plaintiffs in this action as a street, nor to the public, and for more than twenty years the ground now occupied by the Harris High School under and by virtue of said act as a playground has not been used by the plaintiffs nor the public as a street or passageway, but is necessary as a playground for said high school."

The town of Spruce Pine cannot "blow hot and cold in the same breath." It relies on the private act which it and the board of Mitchell County contends is a good defense to this action. The act distinctly designates it as a street, as follows: "*Whereas,* the sections of the street extending from Peterson Street and Tappan Street to the original campus road and line are no longer needed for public purposes," etc.

It is important that the schools should have playgrounds, and this Court has recently decided that in thickly settled cities parks, playgrounds, etc., are a necessary expense. *Atkins v. Durham, ante,* 295. It was admitted on the argument that if the act was constitutional it "bottled up" plaintiffs. It is a fundamental principal that no man's land can be taken for public purposes without "just compensation." If plaintiffs have an easement in this Riverside Drive, it cannot be taken except it be condemned, as provided by law, and "just compensation"

paid, or purchased from plaintiffs. *Hiatt v. Greensboro,* 201 N. C., 515. This law is recognized in all civilized lands and is imbedded in our jurisprudence as firm as the everlasting hills and mountains which can be seen from the location in controversy.

In *Robinson v. Barfield,* 6 N. C., 392 (420), decided July Term, 1818, we find this strong language: "Had the Legislature any right or power to take the lands without the consent of the lessors of the plaintiff, in whom the fee simple vested, and without compensation rendered, give them to General Thomas Brown and his heirs; or, in other words, is the act of the Assembly, passed in the year 1788, *confirming the title of Gen. Brown, of any force or effect?* I am of opinion the act is a nullity, and does not affect the rights of the lessors of the plaintiff. The Constitution declares that the Legislative, Executive, and Supreme Judicial powers of government ought to be forever separate and distinct from each other. The transfer of property from one individual, who is the owner, to another individual, is a *judicial* and not a *legislative* act. When the Legislature presumes to touch *private property,* for any other than public purposes, and then only in case of necessity, and rendering full compensation; it will behoove the judiciary to check its eccentric course, by refusing to give any effect to such acts: Yes, let them remain as dead letters on the statute book. Our oath forbids us to execute them, as they infringe upon the principles of the *Constitution.* Miserable would be the condition of the people if the judiciary was bound to carry into execution every act of the Legislature, without regarding the paramount rule of the Constitution."

In *Lowe v. Harris,* 112 N. C., 472, at p. 480, citing a wealth of authorities, it is said: "Philosophical writers upon law generally in all countries, however, deny the power of the Legislature to pass statutes that impair a right acquired under the law in force at the time of its enactment, and insist that the right to repeal existing laws does not carry with it the power to take away property, the title to which vested under and is protected by them. But the Legislature of North Carolina is restrained by Article I, sec. 10, of the Constitution of the United States, and Article I, sec. 17, of the Constitution of North Carolina, not only from passing any law that will divest title to land out of one person and vest it in another (except where it is taken for public purposes after giving just compensation to the owner), but from enforcing any statute which would enable one person to evade or avoid the binding force of his contracts with another, whether executed or executory." *Booth v. Hairston,* 193 N. C., 278 (284).

It is well settled in this State that the courts have the power, and it is their duty in proper cases, to declare an act of the General Assembly unconstitutional—but it must be plainly and clearly the case. If there

is any reasonable doubt, it will be resolved in favor of the lawful exercise of their powers by the representatives of the people. It has been frequently said that this State was the first in the United States to declare an act of the General Assembly unconstitutional (*Bayard v. Singleton,* 1 N. C., 42 [45]), but other states claim this distinction also. Virginia claims to be the first—*Commonwealth v. Caton et al.,* reported in 4 Call, 5 (November, 1782). In Two Centuries' Growth of American Law, 1701-1901 (Yale Law School), we find the following, at p. 24: "In the case of *Holmes v. Walton* (N. J.), was adjudged to be void, because contrary to the Constitution. The date of this judgment, although formerly put later, it seems now to be established was 1780. . . . (Note) *Commonwealth v. Caton,* in Virginia, 1782. See 4 Call's Reports, 5; Thayer's Cases on Constitutional Law, I. 55; *The Symsbury Case,* in Connecticut, 1784-5; Kirby's Reports, 444, 447, 452. *Trevett v. Weeden,* in Rhode Island, 1786; *Bayard v. Singleton,* in North Carolina (1787). U. S. Supreme Court in *Marbury v. Madison,* 1 Cranch, 137 (Feby. Term, 1803)."

For the reasons given, the judgment of the court below is

Reversed.

C. A. HARDY, ADMINISTRATOR OF PAUL G. HARDY, DECEASED, v. DR. OLIVER DAHL.

(Filed 14 October, 1936.)

1. Physicians and Surgeons C b—Practitioner of particular school of healing must possess and use skill ordinarily possessed by like practitioners.

A person holding himself out as a practitioner of a particular school of healing of human diseases is required to possess and apply with reasonable care and diligence in the exercise of his best judgment that degree of knowledge and skill ordinarily possessed by other practitioners of the same method or system of practice, and is liable for damages resulting from his failure to possess or exercise such skill, but he is not required to possess the highest technical skill nor the knowledge and learning of the well recognized schools of medicine and surgery, the practitioner having been selected to administer, with the requisite degree of skill and care, the particular system advocated by his school of practice.

2. Evidence K c—Trial court's decision that witness is not an expert is reviewable when based upon conclusion of law.

Ordinarily, the competency of a witness as an expert is addressed to the discretion of the trial court and is not reviewable, but when the court's decision is based upon a conclusion of law from the facts elicited upon preliminary examination, the decision is reviewable.

3. Same—Evidence held to show that witnesses were experts upon matters in question and their testimony should have been admitted.

This action involved the question of negligence on the part of a practitioner of naturopathy in the administration of his system of healing. Defendant offered two witnesses who testified on preliminary examination that they had diplomas from a recognized school of naturopathy, had been duly licensed by the states in which they practiced, and had practiced naturopathy twenty-four and eighteen years, respectively. The trial court held as a matter of law that the witnesses were not experts. *Held:* The witnesses were experts upon the question of the proper treatment of a patient under this system of practice, and the holding of the court as a matter of law that they were not experts and the exclusion of their testimony upon proper hypothetical questions is subject to review and *is held* for error.

4. Physicians and Surgeons C b—Fact that practitioner had not obtained required license held irrelevant to issue of practitioner's negligence.

Defendant is a practitioner of naturopathy, and this action was instituted to recover damages alleged to have resulted from his negligence in the practice of his system of healing. Defendant had not obtained a license to practice as required by C. S., 6704. *Held:* Defendant's practice of his system of healing without the required license subjects him to indictment, but is irrelevant to the issue of negligence involved in the civil action, and it is error to admit evidence and submit issues in the civil action relating to defendant's failure to obtain the license and his practice of his profession illegally.

5. Appeal and Error J g—

Where a new trial is awarded on certain exceptions, other exceptions relating to matters which may not arise on the subsequent hearing, need not be considered.

APPEAL by defendant from *Phillips, J.,* at May-June Term, 1936, of HENDERSON. New trial.

Action for damages for wrongful death alleged to have been caused by negligence and want of skill on the part of the defendant in the treatment of a disease with which plaintiff's intestate was suffering, resulting in the death of said intestate.

It was alleged that the defendant held himself out as a doctor of naturopathy, as one possessing the requisite skill and learning to diagnose and treat diseases by natural methods without the administration of drugs or surgery; that without having been licensed or qualified under the statute as a non-drug-giving practitioner and without possessing the requisite knowledge, learning, and skill in the subjects of anatomy, physiology, and diagnosis, undertook to treat plaintiff's infant son, the intestate, with the result that the child died as a result of the negligence and want of skill of the defendant; that the child had diphtheria, which the defendant negligently and unskillfully diagnosed and improperly treated as tonsilitis, permitting the child to have only fruit juices for

the space of two weeks and failing to give proper care and attention until the child was almost *in extremis,* when regular medical practitioners were called in, diphtheritic antitoxin administered, but too late to save the child's life.

Defendant denied the allegations of negligence and want of skill in the treatment of plaintiff's intestate, and alleged that the treatment given was in accord with the teachings and methods of naturopathy, which he held himself out as and was qualified to practice, and denied that the death of the child was due to any act or neglect on his part.

In apt time the defendant requested the court to charge the jury as follows: "The court charges you further that the fact that the defendant did not procure a license to practice naturopathy in this State cannot be considered by you as evidence of negligent treatment of plaintiff's intestate. The fact that he has no license to practice this profession could not be a proximate cause of the injury complained of. The plaintiff must satisfy you by the greater weight of the evidence of the negligent or unskillful treatment on the part of the defendant, and his failure to procure a license is no evidence of either."

The following issues were submitted to the jury:

"1. Did the defendant, unlawfully, hold himself out to the public as being one qualified to diagnose, operate, prescribe for, and treat diseases, pain, injury, deformity, or physical conditions of the human body, as alleged in the complaint?

"2. Did the defendant unlawfully diagnose, prescribe for, and treat plaintiff's intestate, as alleged in the complaint?

"3. Was the death of plaintiff's intestate caused by the negligence and unskillful treatment of the defendant, as alleged in the complaint?

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

Upon each of the first two issues the court charged the jury to answer "Yes," if they found the facts to be as the evidence tended to show.

The jury for their verdict answered the first, second, and third issues "Yes," and fixed the damages under the fourth issue at $1,400.00.

From judgment on the verdict the defendant appealed.

O. B. Crowell and R. L. Whitmire for plaintiff, appellee.
Redden & Redden and J. E. Shipman for defendant, appellant.

DEVIN, J. The defendant held himself out as a non-drug-giving practitioner of that system or school for the healing of human diseases known as naturopathy. By virtue of section 6704 of the Consolidated Statutes the statutory provisions for the examination of applicants and the issuance of certificates for the practice of osteopathy were made to

apply "to all other non-drug-giving practitioners except chiropractors (as to whom special statutes are applicable), by whatever name they are known or call themselves, or of whatever school they claim to be graduates or hold diplomas, and to anyone who holds himself out as being able to diagnose, treat, operate, or prescribe for any human diseases, . . . and who shall offer or undertake by any means or method to diagnose, treat, operate, or prescribe therefor without the use of drugs. . . . Provided, however, that all such persons so applying to said board for examination shall be examined only on the subjects of anatomy, physiology, pathology, and diagnosis."

It appeared in evidence that the defendant had graduated from and held a diploma from the American School of Naturopathy, had practiced in New York and in Florida, and had, upon examination in the latter state, been granted a certificate to practice there, but had not stood the examination or received the certificate required by C. S., 6704, in North Carolina.

It further appeared that the plaintiff, the father and administrator of the estate of the intestate, was himself "a believer in the profession of naturopathy the same as Dr. Dahl"; that he knew the defendant well and had previously employed him to treat other members of his family on several occasions; that plaintiff's brother was a practitioner of naturopathy; that plaintiff did not believe in the treatment prescribed by physicians for diphtheria in the administration of antitoxin "unless absolutely necessary."

But plaintiff's adherence to the same school of thought as the defendant would not prevent his recovering damages for the death of his intestate if he can show that the death of the child proximately resulted from the negligent and unskillful treatment of the defendant according to the method he held himself out to know and practice. "In calling a physician, a person is presumed to elect that the treatment shall be according to the system or school of medicine to which such physician belongs." *Van Sickle v. DooLittle,* 184 Iowa, 885. "When a doctor accepts professional employment he is only required to exercise such reasonable care and skill as is usually exercised by doctors in good standing of the same school of practice." *Nelson v. Dahl,* 174 Minn., 574.

In determining liability in a civil action for damages on the ground of negligence, the defendant was not required to possess the highest technical skill nor the wide scientific knowledge and learning of the well recognized schools of medicine and surgery, nor to exercise the utmost degree of care, but only to exercise that degree of care, knowledge, and skill ordinarily possessed by members of his school of practice, and to use reasonable care and diligence in the exercise of that skill and knowl-

edge and in the exercise of his judgment in the treatment he holds himself out to practice. 48 C. J., 1118; 21 R. C. L., 386.

Though the defendant held himself out, and the plaintiff, on behalf of his infant son, consulted him as a practitioner of naturopathy and not as a regular physician, the defendant claimed to possess the skill requisite for diagnosis and treatment of disease, and in the performance of what he undertook to do he must be held to the degree of skill and care which he claimed to possess.

One who undertakes to treat the sick and holds himself out as competent to administer a certain kind or character of treatment, undertakes to bring to his employment in each case a fair, reasonable, and competent degree of skill and reasonable care and diligence in the use of his skill and in the application of his knowledge, and that he will exert his best judgment and give reasonable attention to the progress of the treatment he prescribes, and is answerable in damages for injuries proximately resulting from want of that degree or knowledge and skill ordinarily possessed by those of his system or method of practice, or from failure to exercise due care and diligence or to use his best judgment in the treatment of the case. He is not required to use all known and reasonable means, or possess extraordinary learning or skill. *Nash v. Royster,* 189 N. C., 408. When the defendant held himself out to the plaintiff and the public as a doctor of naturopathy, the law imposed upon him, with respect to his employment, the duty of possessing and exercising that reasonable degree of diligence, learning, and skill ordinarily possessed by similar practitioners. 21 R. C. L., 386.

The defendant offered two witnesses, Dr. Carl Frischkorn and Dr. J. H. Lauber, as expert witnesses for the purpose of showing in response to proper hypothetical questions the opinions of these witnesses that the treatment of plaintiff's intestate, as testified by defendant, was in keeping with the practice of naturopathy generally, and conformed to the teachings and practices of naturopathy in diseases of this kind. Upon objection by plaintiff, this evidence was excluded, the court holding "as a matter of law that the witness was not an expert witness."

The qualifications of the witness Frischkorn were as follows: "I live in Norfolk, Virginia, have lived there since 1906. I am a naturopath physician, have practiced naturopathy since 1912, and have had a license to practice naturopathy under the laws of Virginia since 1922. I hold a diploma from the American School of Naturopathy, which is a recognized school of naturopathy. I took the course prescribed by that school, which is the same school that Dr. Dahl attended, and am now in the practice of that profession."

The witness Lauber testified he was a graduate of the American School of Naturopathy, had practiced naturopathy continuously since 1918, and was residing in and licensed by the State of Florida.

An expert has been defined as "one who is skilled in any particular art, trade, or profession, being possessed of peculiar knowledge concerning the same"; "one who must have made the subject upon which he gives his opinion a matter of particular study, practice, or observation." The term implies both knowledge from study and practical experience in the art or profession. Roger's on Expert Testimony; Greenleaf Ev., sec. 440; Wigmore, sec. 555; Black's Law Dictionary; *Pridgen v. Gibson,* 194 N. C., 289. "The test is to inquire whether the witness' knowledge of the matter in relation to which his opinion is asked is such, or so great, that it will aid the trier in his search." *State v. Killeen,* 79 N. H., 201; *Macon Ry. & Light Co. v. Mason,* 123 Ga., 773; Wigmore on Ev., sec. 1923. "The common law does not require that the expert witness shall be a person duly licensed to practice medicine." Wigmore on Ev., sec. 569; *Swanson v. Hood,* 99 Wash., 506; *People v. Rice,* 54 N. E., 48 (N. Y.).

While the competency of a witness to testify as an expert is a question primarily addressed to the discretion of the court, and his decision is ordinarily conclusive (*Flynt v. Bodenhamer,* 80 N. C., 205; *S. v. Cole,* 94 N. C., 958; *S. v. Wilcox,* 132 N. C., 1120), this rule is subject to the qualification that, when the preliminary question of the competency of the witness is made to turn upon a matter of law, it is subject to review. The judge's findings of fact, if supported by evidence, are usually final, but his conclusions thereon constitute legal inferences which are reviewable. *Pridgen v. Gibson, supra; Liles v. Pickett Mills,* 197 N. C., 772.

This evidence was competent. Its value, credibility, and weight were matters for the jury. *Voight v. Indus. Com.,* 297 Ill., 109.

The fact that the defendant was engaged in treating patients without having obtained license so to do, in violation of C. S., 6708, was not evidence of negligence in the treatment of plaintiff's intestate, and the instructions presenting this view, which were prayed for by the defendant, should have been given. The question was not whether he was licensed or not, but whether he exercised proper care in the treatment of the patient. As was said in *Brown v. Shyne,* 242 N. Y., 176, 44 A. L. R., 1407: "Unless the plaintiff's injury was caused by carelessness or lack of skill, the defendant's failure to obtain a license was not connected with the injury." *Bute v. Potts,* 76 Cal., 304; *Janssen v. Mulder,* 232 Mich., 183.

If the defendant has been engaged in treating diseases in violation of the statute, he is liable to indictment, and, upon conviction, to suffer the prescribed penalty, but in a civil action, bottomed upon the law of

negligence, the failure to possess a State certificate is immaterial on the question of due care.

The defendant further excepted to the submission of the first and second issues and to the peremptory instruction of the court below thereon, in favor of the plaintiff. It would seem that the third issue would have determined the controversy, and was comprehensive enough to permit either party to present his case fully.

The defendant's motion for judgment of nonsuit was properly denied.

For the reasons herein pointed out, the defendant is entitled to a new trial. There were other exceptions noted, but it is unnecessary to discuss them, as the questions thereby presented may not arise in another trial.

New trial.

ANNIE GREY WILLCOX POOLE v. H. S. POOLE, W. S. BABCOCK, ADMINISTRATOR OF H. S. POOLE, DECEASED, AND BERTA WILLIAMS BURTON POOLE.

(Filed 14 October, 1936.)

1. **Abatement and Revival D a—**

A special plea in abatement must ordinarily be made before pleading to the merits; otherwise, the right to file such plea is waived.

2. **Judgments K f—Held: This action was attacked on judgment for fraud, and independent action was proper procedure.**

The procedure to attack a judgment for absolute divorce on the ground of fraud perpetrated on defendant and the court in service of process by publication and obtaining judgment upon false allegations in the complaint, while defendant was out of the State on a visit, when plaintiff knew of defendant's whereabouts throughout, is by independent action.

3. **Abatement and Revival C d—Action to set aside absolute divorce does not abate when property rights are involved.**

An action to set aside a decree of absolute divorce abates upon the death of defendant husband unless at the time of his death he owned property, but where the court finds from admissions in the pleadings that the husband owned property at the time of his death, his refusal to submit the issue of whether the husband then owned property is not erroneous, and his holding as a matter of law that the action did not abate is without error.

4. **Estoppel B a—Solemn admission in pleadings estops party from maintaining conflicting position upon the trial.**

In a suit to set aside a decree of absolute divorce, instituted against the husband and thereafter maintained against his personal representative upon the husband's death, the person who had married the husband subsequent to the decree was allowed to intervene upon her allegations

that the husband died possessed of realty, and that her dower rights were involved. *Held:* The admissions in the pleadings estop intervener from maintaining at the trial that the action should abate on the ground that the husband had no property at the time of his death.

APPEAL by defendant Berta Williams Burton Poole from *Harris, J.*, at April Term, 1936, of EDGECOMBE. No error.

This is an action to have a decree of absolute divorce and the verdict on which said decree was rendered at November Term, 1932, of the Superior Court of Edgecombe County in an action instituted by the defendant H. S. Poole against the plaintiff, set aside and vacated on the ground that said decree and verdict were procured by the fraud of the defendant H. S. Poole, as alleged in the complaint.

The action was begun in the Superior Court of Edgecombe County by summons issued on 29 June, 1933. After the complaint was filed, to wit, on 22 July, 1933, the defendant H. S. Poole died. Thereafter on motion of the plaintiff W. S. Babcock, who had been duly appointed as administrator of the said H. S. Poole, deceased, was duly made a party defendant to the action. He filed an answer to the original complaint in which he denied all the material allegations therein, and prayed that the action be dismissed.

On 11 June, 1935, Mrs. Berta Williams Burton Poole filed a petition in the action in which she alleged that after the decree of absolute divorce had been rendered in the action instituted by H. S. Poole against the plaintiff, she had intermarried with the said H. S. Poole, and that she is now his widow, and as such is entitled to dower in the lands and to a distributive share in the personal property, which he owned at his death. She prayed for an order allowing her to interplead in the action, that she might defend the same. Pursuant to her petition, an order was made in the action that she be made a party defendant. Thereafter she filed an answer to the original complaint in which she denied all the material allegations therein, and prayed that the action be dismissed.

When the action was called for trial on the issues raised by the pleadings, the defendant Berta Williams Burton Poole filed a verified plea in abatement, as follows:

"The defendant Berta Williams Burton Poole, a defendant in the above styled action, hereby filed her plea in abatement, and assigns as grounds therefor that the action should abate for that the original defendant H. S. Poole is now dead, and that the said H. S. Poole had no property in his name at the time of his death."

The plea in abatement was denied by the court, and the defendant Berta Williams Burton Poole excepted.

The issues submitted to the jury were answered as follows:

"1. Was the service of summons obtained by the fraudulent act of H. S. Poole? Answer: 'Yes.'

"2. Did the said H. S. Poole perpetrate a fraud on this court by alleging five years separation from Annie Willcox Poole, and obtaining a decree of absolute divorce on said ground? Answer: 'Yes.'"

In apt time, the defendant Berta Williams Burton Poole tendered an issue as follows:

"Did H. S. Poole at the time of his death own any property?"

The court declined to submit this issue to the jury and the defendant excepted.

Thereupon judgment was rendered as follows:

"This cause coming on to be heard at the April Term, 1936, of the Superior Court of Edgecombe County, North Carolina, before Hon. W. C. Harris, Judge presiding, and a jury, and being heard, and the two issues having been submitted to the jury and answered as appear in the record; and it further appearing to the court, and the court finding the facts to be as follows:

"That H. S. Poole, plaintiff in that certain action instituted in the Superior Court of Edgecombe County, N. C., entitled 'H. S. Poole v. Annie Grey Willcox Poole,' same being No. 2984, on the summons docket of said court, and the said Annie Willcox Poole were married on 26 October, 1904, and for 27 years lived together as man and wife in the city of Rocky Mount, in Edgecombe and Nash counties, North Carolina, and that there were born of said marriage three sons; that thereafter, in September, 1931, the said H. S. Poole and Annie Willcox Poole separated from each other, and following said separation, the said Annie Willcox Poole made her home in the city of Raleigh, in Wake County, N. C.;

"That on 11 August, 1932, the said H. S. Poole instituted an action for divorce in the Superior Court of Edgecombe County; that summons was issued in said action to the sheriff of Wake County, N. C.; and said summons was returned endorsed that the defendant Annie Willcox Poole could not be found in Wake County; that service by publication was made in a newspaper called *The Tarboro Southerner,* a newspaper of very limited circulation; that the order of publication was procured from the clerk of the Superior Court of Edgecombe County upon the affidavit set out in the record in that case; that just prior to the issuance of the summons in that case to the sheriff of Wake County, the said H. S. Poole had learned from a sister of the said Annie Willcox Poole that the said Annie Willcox Poole was not in Wake County, but was on a visit to one Joe Poole, a son of the said H. S. Poole and Annie Willcox Poole, who was then living in the city of Washington, D. C., and would be away about three weeks; that while the said Annie Willcox

Poole was in Washington, D. C., the said H. S. Poole communicated with his son, the said Joe Poole, regarding a business matter in which the said Annie Willcox Poole was involved, and learned from his said son Joe Poole that the said Annie Willcox Poole was then in Washington, D. C.; that at all times, from the issuance of the summons in that action on 11 August, 1932, until the granting of the decree therein at the November, 1932, term of the Superior Court of Edgecombe County, the said H. S. Poole knew where the said Annie Willcox Poole was, and that the said H. S. Poole made no attempt to secure personal service of the summons upon the said Annie Willcox Poole, but on the contrary sought to prevent notice of said action from being brought to her attention.

"That the first knowledge which the said Annie Willcox Poole had of the pendency of any suit against her for divorce, or of any judgment rendered against her therein, was in November, 1932, when she learned that the said H. S. Poole had married Berta Burton Poole, the defendant herein; that immediately thereafter the said Annie Willcox Poole consulted an attorney and acting upon his advice, instituted proceedings to have the divorce decree set aside.

"That in said divorce action the said H. S. Poole filed his verified complaint in which he alleged that 'plaintiff and defendant have lived separate and apart for five successive years,' and that 'the separation was not caused by any misconduct on the part of the plaintiff, and he is the injured party.'

"That said allegations in the complaint in that action are and were false; that the plaintiff and defendant in that action had actually been separated less than one year at the time of the institution of that action.

"That the said H. S. Poole died subsequent to the institution of this action; but upon the suggestion and contention of the plaintiff and upon the verified petition to interplead of the defendant Berta Burton Poole, it appears that property rights are involved in this action and the court holds that therefore this action does not abate.

"Now, therefore, upon the foregoing facts and the verdict of the jury, the court being of the opinion and concluding as a matter of law, that these matters and things constitute a fraud upon the said Annie Willcox Poole and upon the court, it is by the court ordered, considered, adjudged, and decreed that the judgment rendered at the November Term, 1932, of the Superior Court of Edgecombe County in the action entitled 'H. S. Poole v. Annie Grey Willcox Poole,' same being recorded in Judgment Docket 17, at page 3, and in the Minute Docket, page 395, office of the Clerk of the Superior Court of Edgecombe County, North Carolina, be and the same is hereby set aside and declared null and void, and of no effect.

"It is further ordered, adjudged, and decreed that the said action entitled 'H. S. Poole v. Annie Grey Willcox Poole,' shall abate.

"It is further ordered that the costs of this action be taxed against the defendant Berta Burton Poole."

The defendant Berta Williams Burton Poole excepted to the judgment, and appealed to the Supreme Court, assigning errors in the trial.

Yarborough & Yarborough for plaintiff.
Geo. M. Fountain & Son for defendant.

CONNOR, J. The defendant on her appeal to this Court relies chiefly on her contention that there was error in the refusal of the trial court to sustain her plea in abatement on the ground that since the commencement of the action the original defendant, H. S. Poole, has died, and that at the date of his death "he had no property in his name." The plea in abatement was filed after the defendant had been allowed to intervene in the action, on the ground that as the widow of H. S. Poole she had an interest in the property, real and personal, which he owned at his death. After she had been made a party defendant, she filed an answer to the original complaint, in which she denied the allegations therein which constitute the cause of action on which the plaintiff prays for relief. By pleading to the merits, after the death of the original defendant, and after his administrator had been made a party defendant, the appealing defendant waived her right, if any she had, to file a plea in abatement on the ground that the original defendant had died since the commencement of the action. A special plea in abatement must ordinarily be made before pleading to the merits; otherwise, the right to file such plea is waived. See *Honig v. Hawa,* 194 N. C., 208, 139 S. E. 222; *Ins. v. R. R.,* 179 N. C., 290, 102 S. E. 504; *Fort v. Penny,* 122 N. C., 230, 29 S. E., 362. 1 C. J., 5, sec. 195.

In *Fowler v. Fowler,* 190 N. C., 536, 130 S. E., 315, it is said:

"It is well settled that for fraud perpetrated on a party to the action, the judgment must be attacked by an independent action." This statement of the law applicable to this action is supported by numerous authorities cited in the opinion of *Clarkson, J.*

This is an independent action in which the judgment in the action entitled, "H. S. Poole v. Annie Willcox Poole," is attacked for fraud perpetrated by the plaintiff in that action against the defendant therein. The action was begun before and was pending at the death of the original defendant, H. S. Poole. After his death, his administrator, on motion of the plaintiff, was made a party defendant. He filed an answer to the original complaint, in which he denied the allegations of the complaint. He did not file a plea in abatement, or otherwise contend that

the action did not survive as to him. He has not appealed from the judgment setting aside and vacating the judgment in H. S. Poole *v.* Annie Willcox Poole on the verdict in the action which sustains the allegations of the complaint.

If it be conceded as contended by the appealing defendant, and as held in other jurisdictions (see *Fowler v. Fowler, supra*), that this action abated upon the death of H. S. Poole, unless he owned property, real or personal, at his death, there was no error in the refusal of the trial court to submit to the jury the issue tendered by the appealing defendant. The judge found from admissions in the pleadings that property rights were involved in the action at the time of the trial, and held that for that reason the action did not abate at the death of the original defendant.

The judgment is affirmed.

No error.

ESSEX INVESTMENT COMPANY, SUCCESSOR TO STATE PLANTERS COMPANY, A CORPORATION, v. J. H. PICKELSIMER.

(Filed 14 October, 1936.)

1. **Courts B e—General county court has no further jurisdiction of a case after its judgment therein is docketed in the Superior Court.**

   When the judgment of a general county court is docketed in the Superior Court of the county it becomes a judgment of the Superior Court in like manner as transcripted judgments of justices of the peace, C. S., 1517, and the general county court has no further jurisdiction of the case, and may not thereafter hear a motion for the appointment of a receiver for the judgment debtor. N. C. Code, 860, 1608 (dd).

2. **Courts B b—General county court held without jurisdiction to appoint receiver for judgment debtor whose property is situate outside the county.**

   The jurisdiction of a general county court is statutory, and it has no extraterritorial jurisdiction except that expressly given within the limitations of the Constitution, and the general county court of Buncombe County *is held* without jurisdiction to appoint a receiver for a judgment debtor having property in another county against whom judgment is rendered in the county court, the statute, C. S., 1608 (n), giving no power to appoint a receiver, and the authority therein given to issue temporary and permanent restraining orders concurrent with the Superior Court, C. S., 851, 859, being limited to actions in Buncombe County, and the authority to issue "process" given by C. S., 1608 (t), being limited ordinarily to summons to compel appearance in court, and C. S., 669, 711, being construed *in pari materia* with the other statutes relating to the same matter.

APPEAL by defendant from *McElroy, J.,* at March Civil Term, 1936, of BUNCOMBE. Reversed.

The plaintiff in the general county court of Buncombe County, N. C., on 2 May, 1932, recovered judgment against defendant in the sum of $7,500.00, with interest, from 20 March, 1931, and cost of action. This judgment of the general county court was transcripted to the judgment rolls of Buncombe County on 5 May, 1932. The defendant had an interest in certain real estate and owned certain personal property in Transylvania County, N. C. Upon petition of plaintiff on 25 November, 1935, duly verified, to the judge of the general county court of Buncombe County, N. C., setting forth certain facts prayed that some "discreet and proper person be appointed as receiver of the defendant J. H. Pickelsimer, and that he be authorized and empowered to take over all the assets of whatsoever nature of the said defendant, and that he liquidate and handle the same in accordance with the further orders of this court." A temporary receiver was appointed on 4 December, 1935, by said judge of the general county court.

The defendant answered said petition and for a further answer said, in part: "This defendant is a citizen of Transylvania County and all the property of any kind, which he owns is now situated in Transylvania County, and that he owns no property of any kind situated in Buncombe County, the county in which this action is instituted; that Transylvania County is in the Eighteenth Judicial District, while Buncombe County is in the Nineteenth Judicial District, and that this court has no jurisdiction or authority to appoint a receiver for property lying in another judicial district, and in another county, from which this court is organized and existing. Wherefore, the defendant prays the court that the temporary receiver heretofore appointed be dismissed, that the motion for a permanent receiver be disallowed, and that the defendant have and recover his costs incurred and that he recover of the plaintiff and his bond such damages as he may be entitled to by reason of the appointment of the temporary receiver herein."

On 9 January, 1936, the judge of the general county court for Buncombe County, N. C., appointed a permanent receiver. The defendant excepted and assigned error as follows: "1. That the judge of the general county court erred in entering the order appointing a temporary receiver in this cause. 2. That the court erred in signing the order making the temporary receiver permanent," and appealed to the Superior Court.

The court below, at March Civil Term, 1936, overruled the defendant's exceptions and assignments of error and affirmed in all respects the judgment of the judge of the general county court. Defendant excepted, assigned as error "the action of the Superior Court in affirming the

judgment of the general county court, and entering the judgment as appears in the record," and appealed to the Supreme Court.

Harkins, Van Winkle & Walton for plaintiffs.
Jones & Ward and Lewis Hamlin for defendant.

CLARKSON, J. We think that the only questions necessary for us to decide on this record are: (1) Does the general county court of Buncombe County, N. C., have authority under the facts in this case to appoint a receiver? We think not. (2) When the judgment was transcripted and docketed in the Superior Court, was the general county court *functus officio?* We think so.

The constitutionality of the general county court of Buncombe County, N. C., has been before this Court before. *Jones v. Oil Co.,* 202 N. C., 328. In the *Jones case, supra,* at p. 332, it is said: "The Superior Court is a constitutional court; it cannot be abolished; its inherent powers cannot be destroyed. *Mott v. Commissioners,* 126 N. C., 866; *State v. Baskerville,* 141 N. C., 811. The General Assembly cannot displace it from its position in the judicial system or establish another court of equal jurisdiction upon a plan different from that provided by the Constitution. *Rhyne v. Lipscombe,* 122 N. C., 650; *Tate v. Commissioners, ibid,* 661. But an allotment or division of jurisdiction is within the contemplation of Article IV, sec. 12. The Legislature may therefore allot inferior courts a portion of the jurisdiction of the Superior Court, providing also for the right of appeal." N. C. Pleading & Practice, secs. 53, 54; *Albertson v. Albertson,* 207 N. C., 547.

N. C. Code, 1935 (Michie), sec. 860, is as follows: "A receiver may be appointed: (3) After judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or when an execution has been returned unsatisfied, and the judgment debtor refuses to apply his property in satisfaction of the judgment."

Section 1608 (dd), is as follows: "Orders to stay execution on judgments entered in the general county court shall be the same as in appeals from the Superior Court to the Supreme Court. Judgments of the general county court may be enforced by execution issued by the clerk thereof, returnable within twenty days. Transcripts of such judgments may be docketed in the Superior Court as now provided for judgments of justices of the peace, *and the judgment when docketed shall in all respects be a judgment of the Superior Court in the same manner and to the same extent as if rendered by the Superior Court, and shall be subject to the same statutes of limitations and the statutes relating to the revival of judgments in the Superior Court and issuing executions thereon.*" (Italics ours.)

Section 1517 is as follows: "A justice of the peace, on the demand of a party in whose favor he has rendered a judgment, shall give a transcript thereof which may be filed and docketed in the office of the Superior Court clerk of the county where the judgment was rendered. And in such case he shall also deliver to the party against whom such judgment was rendered, or his attorney, a transcript of any stay of execution issued, or which may thereafter be issued by him on such judgment, which may be in like manner filed and docketed in the office of the clerk of such court. The time of the receipt of the transcript by the clerk shall be noted thereon and entered on the docket; *and from that time the judgment shall be a judgment of the Superior Court in all respects for the purposes of lien and execution.* The execution thereon shall be issued by the clerk of the Superior Court to the sheriff of the county, and shall have the same effect, and be executed in the same manner, as other executions of the Superior Court; but in case a stay of execution upon such judgment shall be granted, as provided by law, execution shall not be issued thereon by the clerk of the Superior Court until the expiration of such stay. A certified transcript of such judgment may be filed and docketed in the Superior Court clerk's office of any other county, and with like effect, in every respect, as in the county where the judgment was rendered, except that it shall be a lien only from the time of filing and docketing such transcript." (Italics ours.)

When the judgment was docketed in the Superior Court, the general county court was *functus officio* and had no further jurisdiction of the case. *Bailey v. Hester,* 101 N. C., 538; *State v. Goff,* 205 N. C., 545.

A judgment of a justice of the peace, duly docketed in the Superior Court, becomes a judgment of the Superior Court, and may be enforced by execution at any time within ten years from the date of such docketing. *McIlhenny v. Wilmington Sav., etc., Co.,* 108 N. C., 311.

C. S., 614, makes the judgment when docketed a lien on real property in the county where docketed and on the real property in the counties where it is transcripted. A judgment rendered in one county cannot be docketed in another without having been first docketed in the county where it was rendered. *McAden v. Banister,* 63 N. C., 479.

C. S., 1608 (t), in part, is as follows: "The rules of procedure, issuing process and filing pleadings shall conform as nearly as may be to the practice in the Superior Court. . . . All causes pending in said courts shall have rights, privileges, powers, and immunities similar in all respects to those conferred by law on the judges and clerks of the Superior Courts of the State, and shall be subject to similar duties and liabilities: *Provided,* that this section shall not extend the jurisdiction of said judges and clerks, nor infringe in any manner upon the jurisdiction of the Superior Courts," etc.

As this is a general county court, we think the word *process* is limited ordinarily to summons, etc., to compel a defendant in an action to appear in court. The jurisdiction of the general county court is set forth in C. S., 1608 (n), as follows: "The jurisdiction of the general county court in civil actions shall be as follows: (1) Jurisdiction concurrent with that of the justices of the peace of the county; (2) jurisdiction concurrent with the Superior Court in all actions founded on contract; (3) jurisdiction concurrent with the Superior Court in all actions not founded upon contract; (4) jurisdiction concurrent with the Superior Court in all actions to try title to lands and to prevent trespass thereon and to restrain waste thereof; (5) jurisdiction concurrent with the Superior Court in all actions pending in said court to issue and grant temporary and permanent restraining orders and injunctions; (6) jurisdiction concurrent with the Superior Court of all actions and proceedings for divorce and alimony, or either."

The general county court is a statutory one and is limited to Buncombe County, and has no extraterritorial jurisdiction, except what is expressly given it and then subject to constitutional limitations. Nowhere in the statute is any power given it to appoint a receiver, as was done in this action. Temporary and permanent restraining orders and injunctions are limited to actions in Buncombe County.

The Superior Court, a court of general jurisdiction, has these extraterritorial powers. Any other view than the one we take might impinge the inherent powers of the Superior Court and seriously effect a useful general county court.

C. S., 851, is as follows: "The judges of the Superior Court have jurisdiction to grant injunctions and issue restraining orders in all civil actions and proceedings. A judge holding a special term in any county may grant an injunction, or issue a restraining order, returnable before himself, in any case which he has jurisdiction to hear and determine under the commission issued to him, and the same is returnable as directed in the order."

C. S., 859, is as follows: "Any judge of the Superior Court with authority to grant restraining orders and injunctions has like jurisdiction in appointing receivers, and all motions to show cause are returnable as is provided for injunctions."

The sections, C. S., 669, and C. S., 711, referred to by plaintiffs, must be construed *in pari materia* with the other sections before set forth.

We think the judgment of the court below erroneous in two respects: (1) When the judgment was docketed in the Superior Court it was subject to the jurisdiction of that court in like manner as justice's judg-

ment when transcripted. (2) It has no jurisdiction to appoint a receiver as was done in this action.

For the reasons given, the judgment of the court below is

Reversed.

MRS. J. C. HAMPTON v. TOWN OF SPINDALE ET AL.

(Filed 14 October, 1936.)

1. **Negligence A c—Corporations using, but having no control over, municipal sewerage system may not be held liable for nuisance created thereby.**

   Industrial corporations using a municipal sewerage system by emptying their sewage and industrial waste into the sewers, but having no interest in or control over the sewerage system, which is operated and owned by the municipality, may not be held liable as joint tort-feasors with the municipality for damages resulting to lands of a lower proprietor along the stream into which the sewage is emptied.

2. **Same—Corporation diminishing flow of stream may not be held liable for pollution of stream by municipality.**

   Plaintiff instituted this action to recover damages to her lands caused by a municipal sewerage system. Plaintiff alleged that defendant power company, in operating the water system owned by it which supplied water to the municipality, diverted and greatly diminished the flow of water in the stream above the municipality, and that the sewage emptied in the stream below the municipality would have been carried away and rendered less noxious if the flow of water in the stream had not thus been diminished. *Held:* The action was not to recover compensation for the infringement of plaintiff's right to have the undiminished flow of the stream through her land, but to recover damages caused by the pollution of the stream, and the diminution of the flow of the stream cannot be held a proximate cause of such pollution, and the power company cannot be held liable as a joint tort-feasor with the municipality in causing the damage in suit.

APPEAL by the plaintiff from *Pless, J.*, at April Term, 1936, of RUTHERFORD. Affirmed.

Varser, McIntyre & Henry, W. B. Matheny, and Quinn, Hamrick & Hamrick for plaintiff, appellant.

W. S. O'B. Robinson, Jr., W. B. McGuire, Jr., and J. H. Marion for Southern Public Utilities Company (now Duke Power Company), appellee.

Guthrie, Pierce & Blakeney, J. S. Dockery, and W. C. McRorie for Spinners Processing Company, appellee.

S. P. Dunnagan for Stonecutter Mills Company and The Elmore Corporation, appellees.

B. T. Jones, Jr., for Sterling Hosiery Mills, Inc., appellee.

J. S. Dockery for L. M. Carpenter, Receiver, and The Spencer Corporation, appellees.

SCHENCK, J. This is an action instituted by the plaintiff as a riparian owner against the defendants to recover for permanent damages to her land alleged to have been proximately caused by joint negligence and unlawful acts of the defendants in maintaining a nuisance on plaintiff's land, consisting of a polluted stream and of polluted soil and contaminated air.

The following facts are admitted without controversy:

1. All the defendants admit their corporate existence.

2. That the defendants admit that the plaintiff is the owner of the land described in the complaint.

3. The town of Spindale owns and operates its sewerage system; no other defendant has any interest in or control over this sewerage system.

4. That the Duke Power Company owns and operates the waterworks system in the town of Spindale, having purchased same from the town of Spindale on 27 March, 1931, and has operated it in the same manner since that time.

5. All of the mill defendants use the town sewer lines; and no one of the defendants has any separate pipe line or outlet to discharge this sewage into the branch or Holland's creek.

6. All of the manufacturing plants owned by the various defendants discharge their sewage and industrial waste into the said sewerage system of the town of Spindale.

7. The town of Spindale and all of the mill defendants purchase their water from the Duke Power Company, the owner of the waterworks system, and have purchased it since 27 March, 1931.

8. Only the sewage arising on the north side of the Highway No. 20 is emptied into Holland's creek or the branch emptying into said creek; the sewage arising on the south side is discharged into another pipe line and does not go into this creek.

The plaintiff offered evidence tending to show that the sewage from the sewerage system of the town of Spindale emptied into Holland's creek which ran through the land of the plaintiff, and that as a result thereof the banks of the stream were caused to cave in and the sewage was deposited on plaintiff's land, causing the vegetation to die, creating obnoxious and nauseating odors, causing the breeding of annoying and poisonous insects, and rendering the land worthless and uninhabitable.

At the close of the plaintiff's evidence, the court sustained motions for

judgment of nonsuit lodged by all of the defendants, except the town of Spindale, and the plaintiff submitted to a voluntary nonsuit as to said town and appealed to the Supreme Court, assigning as error the action of the court in sustaining the motions of the Southern Public Utilities Company (now Duke Power Company and hereinafter called the Power Company), and of Stonecutter Mills Company, Sterling Hosiery Mills, Inc., Spinners Processing Company, The Elmore Corporation, and L. M. Carpenter, Receiver of The Spencer Corporation (hereinafter called the Mill Companies).

Considering first the appeal from the judgment as of nonsuit as to the Mill Companies: It will be noted from the admitted facts that the town of Spindale owned the sewerage system, and that no other defendant has any interest or control over said system, and that the Mill Companies discharge their sewage and industrial waste in said sewerage system, and that sewage arising on the north side of Highway No. 10 is emptied into Holland's creek. We think, and so hold, that under these facts there was no liability to the plaintiff from the Mill Companies for any pollution of the stream flowing through the plaintiff's land. The rule is clearly and concisely stated in 43 C. J., on pages 1158-9, as follows: "But the inhabitants of a city who invoke its power to construct and control a sewer, and who use the sewer after its completion for the purpose and in the way prescribed by law, are not liable jointly with the city for the damages which result to third persons from the negligence of the city in the construction, management, or operation of the sewer." To the same effect is Thompson's Commentaries on the Law of Negligence, Vol. 5, at p. 372, as follows: "It has been held that citizens who request the construction of a public sewer and use the same are not liable for the negligence of the city in its construction or operation, since they have no control or command over its construction, management, or operation; and hence, they may not be joined with the city in an action for damages resulting from the faulty construction, management, or operation of the sewer." And still further in 9 R. C. L., at page 670, it is written: "Persons on whose initiative a sewer is constructed and who use it after its completion are not proper parties defendant with the municipality in a suit to enjoin its operation on the ground that it is a nuisance," and on page 674, "When an owner of land constructs a sewer and then parts with all control over it to a municipality, he is not liable if it later becomes a nuisance, for the proximate cause of the nuisance is not the construction of the sewer, but its use and it is the municipality that is liable. The inhabitants of a city who invoke its power to construct and who after completion use a sewer, cannot properly be joined with the municipality in a suit for damages and an injunction on account of the effects of its negligence in operating

the sewer." See, also, *Carmichael v. Texarkana,* 116 Fed., 845; *Kraver v. Smith,* 164 Ky., 674; *Johnson v. Kraft-Phenix Cheese Corp.,* 94 S. W. (2nd Series), 54 (Tenn., 1936).

The same rule seems to prevail in the English courts as is evidenced by *Lewis v. Alexander,* 24 Can. S. C., 551, wherein the author of the opinion writes: "It appears to me that if the sewer be vested in the local authority (municipality) and the defendants have the sanction of that authority for doing what they have done, this action is not maintainable, for, if it were, every householder whose house is drained into a sewer which is vested in and is under the control of a local authority, would be liable to be proceeded against for what that authority might do with the sewage which flowed out of the mouth of the sewer although the householder was unable to direct how and in what way the sewage was to be dealt with. It is immaterial who originally constructed the sewer. When once the sewer was vested in the local authority, they are the persons liable for any injury caused by the affluent from the sewer and not the persons who drain into the sewer. . . . The plaintiff has, in my opinion, sued the wrong defendants. . . . The judgment must be entered for the defendants."

Considering next the appeal from the judgment as of nonsuit as to the Power Company: So far as any damage caused by the placing of deleterious substances through the sewerage system into Holland's creek is concerned, what has been said as to the Mill Companies' liability applies with equal force to that of the Power Company, since by the admitted facts "no other defendant (than the town of Spindale) has any interest in or control over this sewerage system."

However, the plaintiff contends in her brief that her land has been damaged by reason of the fact that the Power Company diverted the water from Holland's creek above her land to furnish the town of Spindale with water, and thereby caused the water in said creek to run in diminished quantities through her land. A careful reading of the complaint divulges that the only damage alleged to plaintiff's land is the damage caused by the nuisance due to the pollution of the stream. True, it is alleged, in effect, that if the diminution in the volume of water had not been brought about, the stream in its natural flow would have carried off the pollution and thereby have minimized the damage, and true it is that there is evidence tending to show that the flow of the stream had been diminished, still the gravaman of this action is the damage from the nuisance caused by the pollution of the stream, as appears from the following allegation of the complaint in the summing up of the wrongful and negligent acts complained of: "(a) In that the Southern Public Utilities Company wrongfully diverted the water from Holland's creek to the plants of the various manufacturing defendants

and the town of Spindale, when it knew, or by the exercise of reasonable care and prudence, could have known that the said water so wrongfully diverted would be polluted by each of the defendants, and that neither of the defendants has a purification plant for the treatment of the said water so wrongfully diverted, polluted, and contaminated, mixed with dye liquor and other chemicals and deleterious substances." Under the allegations of the complaint and under the facts as they appear from the evidence, viewing it in the light most favorable to the plaintiff, the diminution of the flow of the stream cannot be held to be a proximate cause of the pollution of the stream, the nuisance complained of. The right of the plaintiff to recover compensation for the taking from her by the Power Company by virtue of its right of eminent domain of her right to have the undiminished flow of the stream through her land is not invoked. The action is solely for damages arising from a nuisance, caused by the pollution of Holland's creek, and there is no evidence that the Power Company polluted the stream.

We think, and so hold, that the court ruled correctly in sustaining the motion of the defendant Power Company for judgment as of nonsuit.

Affirmed.

E. V. NEIGHBORS, EXECUTOR OF E. G. TALTON, DECEASED, v. MAUDE EVANS.

(Filed 14 October, 1936.)

1. Executors and Administrators E c—

In proceedings by an executor to sell lands to make assets the petition should set forth, *inter alia*, as required by the statute, N. C. Code, 79, the value of the personal estate, as near as may be ascertained, and the application thereof, and an allegation merely that the personalty is insufficient is defective.

2. Receivers A a—Party must show apparent right to property in order to be entitled to appointment of receiver under N. C. Code, 860 (1).

Where an executor's petition in proceedings against a devisee to sell lands to make assets alleges merely that the personalty is insufficient to pay debts, without setting forth the personalty and the application thereof, plaintiff executor is not entitled to the appointment of a receiver for the lands on the ground that the action cannot be tried until a subsequent term, and that the devisee had refused to pay taxes, the allegation merely that the personalty is insufficient failing to show plaintiff executor's apparent right to the relief as required for the appointment of a receiver under the provisions of N. C. Code, 860 (1), especially when the devisee denies the allegation that the personalty is insufficient.

3. Same—

Receivership is a harsh remedy, and the courts will not appoint a receiver unless the right to the relief is clearly shown and it is made to appear that there is no other safe and expedient remedy.

APPEAL by defendant from *Daniels, J.*, at January Term, 1936, of JOHNSTON. Reversed.

This is an action brought by plaintiff against defendant to sell certain lands to make assets. Among plaintiff's allegations are the following: "4. That there are claims against the estate of E. G. Talton amounting to approximately four thousand ($4,000.00) dollars and the personal estate of said E. G. Talton is not sufficient to pay said debts. 5. That the said E. G. Talton, deceased, under the terms and provision of the will as set out in paragraph two hereof willed and devised to Mrs. Maude Evans all his real estate consisting of 50½ acres, known as the Henry Watkins lands situate in Beulah Township, adjoining the lands of D. A. Watkins, Bright Fields, J. S. Richardson, J. B. Pearce, *et al.*, defined and described as follows: (describing same). 6. That in order to make assets with which to pay the debts owing by the estate of E. G. Talton it will be necessary to sell the lands described in the foregoing paragraph, the principal part of said debt being three thousand dollars in trust funds held by the said E. G. Talton for the use and benefit of the children of S. H. Hooks. Wherefore, the plaintiff prays the judgment of the court that the lands described in paragraph 5 hereof be sold to make assets with which to pay the debts due by the estate of E. G. Talton; that a commissioner of this court be appointed to make such sale under the orders of this court; for all such other and further relief as he may be entitled to in the premises."

The defendant, in answer, says: "That paragraph four is denied on information and belief, that it is not denied that said estate did owe some debts; it is expressly denied, however, that the personal estate is not sufficient to pay all of said debts, and on the contrary this defendant alleges that, at the time of his death the said E. G. Talton was the owner of personal property, including money, more than sufficient to pay all debts and his obligations, including the costs and charges of administration; and in connection with said paragraph said defendant alleges on information and belief that said executor has made no accounting whatsoever of said personal estate. . . . That, as this defendant is informed, advised, and believes, paragraph six of said petition is untrue and the same is denied. And further answering said petition, this defendant says that as she is informed, advised, and believes, the said E. V. Neighbors, executor, took into his possession immediately upon the death of the said E. G. Talton all of his moneys,

notes, and personal property, amounting to approximately $7,000.00, much more than sufficient to pay all the debts and obligations of said testator, and that said Neighbors has made no accounting for any portion of said personal estate whatsoever. Wherefore, this defendant prays the court for judgment; for all moneys, funds, and personal estate coming into his hands as such executor, out of which he is required to pay all debts owing by said estate. 2nd. That this defendant go hence without day and recover from said petitioner costs for suit herein, and for such other and further relief as defendant may be entitled to and as to the court may seem meet and proper."

The court below made the following order: "The above cause coming on to be heard before the undersigned judge presiding, in the Superior Court of Johnston County, and it appearing to the court that this action cannot be tried at the present term and should be continued; and it further appearing to the court that the defendant Maude Evans has been in possession of the lands sought to be sold in this action, but has failed and refused to pay the taxes upon the same; and it further appearing to the court that it is to the best interest of all concerned, that a receiver be appointed to take charge of said lands; it is, now, therefore, ordered, adjudged, and decreed that J. H. Abell be and he is hereby appointed receiver in this cause, to take charge of the lands described in the complaint, and to rent the same and collect all rents and profits therefrom, and to hold said rents and collections, subject to the further orders of this court, and the said J. H. Abell is required to give bond in the sum of $400.00 for his faithful performance as said receiver.

F. A. DANIELS, Judge presiding."

To the foregoing order the defendant excepted, assigned error, and appealed to the Supreme Court.

No counsel for plaintiff.
A. M. Noble for defendant.

CLARKSON, J. The only exception and assignment of error made by defendant is that the court below erred in signing the order appointing a receiver. We think this must be sustained.

N. C. Code 1935 (Michie), section 860, is as follows: "In what cases appointed—A receiver may be appointed (1) Before judgment, on the application of either party, when he establishes an apparent right to property which is the subject of the action and in the possession of an adverse party, and the property or its rents and profits are in danger of

being lost, or materially injured or impaired; except in cases where judgment upon failure to answer may be had on application to the court," etc.

To sell lands to make assets: Section 79 is as follows: "The petition, which must be verified by the oath of the applicant, shall be set forth, as far as can be ascertained: (1) Amount of debt outstanding against the estate. (2) The value of the personal estate, and the application thereof. (3) A description of all the legal and equitable real estate of the decedent, with the estimated value of the respective portions or lots. (4) The names, ages, and residences, if known, of the devisees and heirs at law of the decedent."

In *McNeill v. McBryde,* 112 N. C., 408 (411-12), it is said: "We think, however, that the petition is deficient in that it does not comply with section 1437 of The Code (now C. S. 79), which requires that it shall set forth 'the value of the personal estate and the application thereof.' It simply states that the personal estate 'is wholly insufficient to pay his (intestate's) debts and the costs and charges of administration.' The purpose of the statute, in requiring the particulars therein mentioned to be stated in the petition, was to enable the court to see whether a sale was necessary; but the present allegation wholly fails to give any such information. It is important that the requirements of the statute should be observed, and we must sustain the demurrer upon this ground. *Shields v. McDowell,* 82 N. C., 137."

In the complaint is the following: "And the personal estate of said E. G. Talton is not sufficient to pay said debts." We think this allegation not sufficient under the statute. Then again, the defendant denies this statement and alleges: "The said E. V. Neighbors, executor, took into his possession immediately upon the death of the said E. G. Talton, all of his moneys, notes, and personal property, amounting to approximately $7,000.00, much more than sufficient to pay all the debts and obligations of said testator, and that said Neighbors has made no accounting for any portion of said personal estate whatsoever."

In *Parker v. Porter,* 208 N. C., 31 (34) it is stated: "While it is well settled that an administrator has the right, and that it becomes his duty under certain conditions, to apply for license to sell the real estate of his intestate to make assets with which to pay debts, it is necessary that the personal property shall first be exhausted. When this has been done and it has been ascertained that the personalty is insufficient to discharge the debts, resort may be had to the realty. The personalty, however, is always the primary fund for the payment of debts. C. S. 74; *Shaw v. McBride,* 56 N. C., 173; *Clement v. Cozart,* 107 N. C., 697." *Wadford v. Davis,* 192 N. C., 484 (487).

It will be noted that the statute (C. S., 860, sec. 1) says: "When he establishes an apparent right to property," etc. *Jones v. Jones,* 187 N. C., 589 (592).

We see no sufficient allegations in the complaint or evidence in the record to justify the appointment of a receiver. A receiver may be appointed where a party establishes an apparent right to property, and the person in possession is insolvent, and ordinarily a receiver will be appointed to take charge of the rents and profits during the pendency of the action. Plaintiff does not come within the above rule. The courts look with jealousy on the application for the appointment of a receiver. It is ordinarily a harsh remedy. The right to relief must be clearly shown and also the fact that there is no other safe and expedient remedy. In some cases a bond is allowed the defendant instead of the appointment of a receiver. *Woodall v. Bank,* 201 N. C., 428.

On the entire record we think a receiver should not have been appointed. For the reasons given, the judgment of the court below is

Reversed.

ROBERT A. REYNOLDS v. EMMA REYNOLDS.

(Filed 14 October, 1936.)

1. Husband and Wife E d—

A deed of separation is rescinded by the resumption of the conjugal relation.

2. Divorce A d—Where deed of separation is rescinded, plaintiff must show later voluntary separation for divorce under N. C. Code, 1659 (a).

Plaintiff instituted this action for divorce on the ground of two years separation, N. C. Code, 1659 (a), and introduced evidence of more than two years separation after a deed of separation between the parties. Defendant introduced evidence tending to show that the conjugal relation was resumed after the deed of separation was executed, but more than two years before the institution of the action, defendant testifying that she gave birth to a child by plaintiff three years after the execution of the deed of separation. *Held:* It was error for the trial court to direct the jury to find for plaintiff if they believed the evidence, the question of whether the parties resumed the conjugal relation after the execution of the deed of separation, and if so, whether there was a voluntary separation thereafter for the required time, being for the jury.

STACY, C. J., concurs in result.

APPEAL by the defendant from *McElroy, J.,* at February Term, 1936, of BUNCOMBE. New trial.

No counsel for plaintiff, appellee.
James E. Rector for defendant, appellant.

SCHENCK, J. This action was instituted by the plaintiff under the provisions of chapter 72, Public Laws of North Carolina, 1931, as amended by chapter 163, Public Laws of North Carolina, 1933, being N. C. Code of 1935 (Michie), sec. 1659 (a), and was before us on a former appeal. *Reynolds v. Reynolds,* 208 N. C., 428.

The plaintiff alleged "that on 13 May, 1927, the plaintiff and defendant separated from each other; that said separation was not caused by any fault of this plaintiff. That plaintiff and defendant have lived separate and apart from that day to this." The complaint was verified on 1 March, 1934. The defendant denied this allegation.

The second issue submitted to the jury was as follows: "Have the plaintiff and defendant lived separate and apart for more than two years next preceding the commencement of this action?" The action was commenced 1 March, 1934.

The plaintiff introduced in evidence a deed of separation between plaintiff and defendant, dated 13 May, 1927, and plaintiff testified that he had lived separate and apart from the defendant since that date.

The defendant testified that she had given birth to a child, of which the plaintiff was the father, which child would be five years old in May, 1936.

The following excerpt from the charge of the court is made the basis of an exceptive assignment of error: "The action was commenced, according to the summons, in 1934, and they have lived separate and apart from each other considerably more than two years, and the court therefore charges you if you believe the evidence, and find the facts to be as testified by the witnesses, you will answer the second issue 'Yes.' "

The assignment of error must be sustained.

The plaintiff relied upon the deed of separation to bring the alleged separation between him and the defendant within the provisions of the N. C. Code of 1935 (Michie), sec. 1659 (a), which reads as follows:

"Marriages may be dissolved and the parties thereto divorced from the bonds of matrimony, on application of either party, if and when there has been a separation of husband and wife, either under a deed of separation or otherwise, and they have lived separate and apart for two years, and the plaintiff in the suit for divorce has resided in the State for a period of one year."

If the parties resumed the conjugal relations after they entered into the deed of separation, as testified by the defendant, the deed was thereby rescinded. *Archbell v. Archbell,* 158 N. C., 409; *Smith v. King,* 107 N. C., 273.

The defendant's testimony to the effect that she had given birth to a child by the plaintiff in May, 1931, considered in the light of the plaintiff's allegation and contention that the final separation took place on 13 May, 1927, under the deed of separation, raised an issue for the jury to answer as to whether there had been a separation between husband and wife under deed of separation, as provided by the statute, and it was error to instruct the jury that if they believed all of the evidence they would answer the issue in favor of the plaintiff.

If it should be suggested that all of the evidence tends to show that the plaintiff and defendant have lived separate and apart since the birth of the child in May, 1931, and that this action was commenced in March, 1934, and that therefore the instruction was a correct one, the reply is that all of the evidence does not tend to show that the separation after the birth of the child was by mutual agreement, express or implied. The only agreement shown was the deed of separation dated 13 May, 1927, and if defendant's evidence is to be believed this was rescinded by the cohabitation by the plaintiff and defendant in 1930.

"Where a husband and wife have lived separate and apart from each other for two years, following a separation by mutual agreement, express or implied, their marriage may be dissolved; but where they have lived separate and apart from each other for two years, without a previous agreement between them, neither is entitled to a divorce, under the statute, C. S., 1659 (a)." *Parker v. Parker, ante,* 264. It should be stated, in justice to the learned trial judge, that the opinion in *Parker v. Parker, supra,* had not been handed down when this case was tried.

New trial.

STACY, C. J., concurs in result.

STATE v. J. D. WINCKLER AND D. M. WINCKLER.

(Filed 14 October, 1936.)

Criminal Law I c—Questions asked by court of defendants' witnesses which tended to disparage them held violation of C. S., 564.

Defendants relied on an alibi to establish their innocence, and introduced a witness who testified that he was playing poker with defendants some distance from the scene of the crime at the time it was committed, and introduced another witness who testified that the character of the witness testifying as to the alibi was good. The court asked the first witness whether his employer knew he played poker all night on Sunday nights, and asked the character witness whether he would say a man's

character was good who played poker all night Sunday night. *Held:* The questions propounded by the court had the effect of impeaching the witnesses and were in violation of C. S., 564, and defendants' exceptive assignments of error thereto must be sustained.

APPEAL by the defendants from *Cranmer, J.*, at May Term, 1936, of WARREN. New trial.

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

John Kerr, John Kerr, Jr., and John Y. Hutcheson for defendants, appellants.

SCHENCK, J. The defendants were tried and convicted upon two bills of indictment charging them with having feloniously broken and entered a storehouse wherein merchandise and money were kept with intent to steal and carry away said merchandise and money, and with feloniously stealing and carrying away from the possession of one Clyde Jeffcoat money to the amount of $100.00, with the use or threatened use of firearms whereby the life of said Jeffcoat was endangered.

The State offered evidence tending to show that about 4:30 in the morning of Monday, 6 April, 1936, the defendants came to the Swan Sandwich Shop, near Norlina, and waked up Clyde Jeffcoat, who was in charge of said shop and sleeping therein, stating that they wanted to buy some gas; that when Jeffcoat came to the door one of the defendants broke the glass in the door and covered Jeffcoat with a pistol, and both defendants entered the shop and took merchandise and money therefrom; that the defendants tied Jeffcoat to his bed and made their escape in an automobile, taking the stolen merchandise and money with them.

The defendants testified and offered other evidence tending to show that from 11:30 o'clock Sunday night, 5 April, 1936, till 7:00 o'clock Monday morning, 6 April, 1936, they were at Newton's filling station, just outside the corporate limits of Boydton, in the State of Virginia; that they were continuously engaged in a poker game during this time and were not therefore at the Swan Sandwich Shop in North Carolina at the time the State's witness testified the shop was entered and he was robbed.

To sustain their alibi, the defendants introduced as a witness one Robert Beville, who testified that he played in the poker game at Newton's filling station with the defendants from about 11:30 o'clock p.m. (5 April) till about 6:00 o'clock a.m. (6 April), and that the defendants were at the filling station during all of this time. In the course of the redirect examination of this witness, the court interposed the

following questions, to which the witness made the following answers: "Q. Who did you say you worked for? A. H. T. Allgood. Q. What kind of business do they do? A. Grocery and general merchandise. Q. Do they know you are playing poker every Sunday night? A. No. Q. Why did you not tell them? (No answer.)" The defendants in apt time objected to these interrogatories by the court and make them the basis for an assignment of error.

The defendants, to further sustain their alibi, offered as a witness one Nat Hutcheson, who testified that he knew the witness, Robert Beville, and that his character was good. During the course of the cross-examination of this witness the court interposed the following question: "Would you say a man that played poker all night Sunday night, in violation of law, was of good character?" To which the witness answered: "I think for truth and veracity he would be." The defendants in apt time objected to the interrogatory and make it the basis of an assignment of error.

Both of the assignments of error must be sustained, as the questions propounded by the court clearly had the effect of impeaching the witnesses, and were in violation of C. S., 564.

Mr. Justice Walker, in a learned and exhaustive opinion in a case wherein the trial judge propounded questions to a witness, who was a lawyer, tending to impeach him by showing unethical practices, writes: "What a judge says in condemnation of a witness is generally fatal to the party in whose behalf he testifies. The witness stands before the jury not only impeached, but thoroughly discredited. What the judge says in disparagement of him counts for far more than witnesses or counsel may utter against him. It would be dangerous to hold otherwise. There are other cases than *S. v. Dick, supra* (60 N. C., 440), and *S. v. Cook, supra* (162 N. C., 586), in which this Court has held that the impeachment of a witness, emanating from the judge, becomes so deep-seated in the minds of the jury as to be beyond the reach of the judge, however much he may endeavor to counteract its evil influence, and it will, at least, leave the party once prejudiced by it so completely handicapped as to prevent that fair and impartial trial which the law guarantees to him and to which he is justly entitled. One word of untimely rebuke of his witness may so cripple a party and blast his prospects in the case as to leave him utterly helpless before the jury. . . . For the judge even to intimate that the conduct of the witness, an attorney, was unprofessional and unethical was undoubtedly calculated to prejudice the defendant, whatever in the way of explanation or atonement of it he may have said afterwards, and however praiseworthy the motive or intention of the judge may have been. The enforcement of a moral principle, when time and occasion call for it, is highly com-

mendable, but the statute does not permit it to be done from the bench when the rights of one of the parties may be seriously impaired, if not destroyed, by it." *Morris v. Kramer,* 182 N. C., 87 (91).

For the errors assigned there must be a

New trial.

B. P. JONES v. DIXIE FIRE INSURANCE COMPANY.

(Filed 14 October, 1936.)

1. Trial G e: Appeal and Error J a—

Where the court finds no facts and gives no reasons for his action in setting aside the verdict, it will be presumed on appeal that he set aside the verdict in the exercise of his discretionary power, which is not subject to review.

2. Trial D a—

Where a party fails to move for judgment as of nonsuit at the close of plaintiff's evidence, its motion therefor at the close of all the evidence cannot be granted, since the right to demur to the evidence is waived. C. S., 567.

3. Same—

The court may not grant a motion to nonsuit after verdict, even when motions therefor are aptly made during the trial and the court's ruling thereon reserved.

APPEAL by the plaintiff from *Sinclair, J.,* at April Term, 1936, of JOHNSTON. New trial.

This is an action upon a fire insurance policy issued to the plaintiff by the defendant, wherein the defendant interposes the defense that the interest of the plaintiff in the property insured was not an unconditional and sole ownership, and that the subject of the insurance was a building on ground not owned by the insured in fee simple, and that the policy sued on contained the following provisions: "This entire policy shall be void unless otherwise provided by agreement in writing added hereto, (a) if the interest of the insured be other than unconditional and sole ownership; or (b) if the subject of insurance be a building on ground not owned by the insured in fee simple."

The plaintiff offered evidence tending to show his title to the property described in the policy sued on, the issuance of the policy, the destruction by fire of the property, and the demand upon and refusal by the defendant to pay.

The defendant offered evidence tending to show that there was outstanding against the land, upon which the building described in the policy stood, an owelty charge.

The following appears at the close of the record: "At the close of all the evidence the defendant moved for judgment as of nonsuit on the grounds (1) that the plaintiff's title is other than sole and unconditional ownership; (2) that the owelty lien against the property constitutes the party in whose favor the lien exists as part owner or part tenant.

"The court: I will hold, gentlemen, that the holder of the owelty was a tenant in common and has an equity in the land.

"Gentlemen of the jury: We have been discussing some law which, in the opinion of the court, applies to this case, while you were out. I am submitting one issue to you: 'What amount, if anything, is the plaintiff entitled to recover of the defendant?' I charge you, gentlemen of the jury, if you find the facts to be as shown by all the evidence on both sides, the parol evidence and the record evidence introduced, it is your duty to answer the issue 'Nothing.'

"The jury answered the issue: '$850.00.' The court, *ex mero motu,* set aside the verdict of the jury.

"Counsel for defendant called the attention of the court to the fact that the motion made was a motion for nonsuit and not a motion for a directed verdict, and that its motion had not been passed upon by the court. The court stated that he had inadvertently overlooked the form of the motion; that the defendant had a right for its motion to be passed upon, and that the ruling he had announced, prior to submitting the case to the jury, indicated that he was holding with the defendant as a matter of law. He therefore granted the motion for judgment as of nonsuit, to which the plaintiff excepted.

"Judgment of nonsuit was entered in favor of the defendant, as appears in the record. The plaintiff excepted in open court and gave notice of appeal to the Supreme Court."

W. J. Hooks and G. A. Martin for plaintiff, appellant.

Brooks, McLendon & Holderness and Abell & Shepard for defendant, appellee.

SCHENCK, J. The assignments of error present two questions:

First: Did the court err in setting aside the verdict?

Second: Did the court err in allowing defendant's motion for judgment as in case of nonsuit?

The first question must be answered in the negative. The record does not state whether the verdict was set aside as a matter of law or as a matter of discretion. However, since no facts are found, and no reasons are given, it is presumed that the verdict was set aside in the exercise of the discretionary power vested in the trial judge; *Bird v. Bradburn,* 131 N. C., 488; *Braid v. Lukins,* 95 N. C., 123, and the exercise of this

discretionary power is not reviewable upon appeal. *Hoke v. Whisnant,* 174 N. C., 658.

The second question must be answered in the affirmative. The record discloses that no motion for judgment as in case of nonsuit was lodged "when the plaintiff introduced his evidence and rested his case," but was lodged for the first time "after all the evidence on both sides is (was) in." The defendant thereby lost his right under C. S., 567, to demur to the evidence. "The motion (for judgment as in case of nonsuit) cannot primarily come at the close of all the evidence. It must be made initially at the close of the plaintiffs' evidence, and, if the motion is refused, there may be an exception and appeal. But if evidence is offered by defendant, the exception is waived. At the end of all the evidence the exception may be renewed, but not then made for the first time." *Nowell v. Basnight,* 185 N. C., 142 (147), and cases there cited.

Even if the defendant had properly lodged its motion for judgment as in case of nonsuit when the plaintiff had introduced his evidence and rested his case, and had properly renewed it after all the evidence of both sides was in, still the court was without authority to allow the motion after the verdict; *Riley v. Stone,* 169 N. C., 421, and this is not affected by the reservation by the court of his ruling on the motion. *Batson v. Laundry,* 202 N. C., 560. See, also, N. C. Practice & Procedure (McIntosh), par. 565 (3), at pp. 613-14.

The judgment entered below is reversed and the case remanded for a New trial.

STATE v. REED COFFEY.

(Filed 14 October, 1936.)

1. Homicide D b—Evidence of defendant's guilt of murder in the first degree held sufficient to be submitted to the jury.

The State's evidence tended to show that deceased was killed from ambush with a shotgun, that deceased had charged accused with larceny. and that the trial was set for the following day, that shortly after the crime, accused stated deceased would not appear to testify against him in court upon the prosecution for larceny, that the homicide was committed with a shotgun belonging to accused's father, that accused had access to the gun, and was seen carrying a gun on the afternoon before the murder, that the gun was found the day after the homicide in a clump of bushes not far from the scene of the crime, that the gun had finger prints of accused upon it, and that, after his arrest, accused stated in response to a question, that his father did not have a shotgun that he knew of. although he knew all about it, and evidence that accused had previously made threats against deceased. Accused relied upon an alibi.

Held: The evidence, though circumstantial, was amply sufficient to be submitted to the jury on the question of accused's guilt of murder in the first degree.

2. Criminal Law G n—

Circumstantial evidence is a recognized and accepted instrumentality in the ascertainment of truth.

3. Criminal Law G s—Court may allow solicitor to read parts of witness' testimony on preliminary hearing to refresh witness' memory.

Upon examination by the solicitor, a witness was allowed to read her testimony upon the preliminary hearing to refresh her memory, and the solicitor was allowed to read part of her testimony to her. *Held:* Defendant's exception to the manner of examination of the witness cannot be sustained, it being permissible for the witness to thus refresh her memory, and if the manner of the solicitor's questioning be deemed leading, the matter was addressed to the sound discretion of the trial court, the purpose of the solicitor not being to introduce in evidence the testimony of the witness taken upon the preliminary hearing.

APPEAL by defendant from *Clement, J.*, at July Term, 1936, of AVERY.

Criminal prosecution, tried upon indictment charging the defendant with the murder of one Hardie Coffey.

Verdict: Guilty of murder in the first degree.

Judgment: Death by asphyxiation.

Defendant appeals, assigning errors.

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

Byron E. Williams for defendant.

STACY, C. J. On Sunday evening, 5 April, 1936, about the hour of 7:30 p.m., Hardie Coffey was shot and killed while sitting with his family in the front room of his home in Avery County, teaching his little girl her music lesson. The murderer stepped up on the front porch, shot through a glass window, and hit the deceased in the back just under the left shoulder. He died almost instantly without speaking.

The evidence which tends to connect the defendant with the killing is circumstantial. Nevertheless, it points unerringly to his guilt. *S. v. Melton,* 187 N. C., 481, 122 S. E., 17. The defendant had been charged by the deceased, who was his uncle, with the larceny of some 'possum hides. He was to be tried on the following day. Shortly after the homicide, the defendant arrived at a church about a mile from the home of the deceased. He was asked whether his uncle would appear in court against him the next day. His reply was that he would not be there. The defendant had access to his father's shotgun, which was used by the

murderer, and it had the defendant's finger prints upon it when it was found, on the day after the homicide, in a clump of laurel bushes, or rhododendron, not far from the home of the deceased. The defendant was seen with a gun on the afternoon before the murder. After the defendant's arrest, the sheriff asked him, "Reed, what did you do with that shotgun?" His reply was, "I don't know anything about any shotgun." Question: "What kind of shotgun did your daddy have?" Answer: "He ain't got no shotgun that I know of." The gun used by the assailant was readily accessible to the accused and he knew all about it. To feign ignorance when candor would serve better is to reveal a troubled mind. On other occasions, the defendant had made threats against the deceased, stating that "some of these days he is going to go and nobody will know what became of him."

The defense interposed by the prisoner was, that he was elsewhere at the time of the homicide. *S. v. Stamey,* 209 N. C., 581, 183 S. E., 736. The jury rejected his alibi. *S. v. Jeffreys,* 192 N. C., 318, 135 S. E., 32; *S. v. Jaynes,* 78 N. C., 504.

On his appeal, the defendant relies chiefly upon his demurrer to the evidence or upon the insufficiency of the State's case to warrant a conviction. *S. v. Carter,* 204 N. C., 304, 168 S. E., 204; *S. v. Montague,* 195 N. C., 20, 141 S. E., 285. It is sometimes difficult to distinguish between evidence sufficient to carry a case to the jury and a mere scintilla, which only raises a suspicion or possibility of the fact in issue. *S. v. Bridgers,* 172 N. C., 879, 89 S. E., 804; *S. v. White,* 89 N. C., 462. In the instant case, however, the evidence is amply sufficient to require its submission to the jury. Indeed, it is fully as strong, if not stronger, than the evidence which was held sufficient to require its submission to the jury in some of the following cases: *S. v. Satterfield,* 207 N. C., 118, 176 S. E., 466; *S. v. Ammons,* 204 N. C., 753, 169 S. E., 631; *S. v. McLeod,* 198 N. C., 649, 152 S. E., 895; *S. v. Allen,* 197 N. C., 684, 150 S. E., 337; *S. v. McKinnon,* 197 N. C., 576, 150 S. E., 25; *S. v. Lawrence,* 196 N. C., 562, 146 S. E., 395; *S. v. Melton,* 187 N. C., 481, 122 S. E., 17; *S. v. Young,* 187 N. C., 698, 122 S. E., 667; *S. v. Griffith,* 185 N. C., 756, 117 S. E., 586; *S. v. Bynum,* 175 N. C., 777, 95 S. E., 101; *S. v. Matthews,* 162 N. C., 542, 77 S. E., 302; *S. v. Taylor,* 159 N. C., 465, 74 S. E., 914; *S. v. Wilcox,* 132 N. C., 1120, 44 S. E., 625.

Circumstantial evidence is not only a recognized and accepted instrumentality in the ascertainment of truth, but, in many instances, quite essential to its establishment. *S. v. Plyler,* 153 N. C., 630, 69 S. E., 269.

The defendant also complains at the manner in which a State's witness, Mrs. C. C. Franklin, was examined by the solicitor. She was asked about her testimony at the preliminary hearing, or coroner's inquest, and was allowed to read her evidence to refresh her recollec-

tion, and the solicitor read portions of it to her. *S. v. Lyon,* 89 N. C., 568. It was permissible for the witness to refresh her memory by referring to her previous testimony. *S. v. Staton,* 114 N. C., 813, 19 S. E., 96; *Storey v. Stokes,* 178 N. C., 409, 100 S. E., 689; *Davenport v. McKee,* 94 N. C., 325. And even if the manner of the solicitor's questioning be regarded as leading, this was a matter addressed to the sound discretion of the trial court. *S. v. Noland,* 204 N. C., 329, 168 S. E., 412; *S. v. Buck,* 191 N. C., 528, 132 S. E., 151; *Bank v. Wysong,* 177 N. C., 284, 98 S. E., 769; *McKeel v. Holloman,* 163 N. C., 132, 79 S. E., 445; *Crenshaw v. Johnson,* 120 N. C., 270, 26 S. E., 810; *S. v. Lyon, supra; Gunter v. Watson,* 49 N. C., 455. Moreover, it is not perceived wherein it could have been hurtful. *S. v. Jones,* 181 N. C., 546, 106 S. E., 817. It was not the thought or purpose of the solicitor to offer in evidence the testimony of the witness taken upon the former hearing. The cases cited by the defendant on the contrary hypothesis are inapposite. *S. v. Young,* 60 N. C., 126; *S. v. Grady,* 83 N. C., 643; *S. v. McLeod,* 8 N. C., 344.

After giving the record that degree of care which a capital case imposes, it is not discovered wherein any error was committed on the trial. Apparently the prisoner has been tried in strict conformity to the established rules and sentenced as the law commands. Hence, the verdict and judgment will be upheld.

No error.

J. C. MORROW, JR., v. T. L. DURHAM, W. G. JUSTICE, AND J. A. RUSHER, MEMBERS OF AND COMPOSING THE BOARD OF COUNTY COMMISSIONERS OF HENDERSON COUNTY.

(Filed 14 October, 1936.)

Taxation A a—Expense required to effect purpose constituting necessary governmental expense is also a necessary governmental expense.

Defendant county authorized a private corporation for a stipulated amount to prepare and submit to its bondholders a plan for the refunding of its bonded indebtedness, which was in default. A plan was prepared and submitted to the bondholders, and approved by the Local Government Commission, whereby the interest rates on defendant county's bonds would be greatly reduced, and the county proposed to issue refunding bonds in accordance with the plan, and also bonds to pay the private corporation in cash for its services. *Held:* The Board of County Commissioners has the power to authorize and sell the refunding bonds under the provisions of the County Finance Act, and the reasonable and necessary expenses incurred in good faith to effect this governmental purpose is a necessary expense of the county, and bonds therefor may be issued without submitting the question to the qualified voters of the county. Art. VII, sec. 7. N. C. Code, 1334 (8) (j).

APPEAL by plaintiff from *Sink, J.*, at Chambers in the town of Hendersonville, N. C., on 29 July, 1936. Affirmed.

This is a controversy without action, which was submitted to the court upon a statement of facts agreed. C. S., 626.

The controversy involves the validity of bonds which the defendants have duly authorized, and, unless enjoined by the court, will issue and sell to raise money, in part, for the payment of the indebtedness of Henderson County, which was incurred for services rendered and expenses incurred in the preparation and submission to the bondholders of Henderson County of a plan for the refunding of the bonded indebtedness of said county.

On the facts agreed, the plaintiff, a resident and taxpayer of Henderson County, contends that the indebtedness incurred by the defendants, as the Board of County Commissioners of Henderson County, for the preparation and submission to bondholders of said county of a plan for the refunding of the bonded indebtedness of said county, is not a valid indebtedness of said county, for the reason that said indebtedness was not incurred for a necessary expense of the county and has not been approved by a majority of the qualified voters of Henderson County; the defendants, on the contrary, contend that said indebtedness was incurred for a necessary expense of Henderson County, and for that reason, although not approved by a majority of the qualified voters of the county, is a valid indebtedness of Henderson County, for the payment of which bonds, duly authorized by the defendants, may be lawfully issued and sold.

The court was of opinion that the indebtedness incurred by the defendants as the Board of County Commissioners of Henderson County, for services rendered and expenses incurred in the preparation and submission to bondholders of the county of a plan for the refunding of the indebtedness of the county, was a necessary expense, and is a valid indebtedness of Henderson County, although said indebtedness has not been approved by a majority of the qualified voters of said county, and accordingly adjudged that bonds which the defendants have duly authorized, when issued and sold by the defendants, will be valid obligations of Henderson County.

The plaintiff excepted to the judgment and appealed to the Supreme Court, assigning error in the judgment.

C. D. Weeks for plaintiff.
Redden & Redden and A. F. Mitchell for defendants.

CONNOR, J. Prior to 1 April, 1936, Henderson County had defaulted in the payment of principal and interest due on its bonded indebtedness. For the purpose of refunding the indebtedness of said county, as author-

ized by statute (N. C. Code of 1935, sec. 1334 [8] [j]), and thereby restoring its credit and relieving its taxpayers of burdensome taxes, the Board of County Commissioners of Henderson County entered into a contract with the North Carolina Municipal Council, Inc., of Raleigh, N. C., by which the said board agreed to pay to said council a sum not to exceed one-half of one per cent of the par value of its outstanding bonds for its services and expenses in the preparation and submission to the bondholders of said county of a plan for the refunding of the bonded indebtedness of Henderson County. The said North Carolina Municipal Council, Inc., has fully performed its contract with the Board of County Commissioners of Henderson County. The said board has duly authorized the issuance of bonds of Henderson County to raise money to pay in cash certain sums now due on its bonded indebtedness, and also to pay for the services rendered and the expenses incurred by the North Carolina Municipal Council, Inc., in the preparation and submission to the bondholders of Henderson County of a plan for the refunding of its bonded indebtedness. This plan, when accepted by the bondholders, will result in a substantial decrease in the interest rate on the bonds of Henderson County heretofore issued and now outstanding, and has been approved by the Local Government Commission of North Carolina.

On the facts agreed in the instant case, we are of opinion that the indebtedness incurred by Henderson County for services rendered and for expenses incurred by the North Carolina Municipal Council, Inc., of Raleigh, N. C., in the preparation and submission to the bondholders of Henderson County of a plan for refunding the bonded indebtedness of said county, is a necessary expense of Henderson County, within the provisions of section 7 of Article VII of the Constitution of North Carolina, and that said indebtedness is a valid indebtedness of Henderson County, although it has not been approved by a majority of the qualified voters of said county. For that reason, the bonds duly authorized by the defendants, as the Board of County Commissioners of Henderson County, when issued and sold as provided by law, will be valid obligations of Henderson County.

In *Henderson v. Wilmington,* 191 N. C., 269, 132 S. E., 25, it is said: "The decisions heretofore rendered by the Court make the test of a necessary expense the purpose for which the expense is to be incurred. If the purpose is the maintenance of the public peace, or the administration of justice; if it partakes of a governmental nature or purports to be an exercise by the city of a portion of the State's delegated sovereignty; if, in brief, it involves a necessary governmental expense—in these cases, the expense required to effect the purpose is necessary within the meaning of Article VII, section 7, and the power to incur such expense is not dependent on the will of the qualified voters."

The Board of County Commissioners of Henderson County, under the provisions of the County Finance Act, has the power to authorize, issue, and sell bonds of said county for the purpose of refunding the valid indebtedness of said county. *Hartsfield v. Craven County,* 194 N. C., 358, 139 S. E., 698. An indebtedness incurred in good faith by the governing body of the county for the reasonable and necessary expense of refunding its indebtedness is a necessary expense, and may be incurred without the approval of a majority of the qualified voters of the county, especially when, as in the instant case, the refunding of said indebtedness will result in decreasing the rate of interest on the bonded indebtedness of the county. The judgment is

Affirmed.

STATE v. CODY FORBES.

(Filed 14 October, 1936.)

1. Seduction A a—

The essential elements of the statutory offense of seduction are (1) seduction, (2) promise of marriage, (3) innocence and virtue of the prosecutrix.

2. Seduction B d—

In order for a conviction of seduction under C. S., 4339, there must be inculpating evidence of each of the essential elements of the crime, in addition to the testimony of prosecutrix, and such "supporting testimony" must necessarily consist of independent facts and circumstances.

3. Same—Testimony of witness that prosecutrix said she and defendant were to be married held not to constitute "supporting testimony."

In this prosecution for seduction, the only evidence in support of the testimony of prosecutrix on the essential element of promise of marriage was the testimony of a witness, admitted solely for the purpose of corroborating prosecutrix, that prosecutrix had told the witness that she and defendant were going to be married, and the further testimony of the witness that she had seen prosecutrix and defendant together over a period of a year and eight months. No other witness testified that prosecutrix and defendant had been seen together. *Held:* The testimony of the witness is not sufficient to constitute proof of the promise of marriage by facts and circumstances independent of the testimony of prosecutrix, and defendant's motion to nonsuit should have been granted.

APPEAL by defendant from *Sink, J.,* at April Term, 1936, of AVERY. Reversed.

Defendant was convicted of seduction under promise of marriage, and from judgment pronounced he appealed.

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

J. V. Bowers for defendant.

DEVIN, J. The criminal offense of which this defendant was convicted is statutory. Its essential elements appear in the language of the statute, C. S., 4339, and have been frequently stated in the decisions of this Court to be: (1) Seduction, (2) promise of marriage, (3) innocence and virtue of the prosecutrix. In addition, the statute contains the further proviso that the "unsupported testimony of the woman shall not be sufficient to convict."

So, that in order to sustain a conviction under this statute, to each of the constituent elements of the offense there must be "supporting testimony" in addition to that of the prosecutrix, and this supporting testimony must necessarily consist of independent facts and circumstances. *S. v. Patrick,* 204 N. C., 299.

The defendant in the case at bar bases his motion for nonsuit upon the failure of the State to offer "supporting testimony" of the promise of marriage.

The only evidence in addition to that of the prosecutrix was that of a girl friend, who testified that the prosecutrix told her, "Me and Cody is going to get married." This witness further testified: "I couldn't say how often I saw them together. He was down pretty often. He came down over a period of approximately a year and eight months. I would see them together sometimes in town, sometimes they would be going to the show or to ride, the usual places where young people congregate." There was no testimony from any other witness that they had been seen together.

The testimony of the witness as to what the prosecutrix told her was competent only in corroboration of the prosecutrix as a witness, and was so restricted by the court. It was not supporting testimony within the meaning of the statute, as it emanated from the prosecutrix herself. *S. v. Moody,* 172 N. C., 967.

The evidence of the witness, as set out in the record and quoted above, falls short of proof of such independent facts and circumstances as would constitute supporting testimony. *S. v. McDade,* 208 N. C., 197; *S. v. Tuttle,* 207 N. C., 649; *S. v. Patrick, supra; S. v. Fulcher,* 176 N. C., 724.

For the reasons stated, we think the learned judge who presided over the trial of the case below should have sustained the motion for judgment of nonsuit.

Reversed.

MRS. DELLA EDNEY v. MOTOR SERVICE AND SALES, INC.

(Filed 14 October, 1936.)

Cancellation of Instruments A c—Failure to read instrument because plaintiff did not have her glasses held not to bar action for cancellation.

Evidence that plaintiff owed nothing on her car, but was induced to sign a conditional sales contract thereon securing a debt owed the dealer by plaintiff's son, for which plaintiff was not liable, by false representations by the dealer's agents that the writing was an application for insurance on the car, and that plaintiff could not read the writing at the time because she did not have her glasses, *is held* sufficient to be submitted to the jury in plaintiff's action for the cancellation of the writing for fraud.

APPEAL by the defendant from *Pless, J.*, at January Term, 1936, of HENDERSON. No error.

This is an action for the cancellation of a paper writing, in form a conditional sales contract, signed by the plaintiff, on the allegation that the signature of the plaintiff on said paper writing was procured by the false and fraudulent representation of the defendant that said paper writing was an application for a policy of insurance on an automobile which the defendant had sold and delivered to the plaintiff. The allegation was denied in the answer.

The issue submitted to the jury was answered as follows:

"Was the paper writing designated as plaintiff's Exhibit B procured by the fraud of the defendant as alleged in the complaint? Answer: 'Yes.'"

From judgment that the paper writing described in the complaint be canceled and surrendered by the defendant to the plaintiff, the defendant appealed to the Supreme Court, assigning errors in the trial.

Redden & Redden for plaintiff.
R. L. Whitmire for defendant.

PER CURIAM. The evidence offered by the plaintiff at the trial of this action was sufficient to support the allegations of the complaint, which are sufficient to constitute a cause of action on which the plaintiff is entitled to the relief prayed for in her complaint. The motion of the defendant for judgment as of nonsuit was properly denied by the trial court. Its demurrer in this Court cannot be sustained.

The evidence for the plaintiff tended to show that the paper writing signed by her is a conditional sales contract, and in legal effect is a

chattel mortgage; that the plaintiff was induced to sign said paper writing by the false and fraudulent representation of defendant's agents and employees that said paper writing was an application by the plaintiff for a policy of insurance on an automobile which the defendant had sold and delivered to the plaintiff; and that plaintiff, although able ordinarily to read, could not read the said paper writing, before she signed it, because she did not have her glasses with her. The debt secured by the mortgage was not the purchase price of the automobile or any part thereof. Plaintiff had paid the full purchase price at the time the automobile was delivered to her. The mortgage secured a debt of plaintiff's son to the defendant, for which plaintiff was not liable. Immediately upon her discovery that the paper writing which she had signed was a mortgage to the defendant on her automobile, the plaintiff demanded that same be canceled and returned to her by the defendant. This demand was refused by the defendant.

The evidence for the plaintiff was sharply contradicted by the evidence for the defendant. The good character of its agents and employees was shown by evidence for the defendant.

All the evidence was submitted to the jury under a charge by the court, in which we find no error. See *Parker v. Thomas*, 192 N. C., 798, 136 S. E., 118. *Cromwell v. Logan*, 196 N. C., 588, 146 S. E., 233, is readily distinguishable from the instant case.

The judgment is affirmed.

No error.

B. G. CARR AND WIFE, BESSIE SNIPES CARR; C. A. CARR AND WIFE, IRENE GOODSON CARR; HESSIE CARR KEITH AND HUSBAND, RAY KEITH, v. ROY JIMMERSON (SINGLE); HAZEL McATEE (ADULT), AND MILDRED GARDIN, A MINOR, AND ROY W. DAVIS, GUARDIAN AD LITEM OF MILDRED GARDIN.

(Filed 14 October, 1936.)

1. Actions B g—

An action to establish the rights of the parties under an ambiguous deed *is held* to come within provisions of the Declaratory Judgment Act. N. C. Code, 628 (b).

2. Deeds C a—

In construing a deed, the language and the entire setting must be considered to ascertain the intention of the grantors, and, if possible, effect must be given to every word, and all its provisions harmonized.

3. Deeds C c—Deed held not to exclude grantor from inheriting as one of the heirs of the grantee.

Grantee's child by his first wife deeded to him lands inherited from her mother. The granting clause read to the grantee "and his heirs

except as to" the grantor, and *habendum*, to the grantee "and his heirs except as to" the grantor. *Held:* The grantee took a fee simple, and the language is too vague and uncertain to exclude the grantor, or those representing her, from inheriting as one of the heirs of the grantor upon his death without disposing of the lands.

APPEAL by plaintiffs, petitioners, from *Sink, J.*, at July Term, 1936, of MCDOWELL. Affirmed.

This is an action instituted under the Uniform Declaratory Judgment Act of North Carolina, seeking proper interpretation, meaning, and effect of clause in the deed in question. This appeal involves the sole question of interpreting and construing the following portions of the deed:

(1) In the granting clause: "To said Edward Carr, Sr., and his heirs except as to M. B. Jimmerson," and

(2) In the *habendum:* "To the said Edward Carr, Sr., his heirs, except as to M. B. Jimmerson and assigns, to their only use and behoof forever."

Edward Carr married twice and had two sets of children. His first wife died seized of the lands in question and left two children, M. B. Jimmerson and E. J. Carr. By his second wife he had four children, one of whom died without children. Edward Carr purchased the land of which his first wife died seized from their two children. In the deed from his daughter, M. B. Jimmerson, appears the provision involved in this appeal as above stated.

The declaratory judgment is as follows: "This cause coming on for hearing at the July Term, 1936, of the Superior Court of McDowell County, N. C., before his Honor, H. Hoyle Sink, Judge presiding, and being heard, and it appearing to the court that this is a petition for declaratory judgment under the Uniform Declaratory Judgment Act of North Carolina, for the construction of a deed from M. B. Jimmerson and husband, M. Austin Jimmerson, to Edward Carr, Sr., dated the 13th day of October, 1898, and recorded in Book 26, at page 583 of the deed records of McDowell County, N. C., all as is set forth in the petition, and the court finding as facts from the record that all persons having or claiming to have any interest, which will be affected by the declaration, have been made parties to this proceeding; that the defendants Roy Jimmerson, Hazel McAtee, and Mildred Gardin, minor, have been served with summons by publication; that Roy W. Davis has been appointed guardian *ad litem* of Mildred Gardin, minor defendant, and summons has been served upon him and he has answered and the said minor and codefendants are properly in court; that the facts are as stated in the petition and are admitted by the guardian *ad litem* and that the defendants Roy Jimmerson and Hazel McAtee have not

answered and the time for answering has expired; that no issues of fact are raised. And after hearing argument of counsel, the court is of the opinion that this is a proper case for a declaratory judgment, and the court being of opinion that the language used in granting the *habendum* clause in the deed from M. B. Jimmerson and husband to Edward Carr, Sr., specifically described in paragraph 8 of the petition, does not manifest a clear meaning and intention to exclude the said M. B. Jimmerson and her heirs at law from the heirs of said Edward Carr, Sr., in so far as the land being conveyed was concerned, and that the title conveyed thereby to Edward Carr, Sr., was a fee simple title, and that upon his death the title acquired by him under said deed passed to and vested in his heirs at law without exception, and that the heirs at law of M. B. Jimmerson inherited the part which their ancestor, M. B. Jimmerson, would have inherited had she survived the said Edward Carr, Sr.: It is therefore considered, ordered, adjudged, and decreed that by proper construction of the language of the said deed from M. B. Jimmerson and husband to Edward Carr, Sr., hereinbefore described, the said Edward Carr, Sr., became vested in fee simple of the title conveyed thereby and that upon his death the title to such of the lands conveyed thereby, as had not been conveyed by him, descended to the heirs at law of Edward Carr under the rules of the statutes of descent without exception. It is further ordered that petitioners shall pay the cost of this action, including an allowance of $10.00 to Roy W. Davis, as guardian *ad litem.*

H. HOYLE SINK, Judge presiding."

The plaintiffs, petitioners, excepted to the judgment as signed, assigned error, and appealed to the Supreme Court.

Winborne & Proctor for plaintiffs, appellants.
No counsel for defendants.

PER CURIAM. The Uniform Declaratory Judgment Act (N. C. Code, 1935 [Michie], sec. 628[2]), is as follows: "Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree."

Section 628 (b) is as follows: "Any person interested under a deed, will, written contract, or other writings constituting a contract, or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise, may have determined any question of

construction or validity arising under the instrument, statute, ordinance, contract, or franchise, and obtain a declaration of rights, status, or other legal relations thereunder. A contract may be construed either before or after there has been a breach thereof." *Allison v. Sharp,* 209 N. C., 477.

This action or proceeding is maintainable under the Uniform Declaratory Judgment Act, as above set forth.

It is well settled that the language used in the entire instrument and setting must be considered to ascertain the intention of the makers. If possible, some effect must be given to every word of a deed and all of its provisions harmonized.

The court below held that the language used: "Does not manifest a clear meaning and intention to exclude the said M. B. Jimmerson and her heirs at law from the heirs of said Edward Carr, Sr., in so far as the land being conveyed was concerned and that the title conveyed thereby to Edward Carr, Sr., was a fee simple title." We think this construction of the deed correct. The meaning of the language in the deed in controversy, in the granting clause: "Except as to M. B. Jimmerson" and "except as to M. B. Jimmerson and assigns," in the *habendum* clause, is vague, uncertain, and ambiguous, and we cannot give it the construction contended for by plaintiffs, petitioners.

The judgment of the court below is

Affirmed.

H. M. HINSHAW AND S. G. CRATER, ADMINISTRATORS OF GEORGE HINSHAW, DECEASED, v. NANNIE PEPPER.

(Filed 14 October, 1936.)

1. Automobiles C j—Plaintiff's evidence held to show contributory negligence on part of plaintiff's intestate as a matter of law.

Plaintiff's evidence tended to show that defendant drove her car into the side of the car driven by plaintiff's intestate as defendant was entering a State Highway from an intersecting county highway, that defendant had stopped her car to allow several cars to pass, but drove into the intersection in front of intestate's car, that intestate's car was being driven by him on the State Highway at a speed of 40 to 45 miles per hour, that he could have seen defendant entering the intersection at a distance of 141 steps, but that he did not slacken his speed, but blew his horn and continued toward the intersection. *Held:* Plaintiff's evidence shows contributory negligence of his intestate as a matter of law in driving at an unlawful speed at the intersection, under the statutes in force at the time of the accident, and that intestate took a chance and lost, and defendant's motion to nonsuit was properly granted.

2. Automobiles C b—

Under C. S., 2616, 2618, it is negligence *per se* to drive a car at a speed in excess of 15 miles per hour in traversing an intersecting highway when the driver's view is obstructed one hundred feet therefrom, and the amendment, ch. 3, Public Laws of 1935, reducing the distance from one hundred feet to fifty feet has no retroactive effect.

3. Negligence D c—

Where plaintiff's own evidence establishes contributory negligence as a matter of law, defendant may take advantage of same by motion to nonsuit.

APPEAL by plaintiffs from *Phillips, J.*, at December Term, 1935, of YADKIN. Affirmed.

This is an action for actionable negligence, brought by the plaintiffs, administrators of George Hinshaw, deceased, against defendant for killing their intestate. The defendant set up the plea of contributory negligence. At the close of plaintiffs' evidence in the court below, the defendant made a motion for judgment as in case of nonsuit. C. S., 567. The court below sustained the motion. The plaintiffs excepted, assigned error, and appealed to the Supreme Court.

David L. Kelly and Grant & Grant for plaintiffs.
Hutchins & Parker for defendant.

PER CURIAM. We think the court below properly sustained the motion by the defendant for judgment of nonsuit.

The plaintiffs' evidence tended to show that the collision occurred on Highway No. 60, between Winston-Salem and Yadkinville about three miles west of Winston-Salem. Polo Road is a county road running practically north and south, and State Highway No. 60 is a concrete road running practically east and west at the point where the two roads intersect. On 20 November, 1934, plaintiffs' intestate was driving a Chevrolet coupe along Highway No. 60 in a westerly direction, and his car was struck by the automobile driven by the defendant while entering said intersection from the north side of said Highway No. 60. Defendant, at the time, was driving her car along Polo Road in a southerly direction. That defendant brought her car to a stop on the north side of said intersection, about two or three feet from the edge of the concrete pavement, which was eighteen feet wide, the shoulders six feet on either side, on Highway No. 60, and waited for about six automobiles to pass; that at said point Highway No. 60 was straight and there was nothing to obstruct her view, from where her car was standing (two or three feet from the edge of the concrete on Highway No. 60), of the car driven by plaintiffs' intestate in a westerly direction, for a distance of 141

steps; that said intestate was sounding his horn, signifying his approach to said intersection, defendant's car struck the car of said intestate on the right side where the fender joins the running board, and at that time the car of intestate was near the center of the road; that said intestate was driving about 40 or 45 miles per hour; that there was another car going in an easterly direction along Highway No. 60, meeting intestate's car, and about the same distance from the intersection, as intestate's car, just before the collision. Plaintiffs' intestate's car turned on two wheels, showed skid marks for 60 to 70 feet, hit a telephone post and ditch bank, and came to a stop about sixty or seventy feet from the point of impact, almost completely demolished, and plaintiffs' intestate was thrown out and killed. Plaintiffs' intestate could have seen the defendant for 141 steps before he reached the intersection.

Conceding, but not deciding, that defendant was guilty of negligence, on all the evidence we think plaintiffs' intestate was guilty of contributory negligence.

Section 2621 (46)—"Speed Restrictions: (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) Where no special hazard exists the following speeds shall be lawful, but any speed in excess of said limits shall be *prima facie* evidence that the speed is not reasonable or prudent and that it is unlawful: 1. Twenty miles per hour in any business district; 2. Twenty-five miles per hour in any residence district; 3. Thirty-five miles per hour for motor vehicles designed, equipped for, or engaged in transporting property; and thirty miles per hour for such motor vehicle to which a trailer is attached; 4. Forty-five miles per hour under other conditions. (c) The fact that the speed of a vehicle is lower than the foregoing *prima facie* limits shall not relieve the driver from the duty to decrease speed when approaching and crossing an intersection, when approaching and going around a curve, when approaching a hill crest, when traveling upon any narrow or winding roadway, or when special hazard exists with respect to 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 or on entering the highway in compliance with legal requirements, and the duty of all persons to use due care," etc. Laws 1935, ch. 3, sec. 2.

Under sections 2616 and 2618, it is negligence *per se* for one to drive his automobile more than fifteen miles per hour in traversing an intersection of highways when the driver's view is obstructed for one hundred feet therefrom, and damages may be recovered for its violation when the proximate cause of the injury. The amendment by this section, reducing the distance from 100 feet to 50 feet, has no retroactive effect. *Goss v.*

Williams, 196 N. C., 213. The present case was prior to the 1935 amendment above set forth.

The plaintiffs' intestate, running 40 to 45 miles per hour, saw, or by the use of due care, could have seen defendant's car entering the Highway No. 60, for 141 steps, but did not slow down, as required by the statute then in force, but at a high rate of speed continued his course and the side of his car, when passing the intersection, was struck by defendant's car. He blew his horn, but continued his speed without slowing down. He took chances and lost his life. We think on all the evidence he was guilty of contributory negligence and no recovery can be had.

Defendant may, on motion to nonsuit, take advantage of contributory negligence established by plaintiffs' evidence. Motion for nonsuit allowed where plaintiffs' evidence establishes contributory negligence. *Davis v. Piedmont & N. Ry. Co.,* 187 N. C., 147; *Boswell v. Whitehead Hosiery Mills,* 191 N. C., 549; *Elder v. Plaza Ry. Co.,* 194 N. C., 617; *Davis v. Jeffreys,* 197 N. C., 712.

We see no evidence as to the doctrine of last clear chance.

The judgment of the court below is

Affirmed.

C. R. CASTLEBERRY v. M. I. SASSER, ADMINISTRATOR OF W. A. SASSER, AND M. I. SASSER, INDIVIDUALLY.

(Filed 14 October, 1936.)

Bills and Notes H a—Endorser may not complain that nonsuit was taken as to maker, since holder may sue any or all persons severally liable.

Since the holder of a note may sue any or all persons severally liable thereon, C. S., 458, an endorser may not attack for fraud a judgment entered against him on the note in a suit maintained by the maker in his capacity of administrator of the holder, in which suit he takes a nonsuit against himself as maker of the note.

APPEAL by the plaintiff from judgment as of nonsuit entered at the close of the evidence by *Sinclair, J.,* at April Term, 1936, of JOHNSTON. Affirmed.

Parker & Lee for plaintiff, appellant.
Winfield H. Lyon for defendant, appellee.

PER CURIAM. This is an action to vacate a judgment entered at the March Term, 1930, of Johnston Superior Court, in favor of M. I. Sasser, administrator of W. A. Sasser, deceased, against the plaintiff and

one Allen Watson, upon the ground that such judgment was fraudulently obtained; the allegation of fraud being "that said judgment was procured against this plaintiff by the fraudulent collusion of the defendant M. I. Sasser, as administrator, with the defendant M. I. Sasser, individually, and the principal debtor, and that on account of said fraudulent collusion said judgment was void." The facts shown by the plaintiff's evidence and relied upon by him to establish fraud are as follows: On 12 December, 1925, M. I. Sasser and Allen Watson executed a joint promissory note for $150.00 payable to C. R. Castleberry in 330 days. C. R. Castleberry, payee, endorsed, without qualification, the said note to the Clayton Banking Company. The note was not paid upon maturity and was subsequently endorsed, without recourse, to W. A. Sasser by the Clayton Banking Company. W. A. Sasser brought suit against M. I. Sasser and Allen Watson as makers of the note and C. R. Castleberry as an endorser thereof. Pending the trial of this action, W. A. Sasser, original plaintiff, died, and his father, M. I. Sasser, qualified as his administrator and was made party plaintiff. When the case came on for trial, M. I. Sasser, administrator of W. A. Sasser, as plaintiff, took a voluntary nonsuit as to M. I. Sasser, and took judgment against the remaining defendants, Allen Watson and C. R. Castleberry (the plaintiff in the instant case).

The plaintiff contends that the elimination of M. I. Sasser as a party defendant, who, as a maker of the note sued on, was primarily liable thereon, and the taking of the judgment against him, the plaintiff, who, as an endorser of said note, was only secondarily liable thereon, was a fraud upon him, and for that reason the judgment should be declared void and vacated.

We cannot agree with this contention. W. A. Sasser, as the original plaintiff, was authorized to include all or any of those severally liable on the note as defendants. C. S., 458. *Bank v. Carr,* 121 N. C., 113; *Bank v. Carr,* 130 N. C., 479. When M. I. Sasser, as administrator of W. A. Sasser, was made substitute plaintiff he was vested with all rights and powers of the original plaintiff, among which was the right to pursue the case against all or any of the defendants. He elected not to pursue it as against M. I. Sasser. In so doing he perpetrated no fraud upon the plaintiff.

We do not pass upon the novel question as to whether there can be a "fraudulent collusion" between a person acting in one capacity with himself acting in another capacity.

The judgment as of nonsuit is

Affirmed.

O. H. ORR, TRUSTEE, v. EARL TWIGGS AND DANIEL L. ENGLISH, ADMINISTRATORS OF T. A. ENGLISH.

(Filed 14 October, 1936.)

Evidence F c—

Evidence that written contract had been lost and could not be found after due diligence *held* sufficient to establish foundation for admission of parol evidence of contents of agreement.

APPEAL by the defendants from *Pless, J.*, at April Term, 1936, of TRANSYLVANIA. No error.

Action to recover on check for $300.00 drawn by T. A. English on the Pisgah Bank.

Ralph H. Ramsey, Jr., for plaintiff, appellee.
Redden & Redden for defendants, appellants.

PER CURIAM. This action was instituted by the plaintiff as trustee under authority of C. S., 449. The assignments of error raise the question as to whether the plaintiff has established by competent evidence the existence of an express trust authorizing him to institute this action. The plaintiff's evidence tended to show that when the Pisgah Bank went out of business that there was a written contract entered into between the former directors of the Pisgah Bank and the Brevard Banking Company wherein the said directors guaranteed certain assets turned over to the banking company, and wherein it was agreed that the plaintiff O. H. Orr, as trustee for the said directors, guarantors, should have authority, *inter alia,* to institute suit to collect any obligations included among said assets. After offering evidence tending to show that the check sued on was actually included among such assets, and that this written contract had been lost and could not be found, the plaintiff offered further parol evidence tending to show the provisions of such contract. To the parol evidence offered to establish the provisions of the written contract the defendants in apt time objected, and the refusal of the court to sustain such objections is made the basis of defendants' principle assignments of error. The defendants argue that a sufficient foundation was not laid for the introduction of the parol evidence as to the terms of the written contract, in that (1) it was not shown that the document was lost, and (2) it was not shown that due diligence had been exercised to find the lost document.

The plaintiff Orr, before testifying as to the provisions of the contract, testified: "A lengthy contract was entered into with the directors

of the bank. The contract was delivered to Mr. T. H. Shipman of the Brevard Banking Company. I do not know where it is now. I have made an effort to locate it and asked Mr. Shipman for it. When I asked for it they looked in the filing cases and said they could not find it, and I could not get the contract for that reason." T. H. Shipman, president of the Brevard Banking Company, a witness for the plaintiff, testified: "I remember that there was a written agreement about the transfer of certain items to the bank, and that this agreement was delivered to me. I did not find that agreement. I made an effort to find it. I do not know where it is now. That agreement was made between the two banks, the Pisgah Bank and the Brevard Banking Company, the directors of both banks. Yes, that contract was delivered to me. I think it was in duplicate. . . . The contract was read to the directors. I saw it after it was signed in my office. It should have been in the files of the bank. I looked in every place where it should have been. . . . I think we put it in the safety deposit box. I looked in that safety deposit box." We think, and so hold, that this evidence was sufficient to establish both the loss of the instrument and due search therefor, and that it laid a sufficient foundation for the introduction of secondary or parol evidence as to the contents of the lost instrument.

The assignments of error based upon refusal to grant motion for judgment as of nonsuit and upon the charge are practically all made upon the theory that the evidence as to the provisions of the written contract, particularly as to the provision authorizing the plaintiff as trustee to institute actions to collect the obligations to the former Pisgah Bank which were included in the assets turned over to the Brevard Banking Company, were incompetent, and since we hold that such evidence was competent the assignments of error cannot be sustained.

Upon the record we find

No error.

THE CATHOLIC SOCIETY OF RELIGIOUS AND LITERARY EDUCATION v. A. C. GENTRY, TREASURER OF THE TOWN OF HOT SPRINGS AND THE TOWN OF HOT SPRINGS.

(Filed 14 October, 1936.)

Taxation B d—

Property of a foreign religious corporation used for educational and charitable purposes in this State *held* not exempt from taxation under C. S., 7971 (17) (19).

APPEAL by plaintiff from *McElroy, J.*, at May Term, 1936, of MADISON. Affirmed.

This is an action to recover a sum of money which was paid by the plaintiff to the defendants on 20 October, 1931, as taxes for the years 1928, 1929, 1930, and 1931, on property, real and personal, which was owned by the plaintiff during each of said years, and is situate within the corporate limits of the town of Hot Springs, Madison County, North Carolina.

The action was begun in the Superior Court of Madison County.

The defendants demurred to the complaint on the ground (1) that the court had no jurisdiction of the subject matter of the action, and (2) that the facts stated in the complaint are not sufficient to constitute a cause of action. The demurrer was overruled as to the first ground, and sustained as to the second ground.

From judgment dismissing the action, the plaintiff appealed to the Supreme Court, assigning as error the ruling of the trial court sustaining the demurrer on the second ground.

Carter & Carter for plaintiff.
James E. Rector for defendants.

PER CURIAM. This appeal involves only the ruling of the trial court sustaining the demurrer of the defendants to the complaint on the ground that the facts stated therein are not sufficient to constitute a cause of action. The ruling that the court had jurisdiction of the subject matter of the action is not presented for review on this appeal. The ruling, however, was manifestly correct. The action is authorized by statute, C. S., 7971. It is alleged in the complaint that all the statutory requirements had been complied with by the plaintiff before the commencement of the action. This is admitted by the demurrer.

It is alleged in the complaint that the plaintiff is a corporation, organized under the laws of the State of Louisiana. It is therefore a foreign corporation, and for that reason its property, real and personal, situate in this State, although held and used exclusively for religious, educational, or charitable purposes, is not exempt from taxation under the provisions of C. S., 7971 (17), and C. S., 7971 (19). See C. S., 7971 (87). Each of these statutory provisions was in force and effect during the years 1928, 1929, 1930, and 1931.

The judgment is
Affirmed.

FRANK W. BROOKSHIRE v. GURNEY P. HOOD, COMMISSIONER OF BANKS, EX REL. CENTRAL BANK & TRUST COMPANY OF ASHEVILLE, N. C.

(Filed 14 October, 1936.)

1. **Banks and Banking H e—**

Property bequeathed to a bank to be held by it in trust and used by it in the education of testatrix' grandson, and balance remaining to be paid him upon his majority, *is held* to entitle the grandson to a preference in the bank's assets upon its insolvency upon his majority, no part of the fund having been used for his education.

2. **Same—Claim of nonresident filed six years after receivership held not barred in absence of actual or constructive notice of receivership.**

The preferred claim of a nonresident against an insolvent bank is not barred because not filed until three and a half years after his majority and six years after its receivership, when the nonresident had no notice, actual or constructive, of the bank's receivership until the time of filing claim, and an action thereon begun before the expiration of ninety days from the rejection of the claim can be maintained.

APPEAL by defendant from *Phillips, J.*, at Chambers in the city of Asheville, N. C., on 16 September, 1936. Affirmed.

This is an action to have plaintiff's claim against the Central Bank and Trust Company, of Asheville, N. C., an insolvent banking corporation now in the hands of the defendant for liquidation, adjudged a preferential claim, and entitled to payment as such by the defendant out of assets in his hands belonging to the estate of said insolvent banking corporation.

On the facts admitted by the parties and found by the judge by consent, it was ordered and adjudged by the court that plaintiff's claim against the Central Bank and Trust Company, of Asheville, N. C., for the sum of $1,538.89, is a preferential claim, and that plaintiff is entitled to have his claim for said sum paid by the defendant as such. The defendant appealed to the Supreme Court, assigning as errors the conclusions of law made by the judge on the facts found by him.

William J. Cocke, Jr., for plaintiff.
Johnson, Rollins & Uzzell for defendant.

PER CURIAM. On 13 June, 1921, the Central Bank and Trust Company, of Asheville, N. C., received from the executor of Mrs. Julia E. Brookshire, deceased, the sum of $1,120.00, which was paid by the said executor to the said bank and trust company, pursuant to the provisions of Item 2 of the last will and testament of the said Mrs. Julia E. Brookshire, which are as follows:

"ITEM 2. I give, devise, and bequeath to the Central Bank and Trust Company, of Asheville, North Carolina, one thousand dollars out of my estate, to be held by said bank and trust company as trustee, and to be used by it in the education of my grandson, Frank William Brookshire, son of my son, Emmett B. Brookshire. If there is any part of said sum not consumed in the education of said Frank W. Brookshire, then the said Central Bank and Trust Company, trustee, shall pay over the same to the said Frank William Brookshire when he attains the age of 21 years."

No part of said sum was expended by the Central Bank and Trust Company, trustee, for the education of the plaintiff. He attained the age of 21 years on 12 December, 1932. In recognition of its insolvency at said date, the Central Bank and Trust Company, on 30 November, 1930, surrendered all its assets to the defendant for liquidation, as provided by law. The plaintiff, who is a resident of the State of Utah, had no notice, actual or constructive, of the insolvency of the Central Bank and Trust Company until on or about 1 July, 1936, when he filed his claim for the amount due him by said bank and trust company with the defendant.

The claim was rejected by the defendant on 6 July, 1936. This action was begun before the expiration of ninety days from the date of such rejection. The amount of the claim is now $1,538.89.

On these facts, there was no error in the conclusions of law on which the judgment was rendered. The judgment is affirmed on the authority of *Andrews v. Hood, Comr.,* 207 N. C., 499, 177 S. E., 636.

Affirmed.

STATE OF NORTH CAROLINA, EX REL., BRANCH BANKING & TRUST COMPANY, GUARDIAN OF LAWRENCE W. SMITH, LUNATIC, v. LENA L. SMITH, ADMX. OF ESTATE OF CLARENCE J. SMITH, DECEASED, THE FIDELITY & CASUALTY COMPANY OF NEW YORK, J. W. HODGES, AND MASSACHUSETTS BONDING & INSURANCE COMPANY.

(Filed 14 October, 1936.)

Process B d—Defects in summons and complaint served on Insurance Commissioner under the statute held cured by order nunc pro tunc.

In an action against a nonresident insurance company in which process is served on the Insurance Commissioner under the statute, defects in the copy of summons in failing to show the clerk's signature and seal of the court, and in complaint and bond in failing to be signed by the attorney, may be cured by an order of the clerk remedying the defects *nunc pro tunc* when it appears that the original papers were not defective.

APPEAL by Massachusetts Bonding and Insurance Company from *Sinclair, J.*, at February Term, 1936, of HARNETT.

Action against individual defendant, administratrix of the deceased guardian of an incompetent, and the corporate defendants, sureties on the guardian's bond.

Summons was duly issued out of the Superior Court of Harnett County by the clerk thereof, under seal, 29 November, 1935, and service upon the corporate defendants attempted by delivering copies of the summons and complaint to the Insurance Commissioner of North Carolina in the county of Wake, pursuant to the statute. Prosecution bond was duly executed and filed at the time of issuance of summons, and the complaint was signed by counsel and duly verified.

Upon the copies delivered by the sheriff of Wake County to the Insurance Commissioner, however, did not appear the name of the clerk, nor the impression seal, nor the name of plaintiff's attorney. In all other respects the papers so delivered to the Insurance Commissioner were true copies of the summons and complaint.

In apt time the defendant Massachusetts Bonding and Insurance Company entered special appearance before the clerk and moved to strike out the entry of service and to dismiss the action on the ground that no summons had been issued, and that there had been no service of summons on the movant. And the plaintiff caused notice to be served on said defendant of plaintiff's motion that the clerk hear and consider the motion to dismiss and that he make appropriate orders with respect thereto. Upon the hearing of said motions before the clerk, he made an order that the name of the clerk, the official seal, and the name of plaintiff's attorney be affixed *nunc pro tunc* to the copies of summons and complaint delivered to the Insurance Commissioner for the moving defendant.

The clerk further found the facts and adjudged that the failure to place the name of the clerk and seal on the copy of the summons and the name of the attorney on the copy of the complaint was harmless and immaterial omission; that all information necessary was furnished the defendant, and that it was in no way prejudiced thereby, and thereupon denied the motion to dismiss the action or to strike out the entry of service.

Upon appeal to the judge, the ruling of the clerk was affirmed, and defendant appealed to this Court.

John G. Dawson and Neill McK. Salmon for plaintiff, appellee.
J. F. Flowers for defendant, appellant.

PER CURIAM. It is apparent that the summons was properly issued, under seal, and prosecution bond and verified complaint duly filed. While the copies delivered to the Insurance Commissioner for the defendant did not show the name of the clerk, the seal of the court, nor the name of plaintiff's attorney, these omissions were supplied by proper order *nunc pro tunc,* and thus any defect in the service was cured. *McLeod v. Pearson,* 208 N. C., 539; *Casualty Co. v. Green,* 200 N. C., 535; *Calmes v. Lambert,* 153 N. C., 248; *Henderson v. Graham,* 84 N. C., 496.

The findings and order of the clerk, affirmed by the judge on appeal, sustain the judgment.

Affirmed.

STATE v. BERT LANCASTER.

(Filed 14 October, 1936.)

Indictment C c—Absence of endorsement on bill of indictment that witnesses for State had testified held insufficient ground for quashal.

The absence of an endorsement on the bill of indictment by the foreman of the grand jury that any witnesses for the State had been sworn and had testified before the grand jury is insufficient to overcome the presumption of validity arising from its being returned a "true bill," and is insufficient ground for quashal, the provisions of C. S., 2336, being directory and not mandatory.

APPEAL by defendant from *Williams, J.,* at April Term, 1936, of WAYNE. No error.

This is a criminal action in which the defendant was tried on four indictments, which were consolidated by order of the trial court for purposes of trial. C. S., 4622.

The defendant was convicted of the crime charged in each indictment, and appealed from the judgments on three of said convictions to the Supreme Court, assigning errors on the trial.

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

J. Faison Thomson for defendant.

PER CURIAM. The defendant's motions that each of the indictments be quashed, and that judgment on each of the convictions be arrested, on the ground that the indictments were fatally defective, for that it did not appear by an endorsement of the foreman of the grand jury that any person whose name appeared on the back of the bill of indictment

as a witness for the State, had been sworn and had testified before the grand jury, were properly denied.

The absence of such endorsement was not sufficient to overcome the presumption of the validity of the indictment arising from its return by the grand jury as a "true bill." *S. v. Lanier,* 90 N. C., 714. No evidence was offered by the defendant in support of his motion. *S. v. Sultan,* 142 N. C., 569, 54 S. E., 841. The provisions of C. S., 2336, with respect to the duty of the foreman of the grand jury, are directory, and not mandatory. *S. v. Avant,* 202 N. C., 680, 163 S. E., 806.

Defendant's assignments of error based upon exceptions to the charge of the court to the jury cannot be sustained. There was no error in the charge. See *S. v. Lancaster,* 208 N. C., 349, 180 S. E., 577. The judgments are affirmed.

No error.

MYRTLE H. WILSON v. INTER-OCEAN CASUALTY COMPANY.

(Filed 4 November, 1936.)

1. Evidence B a—

The burden of proof is on the party asserting the affirmative, whether plaintiff or defendant, to support the issue by the preponderance of the evidence or by its greater weight, and the burden of proof constitutes a substantial right.

2. Trial E c—

The failure of the court to define "the greater weight of the evidence," in its instruction correctly placing the burden of proof, will not be held for error in the absence of a special request for instructions, the definition being a subordinate feature of the charge.

3. Trial E f—

An asserted error in the statement of the contentions of a party must be brought to the attention of the trial court at the time in order for an exception thereto to be considered on appeal.

4. Evidence N b—Instruction on relative weight to be given positive and negative testimony held without error.

The charge of the court that the opportunities of witnesses (who had testified that they did not smell whiskey on the breath of the person in question) might be so frequent and favorable as to approach in weight to a positive statement; yet when the positive testimony would not conflict with the negative under any ordinary circumstances, the witnesses being equally credible, the former should preponderate, *is held* without error, it being the duty of the jury to reconcile the evidence if possible.

5. Insurance R a—Instruction defining "intoxicated" as used in accident policy held without error on insurer's appeal.

Insured was killed in an accident while riding as a passenger in an automobile. Insurer admitted issuance of the policy and that it was in

force at the time, but denied liability under the proviso in the policy that no liability should attach if injury should proximately result from insured's intoxication at the time, and assumed the burden of proof on its affirmative defense. The trial court instructed the jury that "intoxicated" and "drunk" were synonymous terms, and that the issue should be answered in favor of insurer if insured had drunk intoxicants to such extent as to appreciably affect and impair to any extent his mental or bodily faculties, or both. *Held:* The instruction is favorable to insurer, and will not be held for error on insurer's appeal.

6. Appeal and Error J e—

A new trial will not be awarded for error which is not material or prejudicial.

APPEAL by defendant from *Frizzelle, J.*, and a jury, at March Term, 1936, of PITT. No error.

This is an action brought by plaintiff against defendant to recover $2,500 on an accident insurance policy, A-8-1, 383469, in defendant's company, executed 15 December, 1933, on the life of her husband, R. C. Wilson, provided he came to his death from the effects of bodily injury caused directly by external, violent, and accidental means, and the death resulted from such injury within 30 days from the date of the injury. Plaintiff was the beneficiary under the policy. The premium had been paid.

R. C. Wilson was fatally injured in an automobile accident near Graingers Station, in Lenoir County, N. C., on 12 December, 1934, at 11:05 p.m., while riding as a passenger in an automobile, and died the next day from the injury sustained. The policy was in full force and effect, and the defendant was notified pursuant to the terms of the policy.

The defendant denied the material allegations of the complaint, and for a further answer set up the following defense: "That the defendant is informed, advised, and believes, and upon such information, advice, and belief alleges that at the time the said R. C. Wilson sustained the injury complained of, the said R. C. Wilson was intoxicated, or under the influence of or affected by alcoholic liquors and intoxicants, and that said injuries resulted directly or indirectly from intoxicants or narcotics, and while the said R. C. Wilson was violating the laws of the State of North Carolina, and such violation and intoxication was the direct cause of said injuries, and the defendant specifically pleads the general provisions, conditions, and limitations of its said policy in bar of any recovery in this action, and herein incorporates said general provisions to the same full extent as though the same were herein copied word for word, and specifically pleads in bar of any recovery in this action section 8 of the general provisions of said policy, which are as follows: 'The insurance under this policy does not cover any loss, fatal or otherwise, sustained: while intoxicated or under the influence of or

affected by, or resulting directly or indirectly from intoxicants or narcotics; while violating the law, if such violation is the direct cause of the accident; any loss contributed to or caused by any mental or bodily infirmity,' and the defendant is advised and so alleges that at the time of said accident and the injury complained of, the said R. C. Wilson was violating the terms, conditions, and provisions of said policy, and the defendant specifically pleads such violation and limitation of said policy in bar of any recovery in this action."

The facts: The insured, R. C. Wilson, was fatally injured in an automobile accident about 11:05 p.m., the night of 12 December, 1934, on the Kinston-Greenville Highway, at Graingers Station, while an occupant in a Chevrolet Coupe, one-seat car, the property of W. J. Hardee, and occupied by W. J. Hardee, R. C. Wilson and one Jesse Jones, driver of the car, all three in one seat. The car was being driven at a high rate of speed toward Kinston from Greenville, and failed to make a curve, left the highway and turned over several times, coming to rest on the railroad tracks. W. J. Hardee was instantly killed; R. C. Wilson, the insured, fatally injured, and Jesse Jones was only slightly injured and disappeared from the scene of the accident shortly after the first persons on the scene arrived. Jesse Jones was not available as a witness on the trial, having been killed by a hit-and-run driver a few days prior thereto. The defendant's evidence tended to show that the insured, R. C. Wilson, and W. J. Hardee on the day prior to the night of the accident were in attendance upon a hog killing on the Hardee farm, adjacent to the town of Greenville, at which there was much drinking during the day on and off at the hog killing. Wilson was drinking. In the words of defendant's witness, T. E. Pollard: "He was what I would call drinking. He was jolly good, but did not stagger. He stayed about one way all day. The last time I saw him, about three o'clock, his condition was the same." During the course of the hog killing, Mr. Wilson bet Mr. Hardee a pint of liquor on the weight of the hogs, and Wilson won the bet. Pollard testified: "I don't know whether he got the pint of liquor or not." Wilson ate no food during the day at the hog killing. On cross-examination, he testified: "There was seven men present at the hog killing. I did not see but two pints of whiskey out there. I think pretty much all seven men took a drink. All seven men took a drink out of the two pints. The hog killing started at nine o'clock and between nine o'clock and three o'clock all seven men drank two pints of whiskey. I said he was not drunk. I say he could attend to his business. He did do it. He did not seem to stagger any."

Between four and five o'clock on the afternoon prior to the night of the accident, Mr. Wilson and Mr. Hardee were found in Mr. Hardee's Chevrolet coupe on a dirt road about three miles southeast of Greenville,

parked on the left side of the road, stalled in a ditch, with lights on the car and the door of the car open into the road, blocking the road, by the witness, Arthur Denton, who was accompanied by one Jesse Jones. Mr. Wilson came out of a house and asked Denton to help him get into town, stating he, Wilson, could not drive the car and that Hardee was too drunk to drive. Jesse Jones, who was riding with Denton, offered to drive the car for Wilson and Hardee and joined Wilson and Hardee and drove the car in a direction away from Greenville. This was around five o'clock p.m., preceding the night of the accident. At about 11:05 p.m., the coupe (single seat) being driven in the direction of Kinston on the Greenville-Kinston Highway, occupied by Wilson, the insured, Hardee, and Jones, at a high rate of speed, failed to make a curve at the railroad crossing at Graingers Station, left the highway, ran head-on into an embankment, and turned over, killing Hardee instantly and fatally injuring Wilson. Jesse Jones was only slightly injured and able to leave the scene of the accident immediately after its occurrence. Wilson was thrown six or eight feet from where the car finally rested. A pint bottle of whiskey, half full, was found on the scene. Wilson was carried to the Parrott Memorial Hospital in Kinston at approximately twelve o'clock. He had been drinking and there was a strong odor of alcohol upon his breath. He was unconscious from the accident and died the following day. Jack Taylor testified: "I detected the odor of alcohol or whiskey upon him. It was as strong as I ever detected, I think. It was my opinion that night he was under the influence of intoxicating liquor."

The plaintiff contended that the insured, Wilson, was not intoxicated or under the influence or effects of intoxicating liquor, or granting that he was drinking and intoxicated and affected by liquor during the day preceding the night of the accident, that he had fully recovered therefrom. Plaintiff offered evidence of witnesses who saw and talked to the insured between the hours of three and eight-thirty o'clock p.m., on the day of the accident, and none of them detected the odor of alcohol about the deceased, and all of whom declared that so far as they could tell, the insured was sober. Several witnesses were introduced who went to the scene of the wreck, all of whom testified that they came in close contact with the insured, handled him, and put him in the automobile, and that they did not detect on him the odor of alcohol, and that so far as they could tell, insured had not been drinking. After the insured had been taken to the hospital at Kinston, Dr. M. T. Frizzelle, a reputable physician of Ayden and brother-in-law to W. J. Hardee, who was killed in the same accident, Jack Spain, a lawyer of Greenville and son-in-law of W. J. Hardee, and S. G. Wilkerson, an undertaker of Greenville, went to the hospital where insured had been carried. Dr. Frizzelle testified

in part: "I bent down close to his face for the purpose of smelling his breath, in about six inches, something like that. I didn't detect the odor of whiskey on his breath when I did that." Jack Spain testified, in part: "I got right over him, within two or three inches of him. He was breathing the full force of his breath right out of his mouth. I did not smell any odor of whiskey—and I can smell it." S. G. Wilkerson testified, in part: "His mouth was open. I got within two or three inches of his mouth. When I did that, I didn't detect the odor of intoxicating liquor. I know the odor of whiskey. I can detect it on a man who has been drinking it. . . . I did not detect any odor of whiskey at all on his breath." Dr. Frizzelle and Mr. Spain likewise testified that they made a searching examination of the wrecked car and that they found no liquor in it and nothing to indicate that any liquor had been on the car. There was no contention that the insured was driving the car at the time he received his fatal injuries. In fact, it was in evidence that the insured had never driven an automobile.

In the record is the following: "Upon conclusion of reading the pleadings, the defendant having admitted the execution of the policy, the death of the insured, and that the policy was in full force and effect at the time of the death of the insured, the defendant voluntarily assumed the burden of the issue."

The issue submitted to the jury and their answer thereto were as follows: "Was the deceased, R. C. Wilson, intoxicated or under the influence of or affected by intoxicants at the time of the fatal injury, as alleged in the answer? Answer: 'No.'"

The court below rendered judgment on the verdict for plaintiff. The defendant made numerous exceptions and assignments of error and appealed to the Supreme Court.

Blount & James and Albion Dunn for plaintiff.
Lewis G. Cooper for defendant.

CLARKSON, J. Section 8 of the general provisions of the policy in controversy reads as follows: "The insurance under this policy does not cover any loss, fatal or otherwise, sustained: while intoxicated or under the influence of or affected by, or resulting directly or indirectly from intoxicants or narcotics; while violating the law; if such violation is the direct cause of the accident; any loss contributed to or caused by any mental or bodily infirmity."

There was only one issue submitted to the jury in the court below: "Was the deceased, R. C. Wilson, intoxicated or under the influence of or affected by intoxicants at the time of the fatal injury, as alleged in the answer?" The answer of the jury was "No."

There was no exception by defendant to the issue submitted, nor was any other issue tendered by it. *Grier v. Weldon,* 205 N. C., 575. The defendant voluntarily assumed the burden of the issue.

The numerous exceptions and assignments of error made by defendant cannot be sustained. They are as follows: The court below charged the jury in different portions of the charge: (1) "The burden, therefore, of sustaining that issue is upon the defendant upon evidence which shall satisfy you by its greater weight that its allegations and contentions are true and correct." (2) "If the defendant has satisfied you from the evidence, and by its greater weight, that the deceased, R. C. Wilson, was intoxicated or under the influence of, or affected by intoxicants at the time of the fatal injury, as alleged in the answer, it will be your duty to answer that issue 'Yes.' If the defendant has failed to satisfy you of that, or of those facts, those contentions, upon the evidence, or by its greater weight, then it will be your duty to answer the issue 'No.'" (3) "Now, gentlemen, upon that testimony the plaintiff contends that you ought to be satisfied that Mr. Wilson at the time of the fatal injury was neither intoxicated nor under the influence of, nor affected by alcoholics or narcotics. She contends that you, gentlemen, remembering that the burden of the issue is upon the defendant to satisfy you upon the evidence, and by its greater weight, if its contentions are true, they not only failed to sustain and carry the burden of the issue upon it, but that she has offered evidence, the greater weight of which, as she contends, while the burden is not resting upon her to satisfy you by its greater weight, but she contends that she has offered evidence which by its greater weight should satisfy you that her contentions about it are correct, and that, therefore, you should answer that issue 'No.'"

The defendant contended that in the first two above excerpts from the charge it was the duty of the court below in the charge to the jury to have defined what constituted the greater weight of the evidence, and in failing to do so the court committed error. C. S., 564. We cannot so hold.

The burden of proof is on the party who substantially asserts the affirmative of the issue, whether he be nominally plaintiff or defendant. The burden of proof is on the party holding the affirmative. It constitutes a substantial right. *Hunt v. Eure,* 189 N. C., 482; *Boone v. Collins,* 202 N. C., 12; *Stein v. Levins,* 205 N. C., 302 (306). A preponderance of the evidence, or by the greater weight, is all that is required in a civil action. If the defendant desired more elaborate instructions on a subordinate feature, it should have submitted an appropriate prayer. *S. v. Gore,* 207 N. C., 618; *S. v. Anderson,* 208 N. C., 771 (788).

The third portion of the charge, as set forth above, is a contention, and if not accurate the defendant should have called the matter to the attention of the court at the time. It is too late after verdict. *Albritton v. Albritton, ante,* 111 (115).

The court below charged the jury as follows: "For instance, the force of negative testimony must manifestly depend upon the opportunities of observation afforded to the witness. Those opportunities might be so favorable and frequent as to approach in weight to a positive statement; *yet we take it when the positive testimony would not conflict with the negative under any ordinary circumstances, the witness being equally creditable, the former should preponderate.*"

The above, which is in italics in defendant's brief, is taken *verbatim* from *Henderson v. Crouse,* 52 N. C., 623 (625-6): "Yet we take it when the positive is in conflict with the negative, under any ordinary circumstances, the witnesses being equally credible, the former should preponderate." *S. v. Murray,* 139 N. C., 540 (542). In fact, it is well settled that it is the duty of the jury to reconcile the evidence, if possible. We see no error in this contention of defendant.

The court below charged the jury as follows: "The court instructs you that, under the law, 'intoxicated' is synonymous, or practically so, with the word 'drunk'—that they mean practically, in ordinary usage, the same thing—an intoxicated person is a drunken person—a drunken man is an intoxicated man. And that means, intoxicated means, in law, that the subject must have drunk of alcoholics to such an extent as to appreciably affect and impair his mental or bodily faculties, or both. Now, the court instructs you further, that to be under the influence or affected by liquor means, that the subject must have drunk a sufficient quantity to influence or affect, however slightly, his body and his mind, his mental and physical faculties. Not that they must be appreciably impaired, not that his emotions or passions must be stimulated or excited, or aroused, and the judgment impaired, but it does mean that to be under the influence or affected by it, must to some extent, at least, affect him. He must to some extent, at least, feel it to be affected by it. If the defendant has satisfied you from the evidence, and by its greater weight, that the deceased, R. C. Wilson, was intoxicated or under the influence of, or affected by, intoxicants at the time of the fatal injury, as alleged in the answer, it will be your duty to answer that issue 'Yes.' If the defendant has failed to satisfy you of that, or of those facts, those contentions, upon the evidence or by its greater weight, then it will be your duty to answer the issue 'No.' "

The words "intoxicated" and "drunk" are commonly regarded as synonymous. *Bragg v. Commonwealth,* 133 Va., 645; *Mutual Life Ins. Co. v. Johnson,* 64 Okla., 222; Black's Law Dictionary (3d Ed.), p. 624,

citing a wealth of authorities, defines "drunk" as follows: "A person is 'drunk' when he is so far under the influence of liquor that his passions are visibly excited or his judgment impaired, or when his brain is so far affected by potations of liquor that his intelligence, sense-perceptions, judgment, continuity of thought or of ideas, speech, and coördination of volition with muscular action (or some of these faculties or processes) are impaired or not under normal control." We see no error in the charge, taking same as a whole, defining the condition a party must be in to avoid the policy. *S. v. Myrick,* 203 N. C., 8.

Under the terms of the policy the charge is favorable to defendant: "Must have drunk a sufficient quantity to influence or affect, however slightly, his body and his mind, his mental and physical faculties."

In Couch Cyc. of Ins. Law, Vol. 6, p. 4553, part sec. 1245, is the following: "And, broadly speaking, the words 'intoxicated,' 'intoxicants,' and 'narcotics,' as used in provisions in accident policies, excluding liability for injury or death while intoxicated or under the influence of intoxicants or narcotics, mean that the insured has used liquors or drugs to such an extent as to disturb the action of his mental or physical faculties, and that his sense of responsibility is substantially or materially impaired."

There are many exceptions and assignments of error as to the admission of evidence and the unnecessary examination of witnesses by the court. We have examined each with care, and we cannot find any error, if error not prejudicial. In fact, some were cured by subsequent evidence to the same effect, at least—the evidence had little, if any, probative value.

We think the evidence was a matter for the jury. They have decided in favor of plaintiff. On the record there is no prejudicial or reversible error.

No error.

L. B. MATTHEWS v. J. T. CHEATHAM AND MARY JOHNS CHEATHAM.

(Filed 4 November, 1936.)

1. **Trial D a—**

Upon a motion to nonsuit, all the evidence upon the whole record tending to support plaintiff's cause of action is to be considered in the light most favorable to plaintiff, and he is entitled to every reasonable intendment thereon and every reasonable inference therefrom.

2. **Automobiles C m—Evidence of defendant's actionable negligence in traversing intersection held sufficient for jury.**

Evidence that plaintiff drove his car with trailer attached into an intersection at a speed of approximately ten miles per hour when the car driven by defendant was 60 to 70 feet away, that the car driven by

defendant, approaching from the right along the intersecting street, was driven at a speed of about forty miles per hour, that there was nothing to obstruct vision, and that defendant did not reduce her speed, but drove her car into the side of plaintiff's car as plaintiff's car had almost cleared the intersection, *is held* sufficient to be submitted to the jury on the issue of defendant's actionable negligence.

3. **Appeal and Error E b—**

Where the charge of the court below is not in the record, it will be presumed that the court correctly charged the law applicable to the evidence.

4. **Automobiles C m—Motion to nonsuit for that plaintiff's own testimony showed contributory negligence held correctly denied when plaintiff's testimony is conflicting on the issue.**

Plaintiff testified on cross-examination that he saw defendant's car approaching along an intersecting street, and, notwithstanding, drove his car in front of her. Defendant moved to nonsuit on the ground that plaintiff's own testimony showed contributory negligence as a matter of law. Plaintiff further testified that although he saw defendant's car approaching, it was 60 to 70 feet away when he entered the intersection, and that defendant did not slacken its speed, but ran into him just before he cleared the intersection. *Held:* Plaintiff's conflicting testimony was correctly submitted to the jury on the question of contributory negligence.

5. **Negligence D c—**

Defendant's motion to nonsuit on the ground that plaintiff's own testimony shows contributory negligence as a matter of law is correctly denied when plaintiff's evidence on the issue is conflicting, the discrepancy in plaintiff's testimony being for the jury.

6. **Automobiles E c—Evidence that husband controlled and maintained car held sufficient to support family car doctrine.**

The evidence disclosed that the *feme* defendant was driving a car owned by her daughter, but that the daughter was a minor and used the car only with the consent of her parents, that all members of the family used the car, which was kept in a garage with two other cars belonging to the *feme* defendant's husband, and that he listed and paid taxes on the car in his own name, secured or attempted to secure insurance thereon in his name, and furnished gasoline and paid repair bills thereon, that at the time of the accident the *feme* defendant had gone for a dress belonging to her daughter and was going to bring her daughter home from work, and that after the accident the husband had title to the car placed in his name, *is held* sufficient to show that the husband controlled and maintained the car as a "family car," and the evidence was correctly submitted to the jury on the issue of his liability under the doctrine.

CONNOR, J., dissents.

APPEAL by defendants from *Harris, J.,* at 30 March Term, 1936, of EDGECOMBE. No error.

This is an action for actionable negligence brought by plaintiff against defendants to recover damages. The complaint, in part, is as follows: "That on 25 November, 1933, the plaintiff was driving his

Chevrolet automobile through the city of Wilson, county of Wilson, State of North Carolina, in a southerly direction and on Tarboro Street, and in a lawful manner, and, as he progressed across the intersection of Tarboro and Vance streets, a Ford automobile, driven in a negligent, wrongful, tortious, and reckless manner, and at an unlawful rate of speed, by Mary Johns Cheatham, one of the defendants herein, ran onto and against the right side of the automobile driven by the plaintiff, wrecking said plaintiff's automobile and throwing him violently therefrom, turning said automobile of the plaintiff over onto and against him, the said plaintiff, in such a manner as to break his pelvis bone in two places, crushing his kidney and other parts of his body, inflicting serious bodily damage on said plaintiff, and thereby permanently injuring him and causing him great agony in body and mind and great suffering, loss of labor, loss of property, hospital, nursing, and doctor's bills, to his great hurt and damage, through no fault of his. That the defendant Mary Johns Cheatham is now and was at the time set out in this complaint the wife of the defendant J. T. Cheatham, and they are now and were at said time living together as man and wife, and the said J. T. Cheatham, at the time set out in the complaint and for some time prior thereto, maintained the Ford automobile, which on said occasion was being operated by the defendant Mary Johns Cheatham for the use, pleasure, and convenience of himself and members of his family, including his wife, the said Mary Johns Cheatham, and that on said occasion the said Ford automobile was being operated by the said Mary Johns Cheatham, with the actual or implied knowledge, consent, and acquiescence of the defendant J. T. Cheatham. That the negligence of the defendants as hereinbefore set out was the direct, sole, and proximate cause of the damage hereinbefore set out suffered by the plaintiff."

The defendant J. T. Cheatham denied the material allegations of the complaint, and says that he did not, as plaintiff alleged, maintain the car either for his own or his family's use, and further sets up the plea of contributory negligence.

The defendant Mary Johns Cheatham denied the material allegations of the complaint and set up the plea of contributory negligence, and further: "That as a direct and proximate result of the aforesaid negligence of the plaintiff, this defendant sustained severe bruises and great shock, both mental and physical, requiring the services of physicians, all to her hurt and damage in the sum of $2,500. This defendant pleads the aforesaid negligence of plaintiff in bar of recovery herein and as a basis for her counterclaim. . . . That plaintiff recover nothing; that she recover of plaintiff the sum of $2,500."

The issues submitted to the jury and their answers thereto, were as follows:

"1. Was the plaintiff injured by the negligence of the defendant Mary Johns Cheatham, as alleged in the complaint? Ans.: 'Yes.'

"2. If so, did the plaintiff by his own negligence contribute to or cause said injury? Ans.: 'No.'

"3. Was the Ford automobile operated by Mary Johns Cheatham owned, maintained, or kept by the defendant J. T. Cheatham for the general use, pleasure, or convenience of his family? Ans.: 'Yes.'

"4. What sum, if any, is plaintiff entitled to recover as damages? Ans.: '$5,200.'

"5. Was the defendant Mary Johns Cheatham injured by the negligence of the plaintiff, as alleged in the answer? Ans.: ....

"6. What sum, if any, is the defendant Mary Johns Cheatham entitled to recover as damages? Ans.: ...."

The judgment of the court below is as follows: "Present: Honorable W. C. Harris, Judge. This cause coming on for trial and being heard before the Honorable W. C. Harris, Judge, and a jury, at 30 March Term, 1936, of the Superior Court of Edgecombe County, and the jury having answered the issues submitted in favor of the plaintiff as appears in the record: Now, therefore, upon motion of Mr. B. H. Thomas and Messrs. Gilliam & Bond, attorneys for plaintiff, it is adjudged, ordered, and decreed that the plaintiff have and recover of the defendants J. T. Cheatham and Mary Johns Cheatham, the sum of $5,200 and the costs of this action, to be taxed by the clerk. W. C. Harris, Judge."

The defendants made numerous exceptions and assignments of error, and appealed to the Supreme Court. The material ones will be set forth in the opinion.

B. H. Thomas and Gilliam & Bond for plaintiff.
Finch, Rand & Finch and Spruill & Spruill for defendants.

CLARKSON, J. The material exceptions and assignments of error made by defendants, are as follows: "For that the court erred in refusing to grant defendants' motion for judgment as of nonsuit at the close of plaintiff's evidence. For that the court erred in refusing to grant defendants' motion for judgment as of nonsuit at the close of all the evidence. For that the court erred in refusing to grant defendants' motion to charge the jury as follows: 'I charge you, gentlemen of the jury, that, if you find the facts to be as testified to by all of the witnesses, it will be your duty to answer the third issue "No."'" We do not think the exceptions and assignments of error can be sustained.

Upon a motion as of nonsuit, all the evidence upon the whole record tending to support plaintiff's cause of action is to be considered in the light most favorable to plaintiff, and he is entitled to every reasonable intendment thereon and every reasonable inference therefrom.

The jury accepted plaintiff's evidence to be true. The evidence sustained the allegations of the complaint (1st) as to the collision: The plaintiff lived in Rocky Mount, and on the morning of 25 November, 1933, he was going to a farm and had to pass through Wilson, N. C. He was driving a Chevrolet automobile with a trailer. He was on Tarboro Street, on the right side, and came to Vance Street and was attempting to cross the intersection when he was injured. When reaching the intersection he had his car under control to stop, if necessary, and had slowed down to 10 miles an hour. He saw a car coming east (in a southeasterly direction) on Vance Street. The car was twice the width of the intersection away when he entered the intersection. He went across the street and just before he cleared it the car driven by the *feme* defendant hit the right-hand door of his car and turned it over. The blow knocked him out of the car. In his opinion she was driving 40 miles an hour. Tarboro Street is 37 feet wide and goes east and west, and Vance Street is 30 feet wide and goes north and south. As he entered the intersection the *feme* defendant was, at the very least, 60 to 70 feet away. She did not reduce her speed or apply her brakes or make any attempt to stop. There was nothing to obstruct her view the entire block. She ran straight into plaintiff's car when he was almost clear of the street. She did not slacken up a bit, and turned his car over. The plaintiff further testified: "I was taken to Moore-Herring Hospital at Wilson, and Mr. J. T. Cheatham, the man of whom his wife ran into me, come in there and took hold of my hand and told me his name and told me it was his wife's car, his car that ran into me, driven by his wife, and he wanted me to stay there for treatment, and he would take care of the damage; it was her fault."

We think the question of contributory negligence on the part of plaintiff was for the jury to determine. The charge of the court below is not in the record, and the presumption of law is that the court charged the law applicable to the facts.

The defendants contend that plaintiff testified on cross-examination that he saw the *feme* defendant, but, notwithstanding that, he ran in front of her and therefore as a matter of law was guilty of contributory negligence. But plaintiff also testified: "I saw Mrs. Cheatham 60 or 70 feet from the intersection. I was in the intersection at that time. I started to pick up. I was almost clear of the street when she hit me. She ran straight into me, did not turn to the right or left. I don't think she saw my car. If she had been looking to the front there was nothing to keep her from seeing it. . . . Mrs. Cheatham did not slacken up a bit. She was going 40 miles an hour. It broke my car in two."

This discrepancy was for the jury. *Taylor v. Rierson, ante,* 185 (189). The presumption of law is that all these matters were left to the jury on a charge free from error.

(2) As to the "family purpose doctrine": R. A. Powers testified, in part: "I know Mr. J. T. Cheatham. The first time I met him was at Herring's Drug Store in Wilson. I was with Mr. Matthews. Mr. Cheatham's son was with him. I heard Mr. Cheatham and Mr. Matthews talk together. Mr. Cheatham said that he maintained three automobiles at his home. That this particular car (Ford) that his daughter won it in a contest. He said she did not ever drive except by consent of he and his wife, and he maintained the car the same as the rest of them. . . . In fact, he said he paid the taxes on this automobile along with his others, and I think he made the statement that he paid the insurance. I will not be positive."

J. D. Davis testified, in part: "I am in the garage business known as the Davis Auto Company, on Green Street, at Wilson. I know Mr. J. T. Cheatham, Mrs. Cheatham, and Miss Martha Cheatham. I remember the Ford automobile of Miss Cheatham that she won in a newspaper contest. From the time of the winning of the car in November, 1933, I had occasion to service and repair the car at different times. Mr. Cheatham brought the car to me most of the time. Mrs. Cheatham has a few times, I think. I would say Mr. Cheatham brought the car in half a dozen times for servicing, and he paid the bills every time. He paid all the bills on all the cars. He is still a very good customer of mine. I have mostly seen Mr. Cheatham drive the Ford car."

Ernest Barnes testified, in part: "I have seen different members of the family driving it, Mrs. Cheatham mostly. I have seen Mr. Cheatham's daughter driving it and Mrs. Cheatham, but, so far as the others, I would not be positive. That was before the accident."

The evidence succinctly, as to the "family purpose doctrine": (1) Defendant J. T. Cheatham had a garage at his home in which this car was kept, with two others. (2) His daughter, who owned the car (won in a newspaper contest) was about 16 years old, a minor at the time. (3) Different members of the family drove the car, including the *feme* defendant. (4) He furnished the gasoline and repaired the car. (5) At the time of the collision the *feme* defendant had gone for a dress that belonged to the daughter, and was to bring her home from her work. (6) That J. T. Cheatham paid the taxes on the car and returned same in his name. (7) He secured, or attempted to secure, insurance on the car in his own name. (8) That no one used the car without his or his wife's consent. (9) After the accident he had the title placed in his name.

In *Watts v. Lefler,* 190 N. C., 722, at p. 725, this Court quotes with approval the following statement from Berry on Automobiles (4th Ed.)

sec. 1280: "The rule is followed in some of the states in which the question has been decided, that one who *keeps* an automobile for the pleasure and convenience of himself and family, is liable for injuries caused by the negligent operation of the machine while it is being used for the pleasure or convenience of a member of his family."

Huddy's Encyclopedia of Automobile Law (9th Ed.), Vol. 7-8, page 324, states the rule: "The person upon whom it is sought to fasten liability under the 'family car' doctrine must own, provide, or maintain an automobile for the general use, pleasure, and convenience of the family. Liability under this doctrine is not confined to owner or driver. It depends upon control and use."

We think there was sufficient evidence to be submitted to the jury that J. T. Cheatham controlled and used the car as a "family car," and the family purpose doctrine was applicable to the facts in this case. On this aspect it is presumed that the court below charged the jury on the law applicable to the facts.

It is well settled that the "family purpose doctrine" is the law in this jurisdiction. *Robertson v. Aldridge,* 185 N. C., 292; *Wallace v. Squires,* 186 N. C., 339; *Watts v. Lefler,* 190 N. C., 722; *Grier v. Woodside,* 200 N. C., 759; *Eaves v. Coxe,* 203 N. C., 173; *Lyon v. Lyon,* 205 N. C., 326; *Byers v. Brawley,* 207 N. C., 151.

In the judgment of the court below, we see

No error.

CONNOR, J., dissents.

FEDERAL RESERVE BANK OF RICHMOND, VIRGINIA, v. F. S. DUFFY AND H. BRYAN DUFFY, AND KATE BRYAN DUFFY AND H. BRYAN DUFFY, EXECUTORS OF THE ESTATE OF F. S. DUFFY, DECEASED.

(Filed 4 November, 1936.)

1. Bills and Notes C e—Evidence held to disclose that reserve bank discounting note was holder thereof in due course.

The evidence tended to show that a national bank holding a note given by defendants for a valid debt, discounted the note with a Federal Reserve Bank, that the note was secured by a mortgage on real estate, but that on its face it appeared to be an open 60-day negotiable note, and that the national bank did not disclose the facts to the reserve bank, and there was no evidence of fraud or collusion between the banks. Upon the failure of the national bank, the makers paid the reserve bank part of the amount due thereon, but refused to pay an amount equal to their deposit in the national bank, claiming that they were entitled to offset the deposit against the note upon their contention that the reserve bank was not a holder in due course. The reserve bank did not learn that the note was

secured by real estate until after the failure of the national bank, and did not attempt to subject the collateral to the payment of the note. *Held:* Since the national bank was acting in its own interest in discounting the note, its knowledge of its precarious condition and that the note was secured by real estate and was not therefor eligible for rediscount, was not imputed to the reserve bank, and the reserve bank is a holder of the note in due course and the right to offset the deposit in the national bank is not available against it.

2. **Banks and Banking D a—**

Where a note executed by the makers for a valid debt is rediscounted by the payee bank, the makers cannot complain that the note was not subject to rediscount under the Federal Reserve Act, only the Federal Government being in a position to complain that a reserve bank exceeded the powers conferred upon it by the Government.

3. **Banks and Banking C d—**

Where a national bank acts in its own interest in rediscounting a note with a Federal Reserve Bank, knowledge of the national bank of matters not appearing upon the face of the note which render it ineligible for rediscount, is not imputed to the reserve bank.

4. **Principal and Agent C c—**

The rule that knowledge of the agent is imputed to the principal does not prevail when the agent is acting in his own interest and has a motive for concealing the knowledge from the principal.

APPEAL by defendants from *Spears, J.*, at January-February Term, 1936, of CRAVEN. No error.

Suit on a negotiable promissory note, executed by F. S. Duffy and endorsed by H. Bryan Duffy, payable to the First National Bank of New Bern, and by said First National Bank of New Bern transferred by endorsement to plaintiff Federal Reserve Bank of Richmond.

The note sued on was in form as follows:

"New Bern, N. C.,
"Sept. 12, 1929.

"Sixty days after date I promise to pay to the order of The First National Bank of New Bern, New Bern, N. C., Thirty-one Hundred and Fifty Dollars ($3,150.00). Negotiable and payable at the First National Bank, New Bern, N. C., with interest after maturity; and we, the makers and endorsers, hereby agree to continue and remain bound for the payment of this note and all interest thereon, notwithstanding any failure and omission to protest this note for nonpayment, or to give notice of nonpayment or dishonor or protest or to make presentment or demand for payment, expressly waiving any protest and all notice of nonpayment or dishonor or protest in any form, or any presentment or demand for payment, or any notice whatsoever. Due Nov. 11, 1929. F. S. Duffy (SEAL)."

Back of said note: "Protest, demand and notice of nonpayment waived. (Signed) H. Bryan Duffy."

"Pay to the order of Federal Reserve Bank of Richmond, Va., September 14, 1929. Demand, notice and protest waived. The First National Bank of New Bern, New Bern, N. C.

(Signed) Hugh P. Beal, Vice-President."

It was not controverted that the note evidenced a valid debt of the defendants, which had been outstanding for a number of years, and which had been originally secured by deed of trust on real estate, still in force, though the note in suit made no reference to any security. It further appeared that the First National Bank of New Bern was indebted to plaintiff in the sum of $20,000, and as security therefor had assigned and transferred certain collaterals which were from time to time renewed and added to; that the note sued on was offered by the First National Bank of New Bern to the Federal Reserve Bank for discount on 14 September, 1929, and credit therefor extended to the New Bern bank as of that date.

The First National Bank of New Bern closed its doors on 26 October, 1929, without having paid its indebtedness to the plaintiff, and the note in suit was sent by plaintiff to New Bern for collection, and the defendants made payments and received credits thereon from time to time until the amount was reduced to $935.57, the exact amount the defendants had on deposit in the First National Bank of New Bern at the time it closed, and the defendants refused to pay anything more on the note, claiming the deposit as a set-off for the balance of said note.

Defendants, in their answer, admitted the execution of the note, but alleged that there was collusion and fraud in the purported transfer and assignment of the note; that the plaintiff knew the First National Bank of New Bern was in distressed condition; that the character of the note was misrepresented to plaintiff by the New Bern bank, of which plaintiff was chargeable with notice; that the note was ineligible for discount by plaintiff under the provisions of the Federal Reserve Act, because secured by real estate and not for an agricultural, industrial, or commercial purpose, and that plaintiff's action in taking and rediscounting said note was in bad faith, and that therefore the plaintiff is not holder in due course of said note, but took same subject to the defendants' right of equitable set-off to the amount of their deposit in the said New Bern bank.

The jury for their verdict found, in response to the issues submitted to them, that the plaintiff was the holder in due course of the note sued on and that defendants were indebted to plaintiff in the amount claimed.

From judgment on the verdict, defendants appealed.

M. G. Wallace and W. H. Lee for plaintiff, appellee.
Abernethy & Abernethy for defendants, appellants.

DEVIN, J. Defendants earnestly contend that under the circumstances of this case the action of the Federal Reserve Bank in taking and discounting the note in suit was in bad faith; that the paper itself was one ineligible for discount under the provisions of the Federal Reserve Act and the rules and regulations of the Federal Reserve Bank, and that plaintiff is not entitled to the position of holder in due course so as to deprive these defendants of the right of set-off to the amount of their deposit in the First National Bank of New Bern.

Defendants' views were fully set out in prayers for instructions tendered in apt time to the presiding judge, and they except to his refusal to give them.

The evidence, as it appears in the record before us, fails to sustain defendants' contentions.

There was no evidence of fraud invalidating the note, nor of collusion between the Federal Reserve Bank and the First National Bank of New Bern, nor of wrongful intent to deprive defendants of any legal rights. The note on its face purported to be an ordinary 60-day negotiable note, eligible for discount.

The fact that the vice-president of the First National Bank of New Bern had not stated all the facts with reference to the purpose of the loan, or that there was real estate security for the original debt, was not known to plaintiff until after the failure of the New Bern bank. The plaintiff is not now seeking to avail itself of the benefit of any security to this action. There was no evidence of fraud in the transaction. The defendants admit the note was given for a valid debt justly due the New Bern bank. They do not deny that a new note or a renewal note for a preëxisting debt was given by them to the New Bern bank, and they do not controvert the fact that this note was by the said bank, before maturity and for value, endorsed to and discounted by the Federal Reserve Bank. But they complain that in the effort to bolster a failing bank, its vice-president was guilty of bad faith in procuring this renewal note from the defendants and misrepresented its character to the Federal Reserve Bank so as to procure its discount; that the Federal Reserve Bank took with notice of these facts, and that its action in discounting the note under the circumstances amounted to bad faith on its part, and that as a result defendants have been wrongfully deprived of their right of set-off against the New Bern bank.

Even if the plaintiff had accepted for discount a paper declared ineligible by the act or by its rules, the defendants, who owe the debt, could not complain.

As was said by Circuit Judge Parker in a well-considered opinion in *Lucas v. Federal Reserve Bank,* 59 Fed. (2nd), 617, (involving transactions with the same bank): "There can be no doubt as to the right and power of the Federal Reserve Banks to take, as collateral security to the indebtedness of member banks, paper which is not eligible for discount. . . . It is given power by the act (12 U. S. C. A., sec. 341, Seventh) to exercise not only the powers expressly granted therein, but also such incidental powers as shall be necessary to carry on the business of banking within the limitations prescribed." The section of the Federal Reserve Act granting incidental powers to Federal Reserve Banks, is practically the same as the section granting incidental powers to national banking associations (12 U. S. C. A., sec. 24, Seventh). *First National Bank v. National Exchange Bank,* 92 U. S., 122. These powers are such as are necessary to meet all the legitimate demands of the authorized business and to enable a bank to conduct its affairs within the general scope of its charter, safely and prudently.

We quote further from *Lucas v. Federal Reserve Bank, supra:* "It is well settled that, under those incidental powers, a national banking association may take as security for a loan, collateral of a character in which it is precluded from investing funds." It was said in *Thompson v. Saint Nicholas National Bank,* 146 U. S., 240, with reference to national banks: "It would defeat the very policy of the act intended to promote the security and strength of the national banking system if its provisions should be so construed as to inflict a loss upon the banks and a consequent impairment of financial responsibility."

It is equally clear that whatever the power of the Federal Reserve Bank with respect to taking as collateral paper not eligible for discount, no one can complain of such action except the government, the sovereign which created and limited its powers. *Kerfoot v. Farmers' & Merchants' Bank,* 218 U. S., 281. In the last cited case, *Mr. Justice Hughes,* speaking for the Court, uses this language: "Although the statute by clear implication forbids a national bank from making a loan upon real estate, the security is not void and it cannot be successfully assailed by the debtor or by subsequent mortgagees, because the bank was without authority to take it; and the disregard of the provisions of the Act of Congress upon that subject only lays the bank open to proceedings by the government for exercising powers not conferred by law." *Union National Bank v. Matthews,* 98 U. S., 621; *Thompson v. Saint Nicholas National Bank,* 146 U. S., 240; *Bank v. Gadsden,* 191 U. S., 621; 12 U. S. C. A., sec. 24 (IX); *Oldham v. Bank,* 85 N. C., 241.

Defendants contend further that the relationship between the Federal Reserve Bank of Richmond, Virginia, and member banks was such as to constitute the latter the agent of the former, and thus impute notice to the principal of all facts known to the member bank.

While the evidence here is not such as to establish the relationship of principal and agent between plaintiff and the First National Bank of New Bern, there is a well-defined exception to the general rule that knowledge of the agent is imputed to the principal. Where the conduct of the agent is such as to raise a clear presumption that he would not communicate to the principal the facts in controversy, or where the agent, acting nominally as such, is in reality acting in his own business or for his own personal interest and adversely to the principal, or has a motive in concealing the facts from the principal, this rule does not apply. 2 A. J., 298; *Bank v. Burgwyn,* 110 N. C., 267. Where the agent is dealing in his own behalf or has personal interest to serve, the knowledge of agent is not imputable to the principal. *Bank v. Wells,* 187 N. C., 515; *Grady v. Bank,* 184 N. C., 158; *Corp. Com. v. Bank,* 164 N. C., 357; *Brite v. Penny,* 157 N. C., 110.

Here the First National Bank of New Bern, seeking to secure additional funds to continue a failing business, negotiates a valid paper which, on its face, is entirely proper and eligible for discount by the plaintiff, but fails to disclose facts which might have prevented its discount, and thereby obtains advances from the plaintiff for its own purposes. The New Bern bank was acting in its own interest, adversely to the plaintiff, in selling to the plaintiff the New Bern bank's property, and hence knowledge of bad faith, if any, on its part cannot in law be imputed to the Federal Reserve Bank.

We appreciate the hardship resulting to the defendants from being deprived of the right to set off their deposit in the First National Bank of New Bern against their note given to that bank, but this right may not be invoked to the detriment of the transferee of this note, who by the law merchant was a holder in due course.

The defendants' exceptions on the record before us cannot be sustained, and in the trial, we find

No error.

L. T. KNOWLES v. J. H. WALLACE (ORIGINAL PARTY PLAINTIFF), AND J. H. REHDER, AND THE FEDERAL LAND BANK OF COLUMBIA (ADDITIONAL PARTIES DEFENDANT).

(Filed 4 November, 1936.)

1. **Ejectment C c—**

Evidence showing good record title in plaintiff, without any record evidence of title in defendant, *held* to support judgment for plaintiff for recovery of land.

2. Deeds B a—

Where an instrument is required to be registered, no notice, however full and formal, will supply the place of registration. C. S., 3308, 3309.

3. Betterments A d—Provision that contract to convey should be void if payments were not made held not to defeat claim for betterments.

The vendor in a contract to convey represented to the purchaser that he had title to the land and agreed to sell upon payment by the purchaser of the contract price in installments, the contract providing that it should be void if the purchaser failed to make the payments as stipulated. The purchaser paid the first installments, went upon the land and made improvements thereon, but failed to make the last payments called for in the contract. The vendor did not have title, and the purchaser was ousted by the holder of the good record title. *Held:* The purchaser is entitled to recover from the vendor the amount paid on the purchase price, plus the value of the improvements, less the reasonable rental value of the property during the time the purchaser had possession, notwithstanding the provision for forfeiture, the vendor having induced the purchaser to pay a part of the purchase price and make improvements under a contract which the vendor could not perform.

4. Contracts E e—

Provisions in a contract for forfeitures and penalties for its breach are abhorred by the law and are looked upon as evidencing bad faith and fraud.

APPEAL by J. H. Wallace from *Grady, J.*, and a jury, at March Term, 1936, of DUPLIN. Modified and affirmed.

The issues submitted to the jury, and their answers thereto, were as follows:

"1. Is the plaintiff L. T. Knowles the owner and entitled to the possession of the lands described in the complaint? Answer: 'Yes.'

"2. Is the defendant J. H. Wallace in the wrongful and unlawful possession of said lands so far as L. T. Knowles is concerned? Answer: 'Yes.'

"3. What is the fair rental value of said lands since 14 January, 1935, up to the present date? Answer: '$125.00.'

"4. Did the defendant J. H. Rehder contract and agree with J. H. Wallace to sell to him the lands in question under the terms named in the written memorandum dated 30 September, 1933, and put him in the possession of said lands under the terms of said memorandum? Answer: 'Yes.'

"5. If so, did J. H. Rehder wrongfully refuse to carry out the terms of said agreement as alleged in the answer of J. H. Wallace? Answer: 'No.'

"6. If so, what amount has J. H. Wallace paid to J. H. Rehder on the purchase price of said land? Answer: '$278.29.'

"7. In what amount, if anything, has the value of said lands been increased by reason of improvements placed thereon by J. H. Wallace? Answer: '$200.00.'

"8. What was the fair rental value of said lands for the years 1933 and 1934? Answer: '$150.00.'"

The judgment of the court below is as follows: "This cause coming on to be heard at the March Term, 1935, of Duplin Superior Court before his Honor, Henry A. Grady, judge, and a jury, and the jury having found for its verdict the issues and the responses thereto as set out in the record, it is hereupon considered, ordered, and adjudged, upon the verdict of the jury, that the plaintiff L. T. Knowles is the owner of in fee simple and is entitled to the immediate possession of the following described real estate, lying and being in Rose Hill Township, Duplin County, North Carolina, containing 26 acres, more or less (describing same). It is further considered, ordered, and adjudged that the plaintiff L. T. Knowles recover possession of said lands from the defendant J. H. Wallace, his agents, servants, and tenants, together with plaintiff's cost incurred, to be taxed by the clerk. Let writ of possession issue. It is further considered, ordered, adjudged, and decreed that the plaintiff L. T. Knowles do have and recover of the defendant J. H. Wallace and his surety, E. J. Wells, the sum of $300.00, the penalty of the bond, to be discharged, however, upon the payment to the plaintiff by the defendant J. H. Wallace and his surety, E. J. Wells, the sum of $125.00, for rents, and the cost of this action to be taxed by the clerk. It is further considered, ordered, and adjudged upon the verdict of the jury that the defendant J. H. Wallace take nothing by his cross action against the defendant J. H. Rehder, and that the defendant Rehder have and recover of the defendant J. H. Wallace his costs incurred, to be taxed by the court. Henry A. Grady, Judge."

The defendant J. H. Wallace made numerous exceptions and assignments of error and appealed to the Supreme Court. The material ones and necessary facts will be considered in the opinion.

Beasley & Stevens for plaintiff.
D. L. Carlton for defendant Fed. Land Bank of Columbia.
Rivers D. Johnson for J. H. Rehder.
Oscar B. Turner for J. H. Wallace.

CLARKSON, J. (1) As to the first three issues, we see no error. On 14 January, 1935, the plaintiff purchased from the Federal Land Bank of Columbia, the land in controversy, paying for same $1,500, in cash, including taxes. There was nothing on the records in the office of the register of deeds in Duplin County, N. C., where the land was situated,

showing that either of the defendants, J. H. Rehder or J. H. Wallace, had any interest in the land in controversy.

In *Bender v. Tel. Co.,* 201 N. C., 356, quoting from *Bank v. Smith,* 186 N. C., at p. 641, citing numerous authorities, is the following: "Where the registration of an instrument is required, no notice to purchaser, however full and formal, will supply the place of registration." C. S., 3308, 3309.

(2) There is neither allegation nor sufficient proof that tends, in any way, to connect the defendant The Federal Land Bank of Columbia with the controversies involved in this action.

In the record is the following: "This cause coming on to be heard before his Honor, Henry A. Grady, judge presiding, and being heard upon motion of D. L. Carlton, attorney for the defendant The Federal Land Bank of Columbia, for judgment that this action be dismissed as to said defendant The Federal Land Bank of Columbia. It is ordered, therefore, that The Federal Land Bank of Columbia be and it is hereby dismissed as a party defendant to this action, and that the said defendant recover its costs incurred in this action, to be taxed by the clerk." There is no exception and assignment of error in the record to this judgment.

(3) The contest narrows itself down to a controversy between the defendants J. H. Rehder and J. H. Wallace. The defendant J. H. Wallace is uneducated, practically illiterate, and can read and write but little, and is able to do but little more than write his own name.

The defendant Wallace offered in evidence, unobjected to, the following exhibits: "*Exhibit A:* 'This is to certify that I will buy the 26-acre farm, formerly the Nelson Young farm at Rose Hill, for the sum of $2,000, and agree to pay $100.00 by Nov. 1, 1933, and $100.00 by June 1, and $150.00 by Nov. 1, 1934, and the balance per year same as in 1934, until the full amount is paid. I also agree to pay six per cent per annum on balance each year. If I fail to make these payments same is null and void. J. H. Wallace.' This is the paper Mr. Rehder prepared and handed to me. I saw him write it and he handed it to me: *Exhibit B:* 'This is to certify that I will buy the 26-acre farm, formerly the Nelson Young farm at Rose Hill, for the sum of $2,000, and agree to pay $100.00 by Nov. 1, 1933, and $100.00 by June 1, 1934, and $150.00 by Nov. 1, 1934, and the balance per year $250.00, same as in 1934, until full amount is paid. I do agree to pay 6% per annum on balance each year. J. H. Rehder.' "

In the fourth issue, unobjected to, these memoranda were dated 30 September, 1933. The defendant Wallace was let into the possession of the land in the early part of 1933. The memoranda were in the fall, 30 September, 1933. The jury found that Wallace paid Rehder on the purchase price of the land $278.29, and the improvements put there by

Wallace amounted to $200.00, making a total of $478.29. The deed to the Federal Land Bank of Columbia to plaintiff was made on 14 January, 1935. Rehder's contract with Wallace called for $100.00 1 November, 1933; $100.00 1 June, 1934; $150.00 1 November, 1934. A total of $350.00 and interest.

In the record is: "*Exhibit L:* Card addressed to J. H. Wallace: 'Wilmington, N. C., Oct. 12-33. Replying to your letter, *the farm is my property.* Please let me hear from you with payment. Best wishes, (signed) J. H. Rehder.'"

Wallace testified: "He (Rehder) said he owned the land, that it was his land." On the entire record there is no evidence that Rehder ever had title to this land that he agreed to sell to this illiterate man for $2,000, and which was later sold to plaintiff for $1,500. Now Rehder claims that Wallace cannot recover for the amount paid on the land, $278.29, and improvements, $200.00, for in the contract is the following: "If I fail to make these payments same is null and void."

In *Luton v. Badham,* 127 N. C., 96 (100), we find: "If the plaintiff's intestate entered upon the defendant's land under a parol contract and placed valuable and permanent improvements thereon, and the defendant, after such improvements were made, repudiates the contract and refuses to convey, the plaintiff has an equitable cause of action. . . . (citing authorities). The Court says in many of these cases that it would be against equity and good conscience to allow the bargainor to repudiate his contract, and thereby to reap the benefit of the bargainee's money and labor. . . . (p. 102-3). It seems to be settled by this Court that it may be done; and the cases cited show that where a party is induced to go upon land and put valuable improvements thereon, by the owner thereof, upon a parol promise to convey the same to the party putting the improvements on the land, and the owner afterwards refuses to convey, it is held by this Court to be a fraud upon the party so induced, and the Court will compel him to pay for such improvements."

In *Ballard v. Boyette,* 171 N. C., 25 (26), citing many authorities, it is written: "It is well settled that the owner of land who has entered into a contract of this character cannot repudiate the contract and retain the benefits which he has received under it, whether in the form of money paid upon the purchase price or of the enhanced value of the land by reason of improvements." *Carter v. Carter,* 182 N. C., 186; *Perry v. Norton,* 182 N. C., 585; *Eaton v. Doub,* 190 N. C., 14 (22-23).

The present case is in many respects similar to *Insurance Co. v. Cordon,* 208 N. C., 723, where it was held that delivery of a contract to convey land is essential to constitute it a valid and enforcible agreement. In that case *Jones v. Sandlin,* 160 N. C., 150 (154), is cited, where it is said: "The general rule is that if one is induced to improve land under

a promise to convey the same to him, which promise is void or voidable, and after the improvements are made he refuses to convey, the party thus disappointed shall have the benefit of the improvements to the extent that they increased the value of the land," citing authorities.

Rehder made a contract with Wallace that he could not perform. As he did not own the land the contract was impossible of performance. Wallace did not know this; in fact, Rehder wrote him "October 12, 1933—the farm is my property," and also told him that he owned the land. He induced Wallace to pay, as found by the jury, $278.29 on the land and make improvements in the sum of $200.00, on a contract which he could not perform. It is well settled in law and equity that a party injured can recover where a contract is brought about either by *suppressio veri* or concealment of the truth or *suggestio falsi*. *Isler v. Brown,* 196 N. C., 685 (686). Now Rehder contends that Wallace having failed to make the payments, the contract to convey was "null and void." Wallace is evicted under an unquestioned title. Suppose Wallace had complied with the contract as contended for by Rehder, he could convey him no title, as he had none. In law, equity, and good conscience, Rehder should pay the amount paid to him by Wallace on the land—$278.29, and improvements, $200.00; total, $478.29, less the rental value of the land for 1933 and 1934—$150.00. The jury has found that the fair rental value of the land for the years 1933 and 1934 was $150.00. This should be deducted from the $478.29 and judgment rendered for Wallace for $328.29. On all the evidence in the record, the answer to the fifth issue should have been "Yes," and the court below should have so instructed the jury.

Under the contract in controversy, Wallace was to pay 6% interest. In the contract it is stated further that if he failed to make these payments "same is null and void." Both in law and equity forfeitures and penalties have always been abhorred and are usually looked upon as oppressive and evidencing fraud and bad faith. In 8 R. C. L., part sec. 117, page 568, speaking to the subject, it is said: "It is impossible to lay down any abstract rule as to what may or may not be extravagant or unconscionable to insist upon, for each case must in great measure depend on its own particular facts and circumstances. Generally speaking, in determining the reasonableness of the amount, the court will take into consideration the relation of the parties, their situation, the absence or presence of fraud or oppression, and the purpose the agreement seeks to subserve."

For the reasons given, the judgment is modified and affirmed in accordance with this opinion.

Modified and affirmed.

STERLING CHADWICK v. W. B. BLADES AND THE TEXAS COMPANY, A CORPORATION.

(Filed 4 November, 1936.)

1. **Partition A a—**

Ordinarily, a tenant in common in realty or personalty is entitled to partition of the property. N. C. Code, 3213, 3215, 3253, 3255.

2. **Partition A b—**

Tenants in common may make a valid agreement, either at the time of the creation of the tenancy or afterwards, whereby the right to partition is modified or limited, provided the waiver of the right to partition is not for an unreasonable length of time.

3. **Same—Tenant held to have limited his remedy to sale of his interest and could not maintain proceedings for partition.**

The contract between tenants in common of a lease of a filling station provided that if one tenant desired to sell or terminate the joint operation of the filling station he should give the other tenant notice and a right to buy at a stipulated price for a period of fifteen days, and upon failure of the other tenant to purchase within the stipulated time, might sell to a third person. Thereafter, one tenant gave the other notice by letter, under the terms of the lease, and advised that if the right to buy were not exercised within the prescribed period he would sell to a third person. *Held:* Under the terms of the agreement, correctly interpreted by the correspondence, the dissatisfied tenant waived his right to institute proceedings for the sale of the lease for partition, but was limited to his right to sell his one-half interest to any person he chose, there being no unreasonable restriction upon alienation.

APPEAL by plaintiff petitioner Sterling Chadwick from *Frizzelle, J.*, at Chambers, 12 March, 1936. From CRAVEN. Affirmed.

This is a petition instituted by plaintiff against the defendants, and especially against W. B. Blades, before the clerk of the Superior Court of Craven County, N. C., to sell personal property for division. The defendant Blades denied the material allegations of the plaintiff's petition and as a further defense set up a contract between the plaintiff and Blades, dated 28 April, 1932. The material parts to be considered on this controversy are as follows (termed a lease contract between Blades of the first part and Chadwick of the second part):

"The said party of the first part has bargained, sold, and by these presents does bargain, sell, and convey to the said party of the second part a one-half undivided interest in and to that certain lease from J. B. Dawson and wife to W. B. Blades, said lease being recorded 28 April, 1932, in the records of the office of the Register of Deeds of Craven

County, in Book 302, page 447, together with all the rights, benefits, and privileges granted in said lease to the party of the first part by J. B. Dawson and wife, together with a one-half interest in all buildings erected on said property.

"This conveyance is subject, however, to all the conditions, provisions, and restrictions appearing in said lease, and for the purpose of making this instrument more definite, said lease referred to as being the lease from J. B. Dawson and wife to W. B. Blades, recorded in Book 302, page 447, is hereby made a part of this instrument in as full and ample manner as though the same was written herein, and it is the intent and purpose of this instrument to convey a one-half interest in the entire lease hereinbefore referred to. . . .

"It is further understood and agreed and made a part of the consideration of this instrument that should the said party of the second part at any time become dissatisfied or decide to sell or separate himself from the operation of said filling station located on the land hereinbefore referred to, then, and in that event, the said party of the first part shall have the right and privilege of buying the interest held by the party of the second part for the sum of One Thousand Dollars, should he so desire, but should the party of the first part refuse to buy and pay for said interest held by the party of the second part after the party of the second part giving the party of the first part fifteen days' notice of his desire to sell, then in that event, the said party of the second part shall have the privilege of selling or disposing of his interest in said lease hereinbefore referred to, to any other person he may desire."

Defendant Blades admitted he received the following letter:

"Beaufort, N. C.
"August 24, 1933.

"Mr. W. B. Blades,
"New Bern, N. C.

"Dear Mr. Blades: As provided in that certain lease or contract between you and me, dated April 28th, 1932, relative to service station in New Bern, N. C., I desire to sell my one-half interest in the same, and therefore, I am giving you the privilege of buying the same by paying the sum of $1,000 to me as provided under the terms of said lease. In the event that you do not buy the same at this price within the next 15 days, I shall dispose of my interest as it may appear to my best interest. This notice is given as provided for under the terms of the said lease. This notice I am sending by U. S. Postal Registered letter,

and I hope you will let me hear from you at once, or within 15 days after the same is received by you. With best wishes, I am, Yours truly,

STERLING CHADWICK."

Since the filing of the petition, the plaintiff petitioner has died and his administrator and heirs at law were made parties plaintiff and adopted the pleadings filed by Sterling Chadwick. There is no evidence on the record involving The Texas Co.

The clerk signed the judgment dismissing the petition, and plaintiffs excepted, assigned error, and appealed to the Superior Court. The court below rendered the following judgment: "This cause coming on to be heard and being heard before his Honor, J. Paul Frizzelle, resident judge of the Fifth Judicial District, at Chambers, upon the appeal of the petitioner from the judgment of the clerk of the Superior Court of Craven County, heretofore rendered in this cause, dismissing the petition of the petitioner; and it appearing to the court that the petitioner is not entitled to the relief prayed for, and that the judgment of the clerk of the Superior Court heretofore rendered in this cause, should be affirmed: It is hereupon considered, ordered, and adjudged that the judgment heretofore rendered by the clerk of Superior Court of Craven County in this cause be and the same is hereby affirmed, and the said petition be and the same is hereby dismissed, and the costs taxed against the petitioner. This 12 March, 1936. J. Paul Frizzelle, Resident Judge of the Fifth Judicial District."

The plaintiffs excepted to the judgment as signed and appealed to the Supreme Court.

C. R. Wheatly and W. B. R. Guion for plaintiffs.
R. E. Whitehurst for defendants.

CLARKSON, J. N. C. Code, 1935 (Michie), section 3213, is as follows: "*Partition of Real Property*—Partition is a special proceeding.—Partition under this chapter shall be by special proceeding and the procedure shall be the same in all respects as prescribed by law in special proceedings, except as modified herein."

Section 3215: "One or more persons claiming real estate as joint tenants or tenants in common may have partition by petition to the Superior Court."

Section 3253: "*Partition of Personal Property*—Personal property may be partitioned; commissioners appointed.—When any persons entitled as tenants in common, or joint tenants, of personal property desire to have a division of the same, they, or either of them, may file a petition in the Superior Court for that purpose; and the court, if it think

the petitioners entitled to relief, shall appoint three disinterested commissioners, who, being first duly sworn, shall proceed within twenty days after notice of their appointment to divide such property as nearly equal as possible among the tenants in common, or joint tenants."

Ordinarily, a petition can be filed before the clerk of the Superior Court to partition property either real or personal under the above provisions of the statute. *Barber v. Barber,* 195 N. C., 711. The petition was to sell for division. Section 3255.

In A. & E. Anno. Cases, Vol. 30, p. 402, note, citing a wealth of authorities, we find: "As a general rule it is a matter of right for a tenant in common to have partition. But it is well established that a cotenant may waive his right to partition by an express or implied agreement. . . . Equity will not award partition at the suit of one in violation of his own agreement, or in violation of a condition or restriction imposed on the estate by one through whom he claims. The objection to partition in such cases is in the nature of an estoppel. *Hill v. Reno,* 112 Ill., 154, 54 Am. Rep., 222. Statutes declaring that joint tenants or tenants in common shall have a right to partition were never intended to interfere with contract between such tenants modifying or limiting this otherwise incidental right, or to render it incompetent for parties to make such contracts, either at the time of the creation of the tenancy or afterwards. *Avery v. Payne,* 12 Mich., 540. . . . While the right to partition may be waived it seems that the waiver must be for a reasonable time. A contract among cotenants that neither they nor their heirs or assigns will ever institute proceedings for partition has been held void as an unreasonable restraint on the use and enjoyment of the land."

In the agreement between Chadwick and Blades, when Chadwick purchased the interest, it was clearly stated: "Then, in that event, the said party of the second part shall have the privilege of selling or disposing of his interest in said lease hereinbefore referred to, to any other person he may desire."

In the letter from Chadwick to Blades, he evidently fully realized the meaning of the contract and said: "In the event that you do not buy the same at this price within the next 15 days, I shall dispose of my interest as it may appear to my best interest."

The plaintiff agreed to the provisions of the lease from Dawson to Blades. He knew the kind of business and property he was purchasing—one-half undivided interest—and agreed with Blades that if he (Blades) did not purchase from him the interest in the lease he could dispose of it "to any other person he may desire." The contract is unusual, but so written, no doubt, on account of the nature of the business, and the lease agreement between Dawson and Blades, the provisions of which Chadwick agreed to; but we construe and do not make

contracts. We do not think it is void as restricting alienation. Chadwick could sell to anyone he may desire. In his letter he construed the agreement that his rights after Blades' refusal, was to dispose of his interest "as it may appear to my best interest," to sell under the contract—not partition.

For the reasons given, the judgment of the court below is

Affirmed.

STATE v. WILLIE TATE.

(Filed 4 November, 1936.)

1. Homicide G d—Testimony that witness identified accused prior to trial in his absence held competent as corroborating her testimony at trial.

Where a witness upon the trial identifies the accused as the man who shot and killed her companion and assaulted her, testimony that, prior to the trial, she told the sheriff, in the absence of the accused, that the voice of the accused, whom she had heard talking in the sheriff's office, was the voice of the man who had committed the crime, is competent as tending to corroborate her testimony at the trial.

2. Homicide G d—Testimony that accused was frequently seen prior to homicide at scene of the crime on lonely road held competent.

Testimony that accused had been frequently seen near the scene of the homicide on a lonely road at nighttime within a few weeks of the homicide, and that on one occasion about two weeks prior thereto he had fired a pistol at the witness as he passed the scene of the crime, *is held* competent as tending to identify the accused as the perpetrator of the crime.

3. Criminal Law G l—Where evidence shows that confession was voluntarily signed, an exception to its admission in evidence cannot be sustained.

Where there is no evidence that the confession of the accused, made to the officer having him in custody, was made under the influence of violence, or threats of violence, or under the inducement or hope of a reward, but the evidence shows that the confession was freely and voluntarily signed by accused, the confession is competent, and an exception to its admission cannot be sustained.

4. Homicide H c—

Where all the evidence discloses that the crime was murder in the first degree, it is not error for the trial court to fail to submit to the jury the question of defendant's guilt of lesser degrees of the crime.

APPEAL by defendant from *Frizzelle, J.*, at March Term, 1936, of PITT. No error.

This is a criminal action in which the defendant Willie Tate was tried on an indictment for the murder of Alexander Warren.

There was a verdict that the defendant is guilty of murder in the first degree.

From judgment that he suffer death by means of asphyxiation, as prescribed by statute, the defendant appealed to the Supreme Court, assigning errors in the trial.

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

S. O. Worthington for defendant.

CONNOR, J. At the trial of this action, the evidence showed that at about 11 o'clock on the night of 28 February, 1936, as he sat in his automobile which was parked on a public road near the city of Greenville, in Pitt County, N. C., Alexander Warren was shot and killed by a man who had suddenly opened the right-hand door of his automobile, and after shooting the deceased, had assaulted a young woman, who was sitting beside him at the time he was shot, with intent to commit rape.

Miss Helen Phelps, a witness for the State, testified as follows:

"I live in Greenville and am nineteen years of age. I knew Alexander Warren. He and I were engaged to be married to each other.

"I saw him on the night of 28 February, 1936. Caswell Brown and Miss Margaret Hardy came to my home at about 8:30 o'clock that night. I went with them to Dal Cox' filling station, where we met Alexander Warren. We rode around together in an automobile until about 10:30 o'clock, when Caswell Brown and Miss Hardy left us. Alex and I then drove in his automobile out on the road leading from the Falkland Highway to the Fair Grounds. He parked his automobile on this road, and turned on the radio. I was sitting beside him, on his right. As he was dialing the radio, the right-hand door of the automobile was opened suddenly, and a man put his arm around my shoulder. As he did so, I cried out, and Alex started to rise from under the wheel. At that moment, a pistol was fired. The man then dragged me from the automobile and assaulted me. He did not succeed in his attempt to rape me. I attempted to escape from him, and he kept saying to me, 'Be quiet. All right, all right.' An automobile drove up while he was attempting to rape me, and he ran off. I returned to the automobile and found Alex unconscious. I did not know that he was dead. I got into the automobile and pushed Alex from under the wheel. I then drove to Dal Cox' filling station. I there discovered that Alex was bleeding. Some one took me first to the sheriff's office, and then to the hospital. I showed the sheriff the scratches and bruises on my person and told him what had occurred.

"Several days after that night, at his request, I went to the sheriff's office. When I got there he told me to stand outside the door. The door was cracked. As I stood there I heard the voices of two persons who were talking in the office. I recognized the voice of one of these persons as the voice of the man who had shot Alexander Warren and assaulted me on the night of 28 February, 1936, and so informed the sheriff. It was the voice of the defendant. I then saw the defendant and identified him by his voice and by his physique as the man who shot Alexander Warren and assaulted me. I am positive that the defendant is the man."

S. A. Whitehurst, sheriff of Pitt County, a witness for the State, testified as follows:

"I was called about 11:40 o'clock on the night of 28 February, 1936. I went to the door and found Miss Phelps and some gentlemen in an automobile near the jail. She was very nervous. She told me that she had been assaulted. I went to Dal Cox' filling station, and there found the dead body of Alexander Warren. He had been shot in the right shoulder. The pistol ball had cut the artery above his heart, and had lodged in his ribs. I turned the body over to the undertaker and went back to the hospital, where I talked with Miss Phelps. I then went to the place where she said she had been assaulted. I found where an automobile had been parked on the road. I saw tracks of a man and a woman leading from the place where the automobile had been parked for a distance of about 126 yards. There were signs of a struggle along the path made by the tracks. I found articles of underclothing which appeared to have been torn from the person of a woman. When I saw Miss Phelps in the automobile that night at the jail, there were scratches and bruises on her person. Her clothing had been torn.

"A few days later—within a week—I arrested the defendant Willie Tate in Greenville, and took him to my office. I sent for Miss Phelps. When she came to my office, I requested her to stand outside the office near a door which was cracked or partly opened. While she stood there, I questioned the defendant and another man in my office. The defendant denied any knowledge of the crime. After she had heard his voice through the door, Miss Phelps told me that she recognized his voice as the voice of the man who had shot Alexander Warren and assaulted her on the night of 28 February, 1936. She said, 'Sheriff, that's the man.' I said, 'Let's be sure.' She replied, 'I am positive.' She was then taken into the presence of the defendant and said to him, 'You are the man who killed my companion and assaulted me on the night of 28 February, 1936.' He denied that he was the man, but subsequently admitted to me that he was present when Alexander Warren was shot and when Miss Phelps was assaulted.

"A few minutes after Miss Phelps had identified him as the man who had shot and killed Alexander Warren, the defendant made a statement to me, in the presence of Mr. George Clark and my secretary, Miss Barr. No threats were made or rewards offered to the defendant to induce him to make this statement. The statement was written down by Miss Barr and signed by the defendant."

The written statement signed by the defendant was offered in evidence by the State. In this statement the defendant said that on the night of 28 February, 1936, he, Otis Watson, and George Lee were at a tobacco barn near the public road leading from the Falkland Highway to the Fair Grounds; that their purpose was to rob persons who might pass along the road in automobiles; that when an automobile in which a man and woman were riding stopped on the road and parked, he, Otis Watson, and George Lee went to the automobile. He said: "George Lee opened the door and Otis Watson shot the man. George pulled the woman out of the automobile. He and I dragged her up the road a little piece. George tore her bloomers off. We both threw her down and tried to get on her. Otis saw an automobile coming and whistled. I ran across the field to the road. I fell into a ditch and got my shoes muddy. I then went home and washed my shoes."

There was evidence offered by the State tending to corroborate the testimony of both Miss Phelps and Sheriff Whitehurst both as to the commission of the crime charged in the indictment and as to the identity of the defendant as the man who committed the crime.

No evidence was offered by the defendant. On his appeal to this Court, he assigns as error: (1) The admission, over his objections, of evidence tending to show that Miss Phelps told the sheriff in the absence of the defendant that she recognized his voice, while he was talking in the sheriff's office, as the voice of the man who had shot and killed Alexander Warren on the night of 28 February, 1936; (2) The admission, over his objections, of evidence tending to show that the defendant had been frequently seen in the nighttime at or near the place of the homicide, during the two or three weeks preceding the homicide; and (3) The admission, over his objection, of the statement signed by the defendant, admitting that the defendant was present at the time the homicide was committed.

These assignments of error cannot be sustained. No reasons are given or authorities cited in the brief filed in this Court on behalf of the defendant in support of these assignments of error. Rule 28, Rules of Practice in the Supreme Court. 200 N. C., 831.

Miss Phelps at the trial identified the defendant as the man who committed the crime charged in the indictment. The testimony tending to show that she told the sheriff in the absence of the defendant that the

voice of the defendant, which she heard while he was talking in the sheriff's office, was the voice of the man who had shot and killed Alexander Warren on the night of 28 February, 1936, was competent as evidence tending to corroborate her testimony at the trial.

The testimony of Ike Anderson that he had seen the defendant at least ten or twelve times near the scene of the homicide, during the nighttime and within a few weeks prior to the homicide and that on one occasion about two weeks before the homicide the defendant had fired a pistol at the witness as he passed the scene of the homicide in his automobile, was competent as evidence tending to identify the defendant as the man who committed the crime charged in the indictment. See *State v. Miller,* 189 N. C., 695, 128 S. E., 1.

There was no evidence tending to show that the defendant made the statement which was offered in evidence by the State under the influence of violence or threats of violence, or under the inducement of a reward or the hope of a reward. The uncontradicted evidence shows that the statement was made, and when reduced to writing, was signed by the defendant, freely and voluntarily. For that reason it was competent as evidence against the defendant, although made by him to the officer who had him in custody. See *State v. Grier,* 203 N. C., 586, 166 S. E., 387.

All the evidence at the trial showed that the homicide was murder. There was no evidence tending to show that the homicide was manslaughter. There was therefore no error in the instruction of the court to the jury with respect to the verdict which they should return, on the facts as they should find them to be from all the evidence. See *State v. Satterfield,* 207 N. C., 118, 176 S. E., 466.

The judgment is affirmed.

No error.

IN RE MRS. MARY Y. BARKER.

(Filed 4 November, 1936.)

1. Clerks of Court A b—Legislature has power to provide that assistant clerks may perform statutory duties of clerks.

While the clerk of the Superior Court is a constitutional officer, the duties of clerks are prescribed by statute, with the exception of the duty to fill vacancies in the office of justice of the peace by appointment, and the Legislature, as creator of the statutory duties of clerks, may prescribe that such duties may be performed by assistant clerks, N. C. Code, 934 (a), *et seq.*, ch. 32, Public Laws of 1921, and an attack upon the appointment of a guardian for an incompetent by an assistant clerk on the ground that the statute delegating the powers of clerks to assistant clerks is unconstitutional is untenable.

2. Insane Persons C a—Service of summons is not necessary to appointment of guardian for incompetent.

Where a person has been adjudged an incompetent at a hearing upon a petition and answer properly filed after service of notice and a copy of the petition upon the alleged incompetent, N. C. Code, 2285, the service of summons upon the incompetent or her guardian *ad litem* is not necessary to the appointment of a guardian for the incompetent, since the service of notice and petition under the provisions of the statute serves every function of a summons, and since the acceptance of service or notice and the filing of an answer to the petition by the guardian *ad litem* waives any further service of summons or notice.

3. Same—Failure to notify relatives of alleged incompetent of hearing is an irregularity, but does not render appointment of guardian void.

While the failure to notify the relatives of an alleged incompetent of the hearing to determine her competency is an irregularity, C. S., 2156, such irregularity does not render the appointment of a guardian in the proceedings void, but gives the relatives an opportunity to attack such appointment, and where, upon such attack, the court finds upon supporting evidence that the guardian appointed is a fit and suitable person, the relatives are not entitled to the removal of the guardian.

4. Same: Attorney and Client C b—Evidence held to support finding that same attorney did not act for adversary parties.

Movants attacked the appointment of a guardian for an incompetent in this proceeding on the ground that the same attorney acted for both the guardian *ad litem* and the original petitioner who was later appointed guardian. The trial court found upon supporting evidence that the attorney for the original petitioner merely assisted the guardian *ad litem* in drawing the answer to the petition as a matter of courtesy, that the answer drawn denied all the material allegations of the petition and fully protected the rights of the alleged incompetent, and that at no time did the attorney for petitioner act or attempt to act as counsel for the alleged incompetent or her guardian *ad litem*. *Held:* The findings, supported by evidence, sustain the court's ruling refusing to remove the guardian on the ground that the same attorney acted for both the petitioner and the guardian *ad litem*.

5. Evidence H a—Testimony of declarations in this case held properly excluded as hearsay.

The relatives of an incompetent moved for the removal of the guardian on the ground that he was supporting the incompetent from her own estate while under a personal obligation to support her under the terms of a prior contract with her. The only evidence of the alleged contract offered was testimony that the wife of the guardian had stated prior to her death that she and her husband were to take care of the incompetent for her life in consideration of certain real estate theretofore deeded to them, and testimony that the incompetent, prior to the adjudication, had stated that she was to be taken care of by the guardian and his wife as long as she lived. *Held:* The evidence was properly excluded upon objection as hearsay, the testimony not coming within any recognized exception to the general rule.

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

APPEAL by the petitioners and movants in the cause from *Alley, J.*, at May Term, 1936, of ROWAN. Affirmed.

Tillett, Tillett & Kennedy for petitioners and movants, appellants.
Stahle Linn and T. G. Furr for respondent, appellee.

SCHENCK, J. This is an appeal by the petitioners and movants from a judgment entered by the judge presiding affirming judgment of the clerk of the Superior Court denying the petition and motion in the cause to have the appointment of E. L. McAlister as guardian of Mrs. Mary Y. Barker declared void, and to remove him as guardian and have another guardian or trustee appointed for Mrs. Barker in his stead.

It is admitted by the parties that the hearing preceding the appointment of the guardian was conducted by Blanche Lampert, assistant clerk of the Superior Court of Rowan County, and that the order appointing such guardian was made by said assistant clerk. The petitioners assail by proper exceptive assignments of error this appointment and contend that it is void for the reason that sections 934(a) *et seq.*, N. C. Code of 1935 (Michie) (Chap. 32, Public Laws 1921), authorizing the appointment of assistant clerks of the Superior Court contravenes the Constitution of North Carolina. It is the contention of the appellant that since the office of clerk of the Superior Court is a constitutional office, the powers and duties of that office cannot be delegated or given to another by legislative enactment. Such might be true if such powers and duties were given to and fixed for the clerks of the Superior Court by the Constitution, but not so when such powers and duties exist only by virtue of statute. Powers and duties which are creatures of the legislature may be taken away, modified, or given concurrently to others by the same power that creates them. The creatures are not beyond the control of their creator. An examination of the Constitution of North Carolina reveals the fact that the only power or duty of a clerk of the Superior Court mentioned therein is in Article IV, section 28, which provides that vacancies in the office of justice of the peace shall be filled by appointment by the clerk of the Superior Court, and this function of the office, we apprehend, must still be performed by the clerk alone. Many of the powers and duties of clerks of the Superior Court are enumerated in section 938 of the Consolidated Statutes. These are given and fixed by legislative enactment, and there is no constitutional barrier to the Legislature's taking away, adding to, or modifying them; or authorizing them to be exercised and performed by another. The Legislature exercised this latter authority when it provided that upon appointment and qualification of an assistant clerk he "shall be as fully authorized and empowered to perform all the duties and functions of the office of clerk of the Superior Court as the clerk himself."

We are of the opinion, and so hold, that the statute, ch. 32, Public Laws 1921, authorizing the appointment of assistant clerks of the Superior Court and authorizing them to perform the duties and functions of the office of the clerk of the Superior Court was a valid and constitutional exercise of the legislative power of the General Assembly of North Carolina, and that the assignments of error assailing such enactment were properly overruled.

The appellants assail by proper assignments of error the proceeding in which the guardian was appointed for the reason that no summons was issued and served upon the alleged incompetent or her guardian *ad litem*. Section 2285, N. C. Code of 1935 (Michie), under which this proceeding was instituted, provides that "any person, in behalf of one who is deemed an . . . incompetent from want of understanding to manage his own affairs . . . may file a petition before the clerk," and, after such petition has been filed, the clerk, upon notice to the supposed incompetent, shall issue an order to the sheriff commanding him to summon a jury of twelve men to inquire into the state of such alleged incompetent. The record discloses that such a petition was filed and such a notice signed by the clerk was served on Mrs. Mary Y. Barker, the alleged incompetent, by the sheriff of Rowan County, and that she was thereby notified to appear before the clerk at the time and place named, if she so elected, to present evidence touching her competency to manage her affairs, and to show cause, if any she had, why the prayer for the appointment of a guardian of her affairs contained in the petition should not be granted. The notice served on Mrs. Barker was accompanied by a copy of the petition.

The question as to whether this proceeding be *ex parte* or adverse is immaterial, since the effect of the statute (C. S., 2285) is to provide that the proceeding may be commenced by the filing of the petition, and that the inquisition may be held upon the notice therein provided being served upon the alleged incompetent, thereby dispensing with the necessity of issuing a summons. The notice to the incompetent to appear at a time and place named to present evidence and show cause, if any she could, why she should not be declared incompetent served every function of a summons.

Any further summons or notice was waived by the guardian *ad litem* not only by the following words: "I do hereby accept service of the petition in this cause, and do hereby waive any and all other notice of service thereof," but also by the actual filing of an answer to the petition.

The assignments of error based upon refusal of the court to remove the guardian for the reason that no summons had been issued and served were properly overruled.

The appellants by proper assignments of error assail the appointment of E. L. McAlister as guardian for Mrs. Barker because the clerk failed to notify the relatives of the alleged incompetent of the proposed hearing to determine her competency to attend to her own affairs, as is provided in C. S., 2156. While this failure may have constituted an irregularity, it did not render the appointment of the guardian void. *In re Parker,* 144 N. C., 170. The effect of the irregularity was to prevent the appointment from being conclusive as to such relatives, and to give to them an opportunity to attack such appointment which they, as movants in this cause, have done. However, the court, upon consideration of the evidence offered, has found that the guardian appointed is a fit and suitable person, and that the movants have failed to show sufficient grounds for his removal. These assignments of error cannot be sustained.

The appellants by proper assignments of error assail the appointment of the guardian upon the alleged ground that the same attorney who acted for the original petitioner, who was appointed guardian, acted likewise for the guardian *ad litem.* The judge made the following additional finding of fact: "4. That in the drafting of said answer the said Ira R. Swicegood, guardian *ad litem,* received the assistance of T. G. Furr, Esq., attorney for E. L. McAlister, the said Ira R. Swicegood and T. G. Furr occupying adjoining offices; that such assistance as was rendered by the said T. G. Furr, Esq., was done as a matter of professional courtesy, common and general in the practice of the profession, and at no time did the said T. G. Furr, Esq., act, or attempt to act, as counsel for the said Ira R. Swicegood, guardian *ad litem,* or his ward, Mrs. Mary Y. Barker, and the court further finds as a fact that the answer of the said guardian *ad litem* is a proper answer in the cause and fully protects her rights and interests." The answer filed by the guardian *ad litem,* which denied every material allegation of the original petition and prayed "that the relief demanded in the petition be denied," together with the evidence in the cause, was sufficient to support the foregoing finding of fact by the judge, and his finding is therefore affirmed, and the assignments of error based upon the contention that the guardian *ad litem* acted for both parties are overruled.

The appellants by proper assignments of error assail the appointment of E. L. McAlister as guardian of Mrs. Mary Y. Barker upon the ground that he is disqualified to act as such guardian by reason of the existence of a contract between him and Mrs. Barker whereby he is obligated to support her during her life, and that he, as guardian, is now supporting her out of her own funds. Practically the only evidence offered of the existence of such contract was that tending to show that Mrs. Carrie Young McAlister, wife of E. L. McAlister, prior to her death in 1931, had stated that she and her husband were to take care of

Mrs. Barker as long as she lived in consideration of certain real estate deeded to her by Mrs. Barker, and that Mrs. Barker had stated that she was to be taken care of by Mr. and Mrs. McAlister as long as she lived. Upon objection, this evidence was excluded. This ruling was manifestly correct, since the evidence was clearly hearsay, and comes within none of the recognized exceptions to the rule that hearsay evidence is inadmissible. These assignments of error were properly overruled.

We have considered the 34 assignments of error, covering the 69 exceptions in the record, and are of the opinion that there was sufficient evidence to support the findings of fact by the clerk, and the additional findings of fact by the judge, and that these findings support the conclusion and judgment of his Honor "that the said E. L. McAlister is the duly and regularly appointed guardian for Mary Y. Barker in a proceeding properly instituted and conducted, and that the said E. L. McAlister is a fit and suitable person to act as said guardian and has properly discharged his duties as such."

The judgment of the Superior Court is

Affirmed.

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

IN RE ESTATE OF H. A. SMITH, DECEASED.

(Filed 4 November, 1936.)

1. Executors and Administrators A a—

The nominee of deceased's nearest of kin will be appointed administrator, if a fit and suitable person, as against those of lesser degree of kinship, provided that no person of the same class as the next of kin renouncing the right files a personal application for appointment. C. S., 6.

2. Same—

Construing C. S., 20, 16, 15, together, the legislative intent is manifest that six months after the death of testator is a reasonable time within which application should be made, in proper instances, for appointment of administrator *c. t. a.*

3. Same—Legatee failing to apply for appointment within six months after testator's death waives right to be appointed administrator c. t. a.

Where a legatee entitled to preferential appointment as administrator *c. t. a.*, under the provisions of C. S., 22, as amended by ch. 63, Public Laws of 1923, fails to object to the appointment of the brother of testator as administrator *c. t. a.*, but waits until after the death of the administrator appointed more than a year after testator's death before asserting

his right and renouncing in favor of a third person, the legatee has waived his right, under the statute, and his nominee is not entitled to appointment as against the nominee of the surviving sisters of testator, the legatee's right under the statute, which is not affected by the filing of a caveat, accruing at the time of the death of the testator, and not at the time of the death of the testator's brother, since his right to appointment under the statute is prior to the right of testator's brother.

4. **Same—**

The right of nomination and substitution is confined to those themselves qualified for appointment, and where a legatee has waived his right to be appointed administrator *c. t. a.* by failing to apply within a reasonable time, he also waives his right of nomination and substitution.

APPEAL by petitioner, F. H. Bailey, from *Alley, J.*, at May Term, 1936, of IREDELL. Affirmed.

This was a controversy over the appointment of an administrator *de bonis non, cum testamento annexo,* of the estate of H. A. Smith, deceased.

H. A. Smith died 16 October, 1934, leaving a last will and testament containing a bequest to James F. Brawley of a substantial portion of his estate. No executor was named in the will. There was no widow or child of the testator, but he left him surviving a brother, two sisters, and nephews and nieces. The clerk of the Superior Court appointed S. R. Smith, the brother of the testator, administrator *c. t. a.*, who, after qualifying and entering upon the administration of the estate, died in February, 1936. Thereupon, F. H. Bailey, a nephew of the deceased testator, applied for letters of administration, filing with his application a written request from James F. Brawley, legatee, that he be appointed. F. H. Bailey's sisters also joined him in this request. Shortly thereafter the two surviving sisters of the deceased filed a renunciation of their right to administer, and nominated J. L. McLain, a stranger in blood, as administrator in their stead, and in this last request other nieces and nephews joined.

Caveat to the will of H. A. Smith, on the ground of mental incapacity and undue influence, was filed in December, 1934, by a majority of the distributees of the estate, and the issue thus raised is still pending in the Superior Court of Iredell County.

The clerk found that J. L. McLain was a "fit, suitable, and proper person to be appointed administrator of said estate"; that F. H. Bailey was a resident of North Carolina and was a "capable and fit person to be appointed administrator of an estate," and adjudged that the two sisters had prior right to letters of administration, were of nearer degree of kinship to the deceased than F. H. Bailey; that James F. Brawley did not have the right to name the person to act as administrator, and that

the two sisters, the next of kin, had renounced their right to qualify in favor of J. L. McLain, and thereupon appointed said McLain administrator *d. b. n., c. t. a.,* of said estate.

Upon appeal to the judge, the order of the clerk was confirmed, and the petitioner, F. H. Bailey, appealed to this Court.

Zeb V. Turlington for petitioner, appellant.
Raymer & Raymer and Grant & Grant for appellees.

DEVIN, J. The statute authorizing clerks of the Superior Court to grant letters of administration, both in cases of intestacy and with the will annexed, prescribes the order in which persons shall be entitled to be granted letters of administration in case of intestacy and sets out the classes having priority or preferential right to the appointment: (1) The husband or widow; (2) the next of kin in the order of their degree; (3) the most competent creditor; (4) any other competent person. C. S., 6.

There is no express provision in the statute requiring the clerk to recognize the right of one belonging to a preferred class to renounce his right to qualify and at the same time nominate another for appointment in his stead, but ever since 1792 (*Ritchie v. McAuslin,* 2 N. C., 220) the courts have so interpreted the statutes and rules of procedure as to give sanction to the right of nomination and substitution, and have sustained the right of the nominee of one preferentially entitled to the appointment, when such nominee is in other respects fit, suitable, and competent, and when the person nominating is himself competent by reason of residence, age, and capacity to act. This construction of the pertinent statutes has been uniformily applied by the courts and has become firmly embedded in the law of administration in North Carolina. *Ritchie v. McAuslin, supra; Carthey v. Webb,* 6 N. C., 268; *Smith v. Munroe,* 23 N. C., 345; *Pearce v. Castrix,* 53 N. C., 72; *Wallis v. Wallis,* 60 N. C., 78; *Hughes v. Pipkin,* 61 N. C., 4; *Little v. Berry,* 94 N. C., 433; *Williams v. Neville,* 108 N. C., 559; *In re Meyers,* 113 N. C., 545; *Boynton v. Heartt,* 158 N. C., 488; *In re Jones,* 177 N. C., 337; Croswell Executors and Administrators, p. 92; 4 Schouler on Wills, Executors; and Administrators, sec. 1647.

These authorities sustain the right of the clerk to appoint the person designated by those preferentially entitled as against one of lesser degree of kinship, or of lower classification under the statute. *Little v. Berry, supra.*

The rule permitting those in a preferred class to nominate the appointee, however, will not prevail against the personal application of one in the same class or equal degree of kinship. *In re Jones, supra.*

But the appellant contends that the nominee of the sisters of decedent was not entitled to the appointment for the reason that in this case there was a will, and that the right to administer is controlled by C. S., 22, as amended by chapter 63, Acts of 1923.

This statute, as amended, reads as follows: "If there is no executor appointed in the will, or if, at any time, by reason of death, . . . removal by order of the court, or on any other account, there is no executor qualified to act, the clerk of the Superior Court shall issue letters of administration with the will annexed to one or more of the legatees named in the said will; but if no legatee qualifies, then letters may be issued to some suitable person or persons in the order prescribed in this chapter."

Appellant contends that, applying the provisions of this statute, even if the renunciation of the sisters did not have the effect of leaving petitioner, F. H. Bailey, entitled as next in degree of kinship, James F. Brawley, the sole legatee under the will, was the only one in the first preferred class fixed by this statute, and that his written request for the appointment, in his stead, of F. H. Bailey, found by the clerk to be competent, should be binding on the clerk.

This view would doubtless have prevailed if the legatee had applied for letters of administration at the time of the probate of the will in common form. But he acquiesced in the appointment of another (or made no objection thereto so far as the record shows), and now, after more than a year, and after the death of the administrator *c. t. a.* appointed by the court, for the first time seeks to assert his priority or preferential claim. C. S., 15, provides that: "If no person entitled to administer applies for letters of administration on the estate of a decedent within six months from his death, then the clerk may, in his discretion, deem all prior rights renounced and appoint some suitable person to administer such estate."

While this statute presumably refers to the estate of intestates, C. S., 20, provides for the appointment of the public administrator "when the period of six months has elapsed from the death of any decedent and no letters testamentary or letters of administration have been applied for." And the last clause of C. S., 16, provides that a coexecutor not qualifying within thirty days after the qualification of the other executor shall lose his right.

Construing these statutes together, and keeping in mind that the chief purpose of the law is to see that some competent person shall promptly administer estates of deceased persons, it is persuasive that it was the legislative intent that six months from the death of the testator should ordinarily be regarded as a reasonable time within which to apply for letters *c. t. a.*, and that by analogy the same rule should apply to all

estates. But, regardless of statutory provision, it has been held that unreasonable delay in qualifying would be deemed to constitute a waiver of prior right. *Hughes v. Pipkin, supra; Stoker v. Kendall,* 44 N. C., 242; *Williams v. Neville, supra; Garrison v. Cox,* 95 N. C., 353.

It is true in *In re Jones, supra* (a case of testacy, but decided prior to the Act of 1923), it was held that failure to apply in six months would not, under the circumstances of that case, prevent the appointment of one of the next of kin. There the testator devised his property to his wife for life. Some years later she died, and one of the next of kin applied for letters of administration *d. b. n., c. t. a.,* and his appointment was sustained by this Court, the six months period being held not to apply because the right of the next of kin to qualify did not accrue until the death of the widow.

But here, under the statute, C. S., 22, no executor having been named in the will, the legatee was given prior right. He could have availed himself of the provisions of the statute by applying for the appointment immediately upon the probate of the will in common form. His right to a preference under the statute accrued at that time. Having failed for more than a year to assert or claim any right under the Act of 1923, it was properly held that his request now for the appointment of another to act as administrator would not entitle his nominee to the appointment. The right to nominate is confined to those who are themselves qualified. *Boynton v. Heartt, supra.*

Nor is the appellant helped by the rule laid down in *In re Bailey,* 141 N. C., 193, that one having prior right to administer would not be deemed to have forfeited his right by not applying within six months, where no other person had been appointed before he applies; for, here, an administrator *c. t. a.* was appointed shortly after the probate of the will, and served as such for more than a year without objection from appellant. *Hill v. Alspaugh,* 72 N. C., 402; *Garrison v. Cox, supra; Withrow v. DePriest,* 119 N. C., 541; *In re Neal,* 182 N. C., 405; *Brooks v. Clement Co.,* 201 N. C., 768. "Where the next of kin are guilty of laches as to the time of making application, the county court may exercise a sound discretion in the premises." *Stoker v. Kendall, supra.*

The question as to the present right to be appointed administrator of the estate is not affected by the filing of a caveat to the will. *In re Meyers, supra.*

Affirmed.

MRS. RUTH TURNER v. W. L. LIPE.

(Filed 4 November, 1936.)

1. **Automobiles C b: C m—Driving into obstructed intersection at speed in excess of 15 miles per hour is negligence per se.**

Evidence that defendant drove his car into an intersection of highways at a speed in excess of 15 miles per hour when his vision of the intersecting highway was obstructed by growing corn, and that his speed was a proximate cause of the accident in suit, is sufficient to overrule his motion as of nonsuit, speed in excess of 15 miles per hour, under the circumstances, being in violation of statute, C. S., 2618, and constituting negligence *per se.*

2. **Automobiles C i—**

Evidence that defendant drove his car into an obstructed intersection at a speed in excess of fifteen miles per hour, although sufficient to establish negligence *per se,* is insufficient to support an issue relating to wanton negligence.

3. **Appeal and Error J g—**

Where it is determined on appeal that an issue of wanton negligence submitted was not supported by the evidence, alleged error in the judgment of the court relating to plaintiff's right to execution against the person of defendant based upon the jury's answer to the issue, need not be considered.

APPEAL by defendant from *Sink, J.,* at May Term, 1936, of DAVIE. Error.

This is an action to recover damages for personal injuries which the plaintiff suffered as the result of a collision between an automobile in which she was riding as a guest of the driver and an automobile which the defendant was driving.

The collision occurred on 10 August, 1935, at an intersection of two highways in Rowan County, North Carolina.

It is alleged in the complaint that the collision between the two automobiles and the resulting injuries to the plaintiff were caused by the negligence of the defendant on entering the intersection from a northerly direction, at an unlawful rate of speed, and in his failure to exercise due care for the safety of the plaintiff, who approached the intersection from an easterly direction, and that such negligence was willful and wanton. These allegations were denied in the answer.

At the trial, the evidence for the plaintiff tended to show that when the automobile in which she was riding as the guest of the driver approached the intersection from an easterly direction, the driver stopped the automobile, and before entering the intersection, looked up and down

the intersecting highway, which runs north and south; that she could see for a distance of about 200 feet to the north; that she did not see any automobile approaching the intersection from the north, and started across the intersecting highway at a low rate of speed; that when she was a little more than half way across the highway, which is 16 to 18 feet wide, the automobile was struck by an automobile which the defendant was driving, on its right side, and was knocked about 25 feet into a field, where it turned over, with the result that plaintiff suffered serious, painful, and permanent injuries to her person; and that defendant entered the intersection at a speed greatly in excess of 15 miles per hour, and without keeping a lookout for other automobiles or other vehicles approaching the intersection from an easterly direction.

The evidence for the defendant tended to show that when he entered the intersection he was driving his automobile at a speed not in excess of 15 miles per hour, and that his failure to see the automobile in which the plaintiff was riding, as it approached the intersection from an easterly direction, was due to the fact that corn—high and thick—was growing in the fields adjoining the intersecting highways.

The issues submitted to the jury were answered as follows:

"1. Was the plaintiff injured and damaged by the negligence of the defendant, as alleged in the complaint? Answer: 'Yes.'

"2. If so, were the acts of the defendant complained of committed in a wanton manner, as alleged in the complaint? Answer: 'Yes.'

"3. What amount of damages, if any, is the plaintiff entitled to recover of the defendant? Answer: '$3,000.'"

In apt time the defendant objected to the submission to the jury of the second issue, and excepted to the refusal of the court to sustain his objection.

From judgment that plaintiff recover of the defendant the sum of $3,000, and the costs of the action, and that if execution against the property of the defendant shall be returned unsatisfied in whole or in part, execution be issued against the person of the defendant, and that the defendant be held under said execution until he pays the judgment or is discharged according to law, the defendant appealed to the Supreme Court, assigning error in the judgment.

Grant & Grant and Clement & Clement for plaintiff.
B. C. Brock and Walter H. Woodson for defendant.

CONNOR, J. There was evidence at the trial of this action which was sufficient to support the allegations of the complaint which constitute the cause of action on which plaintiff demands judgment against the defendant.

The evidence for the plaintiff tended to show that the defendant, while driving his automobile, traversed the intersection of two highways in this State at a speed in excess of fifteen miles per hour, when his view of the highway which intersected the highway on which he was driving was obstructed. This was in violation of the statute (C. S., 2618), and was negligence *per se*. *Albritton v. Hill,* 190 N. C., 429, 130 S. E., 5. There was also evidence for the plaintiff tending to show that this negligence was the proximate cause of the collision between the defendant's automobile and the automobile in which the plaintiff was riding, and of her resulting injuries. This evidence, although contradicted by evidence for the defendant, was properly submitted to the jury.

There was no evidence, however, tending to show that the negligence of the defendant, as shown by the evidence and as found by the jury, was wanton, as that word has been defined by this Court. In *Bailey v. R. R.,* 149 N. C., 169, 62 S. E., 912, it is said:

"The term wanton negligence (whether correctly joined it is needless to discuss) always implies something more than a negligent act. This Court has said that the word 'wanton' implies turpitude and that the act is committed or omitted of willful, wicked purpose; that the term 'willfully' implies that the act is done knowingly and of stubborn purpose, but not of malice. *S. v. Massey,* 97 N. C., 468; *S. v. Brigman,* 94 N. C., 888."

In the absence of any evidence tending to support an affirmative answer to the second issue, it was error to submit that issue, at least without a peremptory instruction to the jury to answer the issue "No."

Whether or not, if there had been evidence tending to show that the negligence of the defendant was wanton, the answer to the second issue was sufficient to support the order that in the event execution to enforce the judgment against the property of the defendant should be returned unsatisfied in whole or in part, execution should be issued against his person, need not be decided in the instant case. See *Foster v. Hyman,* 197 N. C., 189, 148 S. E., 36, where the issue submitted to the jury and answered in the affirmative included the word "willful."

There is error in the judgment containing an order that if execution against the property of the defendant should be returned unsatisfied, in whole or in part, execution should be issued against his person. This order must be stricken from the judgment. It is so ordered.

To that end, the action is remanded to the Superior Court of Davie County.

Error.

MRS. MABEL POOVEY *v.* CITY OF HICKORY.

(Filed 4 November, 1936.)

1. **Appeal and Error J a—**

A motion, made in writing before time for answering expires, that certain paragraphs of the complaint be stricken out under C. S., 537, is made as a matter of right, and the court's order granting the motion is reviewable even though the order recites that the motion was allowed in the court's discretion.

2. **Pleadings I a—**

A motion to strike out under C. S., 537, does not challenge the sufficiency of the complaint to state a cause of action, but concedes that sufficient facts are alleged, and presents only the propriety, relevancy, or materiality of the allegations sought to be stricken out.

3. **Municipal Corporations E f: Nuisance B a—A nuisance may be abated in same action in which damages are recovered.**

An action to recover damages to plaintiff's land caused by the deposit of raw sewage thereon from defendant municipality's sewage disposal plant prior to the institution of the action may be joined with suit to enjoin the future maintenance and operation of the plant after the lapse of a reasonable time for the installation of an adequate plant, or for permanent damage for injuries sustained by the municipality's taking of the property under the power of eminent domain.

4. **Same: Pleadings I a—Allegations held material to plaintiff's right to relief prayed for and were improperly stricken from complaint.**

In an action to enjoin the maintenance and operation of defendant municipality's sewage disposal plant after the lapse of a reasonable time for the installation of an adequate plant, allegations that the population of defendant municipality had greatly increased and would continue to increase, and that attendance upon schools and colleges located in the city had greatly increased since the construction of the sewage disposal plant, rendering the plant inadequate, and that the increased value of taxable property within the city rendered the city financially able to build an adequate plant, are relevant and material allegations upon the question of plaintiff's right to the injunctive relief prayed for, and such allegations are improperly stricken out on defendant's motion under C. S., 537.

APPEAL by plaintiff from *Clement, J.*, at May Term, 1936, of CATAWBA. Reversed.

This action was heard on defendant's motion that certain paragraphs be stricken from the complaint on the ground that the allegations contained in said paragraphs are improper, irrelevant, and immaterial, and are collateral matters which could not be evidentiary on the trial of the action, and if allowed to be read in the presence of the jury might be

used to the prejudice of the rights of the defendant. The motion was in writing and was made before the time allowed by statute for answering the complaint had expired. The motion was allowed.

From the order that certain designated paragraphs be stricken from the complaint, in accordance with the motion of the defendant, the plaintiff appealed to the Supreme Court, assigning errors in the order.

Chas. W. Bagby and C. David Swift for plaintiff.
R. H. Shuford for defendant.

CONNOR, J. It appears from a recital in the order from which the plaintiff has appealed to this Court, that the motion of the defendant was allowed by the court in its discretion. The motion was made in writing before the time allowed by statute for answering the complaint had expired. The motion was not addressed to the discretion of the court, but was made by the defendant as a matter of right. The order allowing the motion is therefore subject to review by this Court on plaintiff's appeal, notwithstanding the recital therein that the motion was allowed by the court in its discretion. C. S., 537. *Hosiery Mill v. Hosiery Mills,* 198 N. C., 596, 152 S. E., 794.

The sufficiency of the allegations of a complaint to constitute a cause of action on which the plaintiff is entitled to relief is not presented by a motion made by the defendant that certain designated allegations be stricken from the complaint, on the ground that said allegations are improper, irrelevant, and immaterial. That question can be presented only by a demurrer to the complaint, either in writing or *ore tenus.* C. S., 511 (6). The motion under the provisions of C. S., 537, concedes that there are facts alleged in the complaint which are sufficient to constitute a cause of action. Only the propriety, relevancy, or materiality of the allegations sought to be stricken from the complaint are brought in question by the motion, which ought to be allowed only when the allegations are clearly improper, irrelevant, or immaterial. Ordinarily, the plaintiff has the right to state his cause of action in his complaint, as he sees fit or as he may be advised. The allegations may be admitted or denied by the defendant in his answer.

It is alleged in the complaint in this action that the plaintiff owns a tract or parcel of land situate near the corporate limits of the defendant; that a creek runs by or through plaintiff's land; that for several years, raw sewage has been and is now discharged by the defendant from its sewage disposal plant into this creek; that the waters of this creek, which flow by or through plaintiff's land, are polluted by this raw sewage; and that by reason of the deposit of this raw sewage on or near plaintiff's land, plaintiff has suffered and will continue to suffer injuries

to her property which have resulted and will continue to result in damages to the plaintiff in large sums.

It is further alleged in the complaint that the sewage disposal plant, which is now and which has been maintained by the defendant for several years, is wholly inadequate for the disposal of the raw sewage collected by the defendant within its corporate limits.

Two causes of action are alleged in the complaint.

On her first cause of action, the plaintiff prays judgment that she recover of the defendant damages for the injuries to her property which she has suffered prior to the commencement of this action by reason of the maintenance and operation by the defendant of its inadequate sewage disposal plant, and that the defendant be restrained from further maintaining and operating its sewage disposal plant, after the lapse of a sufficient time for the defendant to make the said plant adequate for the disposal of sewage collected by defendant within its corporate limits, without injury to the land of the plaintiff.

On her second cause of action, the plaintiff prays judgment that she recover of the defendant damages for permanent injuries to her property which have resulted and will result from the taking of said property by the defendant under its right of eminent domain.

On the facts alleged in her complaint the plaintiff is entitled to the relief which she seeks on both the causes of action alleged therein. See *Anderson v. Waynesville,* 203 N. C., 37, 164 S. E., 583. In the opinion in that case it is said that the right to recover damages for injuries done prior to the commencement of the action is not essentially inconsistent with a subsequent injunction. "A nuisance may be abated in the same action in which damages are recovered." Hale on Torts, 466.

In the paragraphs which have been ordered stricken from the complaint it is alleged in substance that since the construction of the sewage disposal plant which the defendant now maintains and operates within its corporate limits, the population of the defendant has greatly increased and will continue to increase; that schools, colleges, and churches are located within the corporate limits of the defendant, and that attendance upon these schools, colleges, and churches has greatly increased since the construction by the defendant of the sewage disposal plant which it now maintains and operates, and that such attendance will continue to increase; that by reason of the increased value of the taxable property, real and personal, situate within its corporate limits, the defendant is now able financially to construct, maintain, and operate an adequate sewage disposal plant, by levying a small tax on its property owners; and that plaintiff's land has been rendered undesirable for residential purposes by the maintenance and operation by the defendant of its present inadequate sewage disposal plant. These allegations, although

made in language which the defendant thinks is somewhat oratorical, are not improper, irrelevant, or immaterial, nor can it be held that as a matter of law the reading of these allegations to the court, at the trial of the action, and in the presence of the jury, will be prejudicial to the rights of the defendant.

In his brief filed in this Court, the learned counsel for the defendant says that "the defendant under other circumstances would freely admit the truth of the fine things said about its growth, development, and advantages." In reply it may be said that there are no circumstances under which the truth can be hurtful to anyone.

There is error in the order. It is

Reversed.

STATE v. MARSHALL PUETT.

(Filed 4 November, 1936.)

1. **Criminal Law I c: L f—**

   Remarks of the court in the presence of the jury which tend to discredit a witness will be held for reversible error upon appeal of the injured party, but when such remarks are made during defendant's cross-examination of a State's witness, defendant cannot be prejudiced thereby and his exception thereto cannot be sustained. C. S., 564.

2. **Homicide G c—Dying declarations must have been made by person for whose death defendant is being prosecuted.**

   The rule permitting testimony of dying declarations is an exception to the hearsay rule, and such exception does not extend to the admission of a dying declaration of a person whose death is not the basis of the prosecution, although he was mortally injured in the same fight in which the person was killed for whose death defendant is being prosecuted, and although such declarations relate to the fatal combat.

3. **Criminal Law I g—**

   An exception to the charge cannot be sustained when the charge is not prejudicial when read contextually as a whole.

4. **Same—**

   The failure of the charge to contain certain contentions of defendant will not be held for error in the absence of an apt request by defendant for such special instructions.

APPEAL by the defendant from *Clement, J.*, at June Term, 1936, of BURKE. No error.

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

J. B. Riddle, Jr., and Mull & Patton for defendant, appellant.

SCHENCK, J. After the solicitor had announced that he would not ask for a conviction of murder in the first degree, the defendant was convicted of manslaughter upon a bill of indictment charging the murder of Walter Puett.

The evidence tended to show a fight between the deceased, Walter Puett, on the one side, and the defendant Marshall Puett, brother of the deceased, and Lee Puett, son of the defendant, on the other side. Both Walter Puett and Lee Puett received mortal wounds from which they died the following day.

Ersilie Clark, a daughter of Walter Puett, was called as a witness for the State, and testified in effect that she went to the scene of the difficulty and saw Cleve Workman "wring" the hammer out of the hand of the defendant, and that the defendant "picked up the pistol and drawed it on me" and "shot twice." In the record of the cross-examination of this witness, Ersilie Clark, appears the following: "When I first heard the noise of the difficulty on that day I was sitting on the porch of my father's home stringing beans; like there is a fence here and I live only a little further, and this difficulty was down in the corn patch. Q. Is it 1 mile or ½ mile? A. It is not either. By the court: Mr. Patton, I think you are wasting your time, for it is a known fact that a woman has no conception of distance; whether she is educated and intelligent or an uneducated woman; they just do not seem to be able to estimate distances. By Mr. Patton: Your Honor, I wish to except to the statement just made. By the Court: Gentlemen of the jury, do not pay any attention to what I said about women not having any conception of distance; forget about it; I do not want to prejudice the case. To the foregoing remark by the court to counsel for the defendant, in the presence and hearing of the jury, the defendant excepts. This constitutes the defendant's Exception No. 2."

The appellant in his brief contends that "the distance witness was from the scene of the difficulty was material and relevant, bearing upon her credibility as to what she saw, and the remarks of the court amounted to an expression of opinion prejudicial to the cause of the prisoner," and was in violation of C. S., 564. While the statute prohibits the judge from giving an opinion as to whether "a fact is fully or sufficiently proven," such an opinion, if expressed by the judge, must be an opinion adverse to the interest of the appellant in order to avail him upon appeal. The opinion expressed by his Honor as to the inability of women to estimate distance, if it had any effect, had the effect of lessening the strength, or of minimizing the weight of the testimony of the witness, who was a witness for the State, and therefore, if there was any error, it was prejudicial to the interest of the State, and not to that of the defendant. The rule is clearly expressed in these words: "Any

remarks of the presiding judge, made in the presence of the jury, which have a tendency to prejudice their minds *against the unsuccessful party,* will afford ground for reversal of the judgment." *Perry v. Perry,* 144 N. C., 328 (330). To constitute reversible error, an expression of opinion on the part of the court must be prejudicial to the interest of the appellant. This assignment of error cannot be sustained.

The defendant introduced as a witness Dr. J. B. Riddle, the attending physician of Lee Puett, who testified, in the absence of the jury, as follows: "I told him (Lee Puett) he was going to die and that I wanted what we call a death-bed statement, and explained what that was to him. He said he realized it was all up with him. I asked him to tell me from the start up what happened, and he said he came by his uncle's house and his uncle (Walter Puett, the deceased) came out and said, by God, I want pay for my corn that the cattle had destroyed, and he told him to come to town or that he would pick men and let them decide and he would pay it, and that he had started to where his father (Marshall Puett, the defendant) was working on the fence between the pasture and corn where the cattle had been breaking through, so he went to where his father was and his uncle followed and said, by God, I would have settled it, and his uncle jerked his pistol out and shot him, and he said that then he hit his uncle with a pipe something like this, he and his father, and that his father and his uncle went together and fell, and that his father was under the bottom, as I recall it, and that his father called to him to get the gun, and that he, Lee, grabbed the gun and shot, but he said he did not know whether he hit him or not. That was the statement the boy made to me just as near as I can remember it. Lee, at the time of making this statement, was absolutely conscious, but was gradually bleeding to death; he was in a dying condition and did die soon after."

The objection of the State to this testimony was sustained, and the defendant excepted, and makes this exception the basis for an assignment of error. This assignment of error presents the question as to whether the dying declaration of one who was engaged in the fatal combat, but for whose death the defendant is not on trial, is competent evidence in behalf of the defendant.

The general rule in the trial of criminal cases requires the witnesses to appear in person and submit to cross-examination. The admission of the dying declaration of the deceased, in behalf of the defendant as well as in behalf of the State, *S. v. Mitchell,* 209 N. C., 1, in the trial of the person charged with the unlawful homicide of the declarant is an universally recognized exception to the general rule, but this exception has never been extended so as to include the dying declarations of others than the person for whose unlawful homicide the prisoner is on trial.

Such dying declarations are only admissible where the death of the one making them is the subject of the trial, and the circumstances of the death are the subject of the declarations. Wharton's Criminal Evidence, Vol. 1, sec. 544, page 886. "To render dying declarations admissible in evidence, they must have been made by the victim in a case of homicide where the death of the declarant is the subject of the charge and where the circumstances of the death constitute the subject of the declarations." *People v. Cox,* 340 Ill., 111, 172 N. E., 64, and cases there cited. See, also, *Commonwealth v. Stallone* (Penn.), 126 Atl., 56, and *Westberry v. State* (Ga.), 164 S. E., 905. This assignment of error cannot be sustained.

We have examined the other exceptions to the admission and exclusion of evidence brought forward in the brief and find no prejudicial error.

We have also examined those assignments of error which assail various excerpts from the charge, as well as except to the failure to include in the charge certain contentions and legal principles. We are of the opinion, and so hold, that when the charge is read contextually and as a whole, it is free from reversible error, and in the absence of any requests for the presentation of any omitted contentions or legal principles their omission cannot be held for error.

No error.

R. O. ABERNETHY v. W. W. BURNS ET AL.

(Filed 4 November, 1936.)

1. Appeal and Error C b—

Where appellant duly makes out and serves his statement of case on appeal within the time allowed, and appellee fails to except and file countercase, appellant's statement of case becomes the "case on appeal." C. S., 643.

2. Appeal and Error E g—

Where appellee does not except and file countercase to appellant's statement of case on appeal, appellant's statement of case, having become the "case on appeal," imports verity, and the Supreme Court is bound thereby.

3. Appeal and Error J d—

Where plaintiff appellant's statement of case on appeal becomes the "case on appeal" through failure of appellee to file countercase, and the record thus constituted contains evidence sufficient to sustain plaintiff's causes of action when viewed in the light most favorable to him, a judgment as of nonsuit entered in the court below must be reversed on appeal.

4. Judgments K f—

A judgment rendered in proceedings *coram non judice* is void, and may be attacked either directly or collaterally.

5. Judgments L d—

A void judgment will not support a plea of estoppel by judgment.

6. Malicious Prosecution A d—

A *nolle prosequi* is a sufficient termination of a prosecution to support an action for malicious prosecution based thereon.

7. Malicious Prosecution A a—

The distinction between an action for malicious prosecution and one for abuse of process is that malicious prosecution is based upon malice in causing process to issue, while abuse of process lies for the improper use of process after it has been issued, and in the former plaintiff must prove malice, want of probable cause, and termination of the prosecution.

APPEAL by plaintiff from *Clement, J.,* at May Term, 1936, of CATAWBA.

Civil action to recover damages for alleged (1) malicious prosecution, (2) abuse of process, (3) trespass, and (4) wrongful conversion.

The answer denies the material allegations of the complaint, sets up estoppel by judgment, and pleads the statute of limitations.

From a judgment of nonsuit, entered at the close of plaintiff's evidence, he appeals, assigning errors.

R. O. Abernethy, in propria persona, for plaintiff, appellant.

J. L. Murphy, D. M. McComb, Jr., and Thos. P. Pruitt for defendants, appellees.

STACY, C. J. This is the same case that was before us at the Spring Term, 1934, reported in 206 N. C., 370, 173 S. E., 899. There it was said in regard to the plaintiff, a layman, trying his own lawsuit: "He may not get to first base, but he is entitled to come to the bat." Continuing the simile, he did come to the bat at the May Term, 1936, and was called out on strikes. He again appeals, complaining at the rulings of the umpire.

In his application to appeal *in forma pauperis,* plaintiff avers he "is advised by two counsel learned in the law that there was error of law in the ruling of the court below." Just why he is advised and not represented by counsel is not apparent, unless, perhaps, the advice given was of the curb-stone variety or gratuitous kind.

A word about the record: Plaintiff was allowed forty days within which to prepare and serve his statement of case on appeal, and the defendants given forty days thereafter to serve countercase or file exceptions. The plaintiff duly served his case within the time. No excep-

tions were filed by the defendants and no countercase was served by them. The plaintiff's statement of case, therefore, became the "case on appeal." C. S., 643; *S. v. Ray,* 206 N. C., 736, 175 S. E., 109; *S. v. Humphrey,* 186 N. C., 533, 120 S. E., 85; *Carter v. Bryant,* 199 N. C., 704, 155 S. E., 602; *Barber v. Justice,* 138 N. C., 20, 50 S. E., 445. It is far from "a concise statement of the case," and doubtless out of line with what transpired before the trial court, nevertheless, the defendants, by their silence or failure to return it with objections, have consented that "it shall be deemed approved." C. S., 643. It imports verity, and we are bound by it. *S. v. Brown,* 207 N. C., 156, 176 S. E., 260. The defendants say in their brief, "Unless the Court is thoroughly familiar with the history of all this litigation, it would be very difficult, from the record and appellant's brief, to know at times what he is talking about." This is quite true. The record is involved, couched in infelicitous terms, and difficult to comprehend. The conciseness of the transcript, as well as its clarity, doubtless would have been aided by a counter-statement of the case. But the time for this has passed. *S. v. Ray, supra.* We must take it as it is. *S. v. Humphrey, supra.*

Without undertaking to detail the evidence in the peculiar language of the record, suffice it to say plaintiff and his witnesses seem to testify, in substance, and apparently without objection: (1) That plaintiff was arrested on a false charge of trespass at the instance of the defendants; (2) that he was abused and mistreated by the officers on instructions from Little and Burns, the defendants; (3) that he was assaulted by defendants' agent, while under indictment; (4) that the trial in the municipal court was *coram non judice;* (5) that on appeal to the Superior Court, a *nolle prosequi* was entered; (6) that plaintiff has been greatly injured thereby, undergone "great suffwring," etc.; and (7) that the action is not barred by the statute of limitations.

Thus, on the record as it appears here, the plaintiff's evidence, taken in its most favorable light, would appear to be sufficient to carry the case to the jury. The proceeding in the municipal court, if, indeed, it were *coram non judice,* was a nullity, and the judgment rendered therein void. *Greene v. Stadiem,* 197 N. C., 472, 149 S. E., 685; *S. v. Baxter,* 208 N. C., 90, 179 S. E., 450. Of course, we do not say such is the case—only that there is evidence on the record tending to show it. A void judgment may be attacked either directly (*Oliver v. Hood,* 209 N. C., 291, 183 N. C., 657), or collaterally. *Dunn v. Wilson, ante,* 493; *McKee v. Angel,* 90 N. C., 60. It could not avail as the basis for a plea of estoppel. *Harrell v. Welstead,* 206 N. C., 817, 175 S. E., 283. Hence, the case of *Price v. Stanley,* 128 N. C., 38, cited and relied upon by defendants, is not controlling.

The *nolle prosequi,* subsequently taken in the Superior Court, was a sufficient termination of the prosecution to support an action for malicious prosecution based thereon. *Dickerson v. Refining Co.,* 201 N. C., 90, 159 S. E., 446; *Winkler v. Blowing Rock Lines,* 195 N. C., 673, 143 S. E., 214.

There is this distinction between an action for malicious prosecution and one for abuse of process. In the former, it is necessary to allege and to prove three things, not required in the latter: (1) Malice, (2) want of probable cause, and (3) termination of proceeding upon which action is based. *Wright v. Harris,* 160 N. C., 542, 76 S. E., 489; *Ludwick v. Penny,* 158 N. C., 104, 73 S. E., 228; *Stanford v. Grocery Co.,* 143 N. C., 419, 55 S. E., 815; *R. R. v. Hdw. Co.,* 138 N. C., 175, 50 S. E., 571; *Lockhart v. Bear,* 117 N. C., 298, 23 S. E., 484; *Jackson v. Tel. Co.,* 139 N. C., 347, 51 S. E., 1015; 50 C. J., 612; 1 R. C. L., 101, *et seq.*

The distinctive nature of an action for abuse of process, as compared with an action for malicious prosecution, is that the former lies for the improper use of process after it has been issued, and not for maliciously causing process to issue. 1 Am. Jur., 176; *Martin v. Motor Co.,* 201 N. C., 641, 161 S. E., 77; *Griffin v. Baker,* 192 N. C., 297, 134 S. E., 651; *Lockhart v. Bear, supra.*

Speaking to the subject in *Klander v. West,* 205 N. C., 524, 171 S. E., 782, it was said: "In an action for abuse of process, it is not necessary to show malice, want of probable cause, or termination of the action; the two essential elements are the existence of an ulterior purpose and an act in the use of the process not proper in the regular prosecution of the proceeding. The act must be willful. *Carpenter v. Hanes,* 167 N. C., 551."

The whole matter is thoroughly discussed, with full citation of authorities, in *Carpenter v. Hanes, supra,* and *Wright v. Harris, supra.* It would serve no useful purpose to elaborate it further here.

Reversed.

STATE v. J. B. EDMUNDSON.

(Filed 4 November, 1936.)

1. Criminal Law L f—

Even if evidence that accused left the State after the commission of the crime is erroneously admitted on the ground that it tended to show flight, its admission cannot be held prejudicial when accused testifies at the trial fully explaining the reasons for his leaving the State.

2. Same—

The exclusion of evidence offered for the purpose of impeaching a witness cannot be held prejudicial when other evidence tending to impeach the witness upon the same ground is later admitted without objection.

3. Criminal Law L a—

On appeal in a criminal prosecution, the Supreme Court is limited to matters of law or legal inference.

APPEAL by defendant from *Sinclair, J.*, at May Term, 1936, of WAYNE. No error.

The defendant J. B. Edmundson was tried at May Term, 1936, of the Superior Court of Wayne County on an indictment which was returned by the grand jury at April Term, 1933, of said court, in which he was charged with the murder of Pinkney Smith on or about 1 April, 1933, in Wayne County.

The jury returned a verdict that the defendant is guilty of murder in the second degree.

From judgment that he be confined in the State's Prison for a term of not less than ten or more than fifteen years, the defendant appealed to the Supreme Court, assigning as error the admission of evidence offered by the State, the exclusion of evidence offered by the defendant, and instructions of the court in its charge to the jury.

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

N. W. Outlaw and Berkeley & Colton for defendant.

CONNOR, J. This action was first tried at November Term, 1935, of the Superior Court of Wayne County. The defendant was convicted of murder in the second degree. He appealed from the judgment on said conviction to this Court, assigning errors in the trial. His appeal was heard at Spring Term, 1936. The judgment was reversed, and a new trial ordered for error in the instruction of the court to the jury. See *S. v. Edmundson,* 209 N. C., 716, 184 S. E., 504.

The action was again tried at May Term, 1936, of the Superior Court of Wayne County. The defendant was again convicted of murder in the second degree. He has appealed to this Court from the judgment on his second conviction, contending by his assignments of error that there were errors in the trial which resulted in his conviction. His assignments of error on this appeal have been carefully considered. They cannot be sustained. The evidence at the second trial was substantially the same as at the first trial. This evidence was submitted to the jury

under a charge which is in accord with the opinion of this Court on the former appeal, and is free from error. The judgment must be affirmed.

The defendant contends that there was error in the admission of evidence offered by the State showing that the defendant left his home in Wayne County, with his brother, immediately after the homicide, and went to the State of New York, where he remained until his return to Wayne County during the month of September, 1935. This evidence, even if erroneously admitted as tending to show flight, was not prejudicial to the defendant, who, as a witness in his own behalf, testified that he went to the State of New York to accompany his brother, who had shot and killed the deceased, and remained there because he had secured a good job there.

The defendant further contends that there was error in the exclusion of evidence tending to impeach the testimony of Dr. Rose, a witness for the State. The exclusion of this evidence, even if its exclusion was erroneous, was not prejudicial to the defendant. Other evidence tending to impeach the witness was admitted and submitted to the jury. The evidence excluded tended to show that Dr. Rose, on the trial of the brother of the defendant for the murder of Pinkney Smith, had testified that his death was caused by the pistol shot wound and that the wound on the neck of the deceased, inflicted by a knife, was superficial. Evidence to this effect, to which there was no objection by the State, was admitted by the court and submitted to the jury.

The court in its charge to the jury submitted every contention of the defendant as to the facts which the jury might find from the evidence, and instructed the jury as to the law applicable to such facts. We find no error in these instructions.

The defendant was only fifteen years of age at the time of the homicide. All the evidence at the trial showed that if the defendant cut the deceased with a knife, and thereby inflicted a wound which caused or contributed to the death of the deceased, as found by the jury, he did so while the deceased and his brother were struggling on the floor of the schoolhouse, with the deceased on top of his brother. We think the jury might well have found from all the evidence that if the defendant is guilty of an unlawful homicide, he is guilty of manslaughter only. We cannot hold, however, as a matter of law or of legal inference, that there was error in the trial, which resulted in a conviction of the defendant of murder in the second degree. Every contention favorable to the defendant was submitted to the jury who rejected these contentions and sustained the contentions of the State. We find no error in the trial and must, therefore, affirm the judgment.

No error.

E. V. OLDHAM v. SEABOARD AIR LINE RAILWAY COMPANY ET AL.

(Filed 4 November, 1936.)

1. **Railroads D b—Plaintiff's testimony held not to disclose contributory negligence in going upon crossing when he knew train was approaching.**

Plaintiff testified that he stopped his automobile and looked successively in each direction, before attempting to traverse defendant's grade crossing, that he saw some freight cars on the north apparently standing still, but heard no whistle or bell, that he saw no train from the south, that he was familiar with the crossing and knew that a flagman was due to be stationed there, that he started across and the flagman ran out looking to the south, and that he then thought the train was approaching from the south, stalled his car on the first rail, and was struck by a freight train backing from the north. *Held:* Plaintiff's testimony that he thought the train was approaching from the south referred to his apprehension after he had started across, and does not disclose that he went upon the crossing when he knew a train was approaching, and defendant's motion to nonsuit on the ground of contributory negligence was properly denied.

2. **Same—Failure of flagman to give warning of danger is implied invitation to motorist to cross.**

Where a flagman stationed at a crossing is absent and the person driving the car is familiar with the crossing and knows that the flagman is due to be there, or when the flagman is present and is not giving any warning of danger, the motorist may rely upon such fact as an implied invitation to cross and an assurance of safety, but he may not rely exclusively thereon, but such fact may be considered in determining whether the motorist used due care under the circumstances.

APPEAL by defendants from *Williams, J.*, at March Term, 1936, of LEE.

Civil action to recover damages for alleged negligent injury to plaintiff and his automobile.

The facts are these: Plaintiff was injured 5 May, 1934, at a grade crossing in Sanford, N. C., when his automobile collided with a shifting freight train operated by the defendants. Plaintiff was familiar with the crossing. He looked in both directions before entering upon the tracks. He saw some freight cars on his right (north), apparently standing still, but saw no engine and heard no bell or whistle; saw no train on his left (south). Plaintiff knew a watchman was due to be stationed at the crossing. Just as his front wheels reached the first rail, the watchman came running out, looking south, threw up his "Stop" sign, and caused plaintiff to choke down his car. While in this position, defendant's freight train, coming from the north, backed over the crossing, struck plaintiff's car, carried it seventy or eighty feet before stopping, demolished the car, and injured plaintiff.

On cross-examination, plaintiff testified: "I saw the watchman looking to the south and I thought the train was coming from the south, but it was coming from the north. . . . I thought the train was on the main line. It was not on the main line, but was on the first track."

The usual issues of negligence, contributory negligence, and damages were submitted to the jury and answered in favor of the plaintiff.

Judgment on the verdict, from which the defendants appeal, assigning as error the refusal of the court to nonsuit on plaintiff's own testimony.

Gavin & Jackson and K. R. Hoyle for plaintiff, appellee.

J. C. Pittman and Varser, McIntyre & Henry for defendants, appellants.

STACY, C. J. Does the plaintiff's alleged contributory negligence bar a recovery as a matter of law? The answer is "No." *Lincoln v. R. R.*, 207 N. C., 787, 178 S. E., 601. The issue was for the twelve.

Defendants have apparently misinterpreted plaintiff's testimony. He does not say he knew the train was approaching before going upon the crossing. His statement, "I thought the train was coming from the south," has reference to what he thought after his car had choked down or stopped, due to the direction in which the watchman was looking when he ran out with his stop sign.

The pertinent principle was stated by *Hoke, J.*, in *Shepard v. R. R.*, 166 N. C., 539, 82 S. E., 872, quoting with approval from 33 Cyc., 1028, as follows: "Where a railroad company maintains a flagman, gates, or other signals of warning at a railroad crossing, whether voluntarily or by law or custom, the public generally has a right to presume that these safeguards will be reasonably maintained and attended, and in the absence of knowledge to the contrary, the fact that the gates are open, or automatic bells not ringing, or that the flagman is absent from his post or, if present, is not giving a warning of danger, is an assurance of safety and an implied invitation to cross upon which a traveler familiar with the crossing may rely and act within reasonable limits, on the presumption that it is safe for him to go on the crossing. The extent to which a traveler may rely on such assurance is a question of fact, and while ordinarily the same degree of care and vigilance is not required of a traveler under such circumstances as otherwise, he has no right to rely exclusively upon such circumstances, nor will such presumption or assurance excuse the traveler from using every reasonable precaution that an ordinarily prudent man would use under like circumstances. Such facts as the absence or presence of a flagman, or that the gates are open, or that the automatic bells are ringing or not ringing, are merely facts to be considered in determining whether the traveler exercises the degree of care required in attempting to cross."

The same rule was also applied in the cases of *Parker v. R. R.,* 181 N. C., 95, 106 S. E., 755; *Barber v. R. R.,* 193 N. C., 691, 138 S. E., 17; and *Johnson v. R. R.,* 163 N. C., 431, 79 S. E., 690.

The negligence of the defendants is not seriously disputed. The watchman was "out of pocket" as plaintiff approached the crossing. If he had been attentively on duty at that time, the injury might not have occurred. *Shepard v. R. R., supra; Finch v. R. R.,* 195 N. C., 190, 141 S. E., 550.

The case of *Pitt v. R. R.,* 203 N. C., 279, 166 S. E., 67, cited and relied upon by defendants, is easily distinguishable by reason of different fact situations. In the cited case, the plaintiff drove upon the crossing without looking to his left, the direction from which a fast passenger train was approaching, while in the instant case the plaintiff looked in both directions before entering upon the crossing. In like manner, the case of *Rimmer v. R. R.,* 208 N. C., 198, 179 S. E., 753, may be distinguished.

The plaintiff filed a petition for *certiorari* to correct the charge in accordance with the judge's letter. The defendants consent that the correction may be made as requested, and no point is made in respect thereof.

No error.

J. T. PRITCHETT, TRUSTEE, v. J. C. TOLBERT, SHERIFF OF CALDWELL COUNTY.

(Filed 4 November, 1936.)

1. Assignments for Benefit of Creditors B a—Judgment held not a preference within meaning of C. S., 1611.

A judgment duly rendered by a court of competent jurisdiction against a debtor assigning his property to a trustee for the benefit of creditors is not a transfer or conveyance of property by the assignor, although the judgment is rendered within four months prior to the assignment to the trustee, and the judgment is not a preference prohibited by C. S., 1611, and will not be declared void upon suit of the trustee.

2. Assignments for Benefit of Creditors C c—Execution on personalty prior to registration of deed of assignment creates prior lien.

Where a valid judgment is rendered within four months prior to an assignment for benefit of creditors by the judgment debtor, and execution is issued thereon and personal property of the debtor levied upon prior to the registration of the deed of assignment, the judgment is a lien upon the personal property levied upon prior to the title of the trustee in the deed of assignment.

APPEAL by defendant from *Warlick, J.,* at May Term, 1936, of CALDWELL. Reversed.

This is an action to restrain and enjoin the defendant from proceeding under executions which were issued to him as sheriff of Caldwell County by the clerk of the Superior Court of said county to satisfy certain judgments which were rendered against J. Roy Moore and Mrs. Lillie Moore, trading as Lenoir Book Store, in favor of certain of their creditors.

It is alleged in the complaint that the judgments on which the executions were issued were rendered and docketed in the office of the clerk of the Superior Court of Caldwell County within four months next preceding 6 May, 1936, and that the executions which are now in the hands of the defendant were issued on said day.

It is further alleged in the complaint that on 6 May, 1936, J. Roy Moore and Mrs. Lillie Moore, trading as Lenoir Book Store, executed a deed of assignment by which they conveyed to the plaintiff J. T. Pritchett, trustee, all their property, real and personal, for the benefit of their creditors, and that plaintiff has accepted the trusts imposed upon him by said deed of assignment, and is now engaged in the performance of his duties as trustee under the said deed.

The action was heard on an order which was duly served on the defendant to show cause, if any he had, why the temporary restraining order made in the action should not be made permanent.

At the hearing, it was found by the court that the judgments on which the executions now in the hands of the defendant were issued were all rendered and docketed in the office of the clerk of the Superior Court of Caldwell County within four months next preceding the date of the deed of assignment executed by J. Roy Moore and Mrs. Lillie Moore, trading as Lenoir Book Store, to the plaintiff. On this finding, the court was of opinion that both the judgments on which the executions were issued and the executions in the hands of the defendant are void, and accordingly ordered and adjudged that the defendant be and he was restrained and enjoined from proceeding under the executions issued on said judgments.

The defendant excepted and appealed to the Supreme Court, assigning error in the judgment.

W. H. Strickland for plaintiff.
Thomas L. Warren and B. F. Williams for defendant.

CONNOR, J. At the trial of this action in the Superior Court, the plaintiff contended that the judgments on which the executions in the hands of the defendant were issued, having been rendered and docketed

in the office of the clerk of the Superior Court, within four months preceding the date of the voluntary deed of assignment for the benefit of creditors, which was executed by the judgment debtors to the plaintiff, were preferences, under C. S., 1611, and for that reason were void. This contention was sustained by the judge. In this there was error.

C. S., 1611, is as follows: "It is the duty of the trustee to recover, for the benefit of the estate, property which was conveyed by the grantor or assignor in fraud of his creditors, or which was conveyed or transferred by the grantor or assignor for the purpose of giving a preference. A preference, under this section, shall be deemed to have been given when property has been transferred or conveyed within four months next preceding the registration of the deed of trust or deed of assignment in consideration of the payment of a preëxisting debt, when the grantee or transferee of such property knows or has reasonable ground to believe that the grantor or assignor was insolvent at the time of making such conveyance or transfer."

There is nothing in this statute to sustain the contention of the plaintiff. Where a judgment for the recovery of money has been rendered by a court of competent jurisdiction, and the judgment has been duly docketed in the office of the clerk of the Superior Court of the county in which the judgment was rendered, the judgment is not a preference under the provisions of C. S., 1611, although within four months after the date of its rendition or docketing, the judgment debtor executes a voluntary deed of assignment for the benefit of his creditors, by which he conveys all his property, real or personal.

The judgment in the instant case is reversed. The action is remanded to the Superior Court of Caldwell, where such further proceedings may be had as either of the parties may desire.

If, in the instant case, as alleged by him in his answer, the defendant levied upon the personal property described in the complaint, under the executions in his hands, prior to the registration of the deed of assignment under which the plaintiff claims title to said property, the judgments on which the executions were issued are liens upon said personal property, from the date of the levy, having priority over the plaintiff's title to said property. In that case, the temporary restraining order should be dissolved.

Reversed.

STATE v. DAVID WITHERSPOON.

(Filed 4 November, 1936.)

1. Criminal Law G r—

Where the State relies upon the testimony of the prosecuting witness as to the identity of accused as the perpetrator of the crime charged, it is competent for defendant to impeach the credibility of the prosecutrix by evidence tending to show that she is mentally deficient or abnormal.

2. Criminal Law G i—

A nonexpert may testify from his knowledge and observation of the person in question as to such person's mental condition, including strength of memory, the weight and credibility to be given such testimony being for the jury to determine from the witness' intelligence and his means of knowledge and observation of the person in question.

3. Criminal Law I i—

The competency of a witness is a matter for the court, but the credibility of the witness is for the jury, so that a witness having sufficient mental capacity to be a competent witness may be impeached by a showing of mental deficiency as bearing upon the credibility of the witness.

APPEAL by defendant from *Warlick, J.,* at February Term, 1936, of CALDWELL.

Criminal prosecution, tried upon indictment charging the defendant with rape.

The record discloses that on Monday night, 10 February, 1936, the prosecuting witness, a young white woman, was assaulted and ravished by a colored man, or Negro, near the East Harper Avenue school building in the town of Lenoir.

On the following day, Tuesday, about 1:30 p.m., the defendant and another Negro boy by the name of Marshall Hood, were carried to the home of the prosecutrix for identification: "She said she did not believe either one of them was the one," so testifies the officer, "and as we turned to go, this darky here (defendant) thanked her."

The defendant was then released, but rearrested later that afternoon and carried before the prosecutrix again the next morning. She testifies: "When I got to see him the next morning, I said the minute I saw him 'that is him,' without stopping to wait and see. . . . After the officers left with him, I decided Witherspoon was the one that assaulted me. . . . I am sure now that Witherspoon is the man that assaulted me."

The prosecution offered to show by the constable or officer, admittedly not an expert, but who knew the prosecutrix "pretty well," that in his

opinion she was "mentally abnormal" or "not a normal girl mentally." Objection; sustained; exception.

Verdict: Guilty.

Judgment: Death by asphyxiation.

Defendant appeals, assigning errors.

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

Thomas L. Dysard and Hal B. Adams for defendant.

STACY, C. J. In a prosecution for rape, where the question of identity is the principal issue involved, is it competent to impeach the credibility of the prosecuting witness by showing that she is mentally deficient or abnormal? The answer is, Yes. *S. v. Ketchey,* 70 N. C., 624; *S. v. Vernon,* 208 N. C., 340, 180 S. E., 590; 70 C. J., 763; 28 R. C. L., 617; Note, 82 A. S. R., 25. Compare *S. v. Jenkins,* 208 N. C., 740, 182 S. E., 324.

The principle is fully illustrated in the case of *S. v. Rollins,* 113 N. C., 722, 18 S. E., 394, where it was said: "The third exception is well taken. John Jones, on behalf of the State, had testified as an eye-witness to the homicide, and had stated that he was not drunk when it occurred. Had this been pertinent only to impeach his character, his answer would have been conclusive. *S. v. Roberts,* 81 N. C., 605. But it went rather to his capacity to know and remember with accuracy what took place. It was error, therefore, to exclude proof offered to show that he was 'very drunk on that occasion.' It would have served to contradict him and to impair the credit to be given to his evidence, and would have been somewhat corroborative of the prisoner's theory of self-defense. When a witness had testified as an eye-witness to a transaction, it would be competent to show that during the occurrence he was asleep or insensible, and, of course, also that he was very drunk."

Again, in *Isler v. Dewey,* 75 N. C., 466, a witness by the name of Samuel Smith was introduced, and testified on behalf of the plaintiff. The defendant then called a witness, who, over objection, was allowed to testify that "the memory of the witness Smith was below medium." This evidence was held to be competent, the Court saying: "Ever since *Clary v. Clary,* 24 N. C., 78, it has been considered that all persons, and not experts alone, can give their opinion as to the mental capacity of the maker of a will or deed, and on the same reasoning they may do so as to a person who has been introduced as a witness in the cause on the trial. *Bailey v. Pool,* 35 N. C., 404. A person entirely without memory is incompetent as a witness, and if his memory is weak naturally or has been impaired by disease or age his testimony will naturally have less

weight with a jury than if his memory were sound and unimpaired. To prove of a witness that his memory is weak is a legitimate way of impeaching his testimony, and the opinions of those who know him may be resorted to for that purpose."

We were told on the argument the court's ruling was based upon the belief that a nonexpert could not testify to the poor memory of a witness. The law is otherwise. *Harris v. Aycock,* 208 N. C., 523, 181 S. E., 554. It is well settled that anyone who has observed another, or conversed with him, or had dealings with him, and a reasonable opportunity, based thereon, of forming an opinion, satisfactory to himself, as to the mental condition of such person, is permitted to give his opinion in evidence upon the issue of mental capacity, although the witness be not a psychiatrist or expert in mental disorders. *S. v. Keaton,* 205 N. C., 607, 172 S. E., 179; *White v. Hines,* 182 N. C., 275, 109 S. E., 31; *S. v. Turner,* 143 N. C., 641, 57 S. E., 158; *Whitaker v. Hamilton,* 126 N. C., 465, 35 S. E., 815.

Any witness who has had opportunity of knowing and observing the character of a person, whose memory or mental capacity is assailed or brought in question, may not only depose to the facts he knows, but may also give in evidence his opinion or belief as to the strength of mind of the person under review, founded upon such knowledge and observation, and it is for the jurors to ascribe to his testimony that weight and credibility which the intelligence of the witness, his means of knowledge and observation, and all the circumstances attending his testimony, may in their judgment deserve. *Clary v. Clary,* 24 N. C., 78.

It is conceded that the prosecuting witness is competent to give evidence in the case. *S. v. Satterfield,* 207 N. C., 118, 176 S. E., 466; *Lanier v. Bryan,* 184 N. C., 235, 114 S. E., 6. It is not her competency, but her credibility, that is assailed. *S. v. Exum,* 138 N. C., 599, 50 S. E., 283. The two are not the same thing. A person may be a competent witness and yet not a credible one. Competency is a question for the court; credibility a matter for the jury. *S. v. Beal,* 199 N. C., 278, 154 S. E., 604.

There are other exceptions appearing on the record worthy of consideration, but as they are not likely to occur on another hearing, we shall not consider them now. The prisoner is entitled to the benefit of the evidence erroneously excluded.

New trial.

MRS. MILDRED EXUM, ADMINISTRATRIX OF JOE EXUM, v. N. BAUMRIND AND WIFE, SADIE BAUMRIND.

(Filed 4 November, 1936.)

1. **Automobiles C c: C j—Speed in excess of forty-five miles per hour on highway is prima facie negligence, but not negligence per se.**

Plaintiff's evidence tended to show that her intestate, who had owned and operated his motorcycle for only thirty days, was driving at a rate of fifty or sixty miles per hour and had just come around a curve at the time of the collision. *Held:* Under the provisions of N. C. Code, 2621 (46), such speed is *prima facie* evidence of negligence, but not negligence *per se,* and defendants' motion to nonsuit for that plaintiff's evidence showed contributory negligence as a matter of law was properly denied.

2. **Appeal and Error E b—**

Where the charge is not in the record, it will be presumed on appeal that appropriate instructions were given the jury.

STACY, C. J., dissenting.

CONNOR, J., concurs in dissent.

APPEAL by the *feme* defendant from *Spears, J.,* at June Term, 1936, of GREENE. Affirmed.

K. A. Pittman and L. I. Moore for plaintiff, appellee.
Finch, Rand & Finch and Walter G. Sheppard for defendant, appellant.

SCHENCK, J. This was an action for the alleged wrongful death of the plaintiff's intestate, caused by a collision on a State Highway between a motorcycle upon which the intestate was riding and an automobile owned and driven by the appellant.

A nonsuit was entered as to the defendant N. Baumrind, from which no appeal was taken.

The action, as it related to the defendant Sadie Baumrind, was tried upon the usual issues of negligence, contributory negligence, and damage. The jury answered the issues in favor of the plaintiff, and from judgment based on the verdict the defendant Sadie Baumrind appealed, assigning as error the refusal of the court to grant her motion for judgment as in case of nonsuit made when the plaintiff had introduced her evidence and rested her case and renewed after all the evidence on both sides was in. C. S., 567.

On the argument it was conceded that there was sufficient evidence of the defendant's negligence to carry the case to the jury, but it was

earnestly argued that the plaintiff's own evidence established the contributory negligence of her intestate, and that upon authority of *Holton v. R. R.,* 188 N. C., 277, and similar cases, the motion for judgment as in case of nonsuit should have been granted.

While there was evidence introduced by the plaintiff, as well as by the defendant, tending to establish the contributory negligence of the intestate, we cannot hold as a matter of law that such evidence did establish such contributory negligence.

All the evidence tended to show that the collision occurred as the defendant attempted to drive her automobile around and past another automobile approaching a curve and going in the same direction, and that she was unable to get by the other automobile so as to pull her automobile back to her right side of the road before the intestate, coming in the opposite direction on his motorcycle, collided with her automobile on her left side and on his right side of the road.

The evidence introduced by the plaintiff and relied upon by the defendant to prove the plaintiff out of court was to the effect that the intestate had owned and operated a motorcycle for only thirty days, and that when the collision between his motorcycle and the defendant's automobile took place he was driving the motorcycle at a rate of fifty or sixty miles per hour, and had just come around a curve. While prior to the enactment of sec. 4, ch. 311, Public Laws 1935 (N. C. Code of 1935 [Michie], sec. 2621 [46]), the operation of a motor driven vehicle upon the highways of the State at a greater rate of speed than forty-five miles per hour was unlawful, and therefore negligence *per se,* since said enactment such operation is only *prima facie* evidence of negligence, and for that reason it was proper for his Honor to submit the issue as to contributory negligence to the jury, under appropriate instructions. The charge not being contained in the record, it is presumed that such appropriate instructions were given to the jury.

There is some evidence in the record that the intestate slackened the speed of his motorcycle before colliding with the plaintiff's automobile.

There are no assignments of error except the one to the refusal of the court to grant the motion for judgment as in case of nonsuit, and since this cannot be sustained the judgment of the Superior Court must be

Affirmed.

STACY, C. J., dissenting: I think it should be held as a matter of law that plaintiff's intestate was contributorily negligent. "He came around the curve . . . between 50 and 60 miles an hour, . . . and there was plenty of room for him to go between us"—so testified plaintiff's own witness. Instead of taking the path of safety, he seems to have followed his "bicycle eye" and drove directly into the defend-

ant's Buick car. "As the Buick came around, he commenced blowing, . . . threw up his hands, and it made a curious fuss like he cut it off"—this is the only evidence, offered by the plaintiff, to show what plaintiff's intestate did as he approached the defendant's car.

An inexperienced operator of a motorcycle who drives it upon the highway, around a 45-degree curve at 50 or 60 miles an hour, is certainly driving "at a speed greater than is reasonable and prudent." *Davis v. Jeffreys,* 197 N. C., 712, 150 S. E., 488. This is in violation of the statute intended and designed to prevent injury to persons or property. *Godfrey v. Coach Co.,* 201 N. C., 264, 159 S. E., 412. The positive provision of the statute is, that "No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions then existing."

Plaintiff's intestate's negligence, in order to bar a recovery, need not be the exclusive or sole proximate cause of the injury. It is enough if it contribute to the injury. *Wright v. Grocery Co., ante,* 462; *Construction Co. v. R. R.,* 184 N. C., 179, 113 S. E., 672.

CONNOR, J., concurs in dissent.

WACHOVIA BANK AND TRUST COMPANY v. JOHN A. LINDSAY ET AL.

(Filed 4 November, 1936.)

1. **Wills E d—Devise and bequest of property for life with limitation over to a class vests title in remainder in the class upon death of testator.**

   Testator left all his property, real and personal, to his wife for her life or until she remarried, with provision that upon termination of her interest two-thirds of the estate should be distributed to those who would have been his heirs and distributees had he not made the will. *Held:* The limitation over vested in testator's heirs and distributees immediately upon his death, and the persons entitled to take should be determined as of his death and not as of the death of his widow.

2. **Wills E f—Where property is divided prior to termination of life estate children of vested remaindermen have no interest upon death of life tenant.**

   The will in question devised and bequeathed all testator's property to his wife for life, with vested remainder over in two-thirds of the property to testator's next of kin. Prior to the termination of the life estate, the property was divided in proceedings approved by the court, the widow taking one-third and the next of kin living at testator's death taking two-thirds. Each of the next of kin receiving a share of the estate in the

proceedings died prior to the widow's death. *Held:* Only those answering the roll of the class at the time of testator's death took under the will, and their children and grandchildren have no interest in the estate remaining at the time of the widow's death.

APPEAL by answering defendants from *Stack, J.*, at July Term, 1934, of RANDOLPH.

Civil action for construction of will.

The record discloses that Dr. A. Fuller, of Randolph County, died 15 December, 1906, leaving a last will and testament, which is now the subject of controversy between or among some of the parties litigant.

The item which gives rise to this controversy is as follows:

"Item Second: I give, devise and bequeath all my estate and effects both real and personal, including all moneys on hand and all debts due me to my beloved wife Julia C. Fuller, for the term of her natural life or during her widowhood, and upon her second marriage or death, whichever shall occur first, that all said property and effects, shall be disposed of as follows, that is to say, two-thirds thereof to be divided among those who would have been my heirs and distributees had I not made this will, my said wife not included, and the remaining third to my said beloved wife Julia C. Fuller her heirs and distributees in fee simple forever."

In 1907, a division of the estate of the testator was had between the widow and "those who would have been my heirs and distributees had I not made this will"—a brother, a sister, and a nephew—living at the time of testator's death, and said division and settlement was duly approved by order of court in a proceeding brought for the purpose.

The brother, sister, and nephew of the testator, parties to said proceeding, are all dead, and the appealing defendants herein are their children and grandchildren.

The testator's widow never married again, and died in August, 1933.

It is the contention of the appealing defendants that under the second item of the will in question, the "heirs and distributees" of the testator, who ultimately take the "two-thirds of all said property and effects," are to be determined at the death of the widow, and not as of the death of the testator. From an adverse ruling on this point, said defendants appeal, assigning error.

Manning & Manning and J. A. Spence for plaintiff, appellee.

L. T. Hammond, J. V. Wilson, and Walter D. Siler for defendants, appellants.

STACY, C. J. Are those "who would have been" the testator's "heirs and distributees," had he died intestate, and who are designated as the

ultimate takers of two-thirds of his property, to be ascertained and determined as of the date of his death, or at the time of the death of the life tenant? The answer is, At the death of the testator. *Witty v. Witty,* 184 N. C., 375, 144 S. E., 482; *Dixon v. Pender,* 188 N. C., 792, 125 S. E., 623; *Baugham v. Trust Co.,* 181 N. C., 406, 107 S. E., 431.

Had the testator died without making a will, undoubtedly his heirs and distributees would have been determined as of the date of his death, for as said by Blackstone: "An heir is he upon whom the law casts an estate immediately on the death of the ancestor." II Blk., ch. 14; *Welch v. Gibson,* 193 N. C., 684, 138 S. E., 25; *Yelverton v. Yelverton,* 192 N. C., 614, 135 S. E., 632. To hold otherwise would be to take from such words their ordinary and natural meaning and give to them an artificial or hypothetical significance. *Jenkins v. Lambeth,* 172 N. C., 466, 90 S. E., 513; 69 C. J., 262; 23 R. C. L., 549. It is only when the testator uses such words in a different sense—which, of course, he may do—that they are given the artificial signification intended by him. *Scales v. Barringer,* 192 N. C., 94, 133 S. E., 410; *Bowen v. Hackney,* 136 N. C., 187, 48 S. E., 633.

Speaking to the general rule in *Bullock v. Downes,* 9 H. L. Cases, 1, Lord Campbell said: "Generally speaking, where there is a bequest to one for life, and after his decease to the testator's next of kin, the next of kin who are to take are the persons who answer that description at the death of the testator, and not those who answer that description at the death of the first taker. Gifts to a class, following a bequest of the same property for life, vest immediately upon the death of the testator. Nor does it make any difference that the person to whom such previous life interest was given is also a member of the class to take on his death."

In interpreting the present will, the court below applied the general rule, and in this we find no error.

Moreover, it appears that the parents and grandparents of the appealing defendants have heretofore received the very property in controversy in a division and settlement with the widow, on the assumption and belief that they were entitled to same as vested remaindermen. This settlement was approved by order of court, in a proceeding brought for the purpose, and it will not be disturbed, because in a limitation by way of remainder to a class, the law calls the roll of the class immediately upon the vesting of the estate, and those who can answer, take. *Fulton v. Waddell,* 191 N. C., 688, 132 S. E., 669. At the call of the roll in the instant case, the brother, sister, and nephew of the testator answered. They alone took. So said the law in 1907. So says it now.

Affirmed.

MRS. JOHN W. CARLTON, WIDOW OF JOHN W. CARLTON, DECEASED, EMPLOYEE, v. BERNHARDT-SEAGLE COMPANY, EMPLOYER, AND THE TRAVELERS INSURANCE COMPANY, CARRIER.

(Filed 4 November, 1936.)

1. Master and Servant F i—

Where each of the essential facts found by the Industrial Commission is supported by competent evidence, the findings are conclusive on appeal, even though some incompetent evidence was also admitted upon the hearing.

2. Master and Servant F b—

Evidence that an employee was carrying dynamite over a slick, rough road in the performance of his duties, that he twisted his ankle, causing severe sprain and other internal injuries proximately resulting in his death, is sufficient to sustain findings that his death resulted from an accident arising out of and in the course of his employment.

3. Master and Servant F d: Evidence H f—

Testimony of the wife of an employee as to his expressions of bodily feeling tending to show the progress of the injury is competent upon the hearing upon the question of whether the accident proximately caused his death.

4. Master and Servant F d: Evidence E d—

The report signed by the manager of an incorporated employer and filed with the Industrial Commission as required by N. C. Code, 8181 (vvv), is competent upon the hearing and statements contained therein not within the personal knowledge of the manager are competent as an admission against interest.

APPEAL by defendants from *Warlick, J.*, at May Term, 1936, of CALDWELL. Affirmed.

Heard upon defendants' appeal from the North Carolina Industrial Commission, awarding compensation for death of plaintiff's husband, John W. Carlton, found to have resulted from an injury by accident arising out of and in the course of his employment.

From judgment affirming the award of the Industrial Commission, defendants appealed to this Court.

B. F. Williams for plaintiff, appellee.
Sapp & Sapp for defendants, appellants.

DEVIN, J. The single question presented by this appeal is whether there was competent evidence to sustain the award.

If the findings of fact of the Industrial Commission are supported by competent evidence, they are conclusive upon appeal. *Southern v. Cotton Mills,* 200 N. C., 165.

The defendants, however, contend that the evidence offered was incompetent, and therefore insufficient to support the award. In *Brown v. Ice Co.,* 203 N. C., 97, *Brogden, J.,* speaking for the Court, used this language: "Obviously, if all the testimony offered by a claimant, tending to show an injury sustained in the course of his employment, was hearsay and incompetent, no finding based upon such testimony could be upheld."

While some of the evidence offered in the instant case might fall within the category of hearsay, there was competent evidence sufficient to establish the essential facts found.

The report made by M. R. Bernhardt, manager of employer (an unincorporated firm), pursuant to section 8181 (vvv), Michie's Code of 1935, sets out facts sufficient to show that the deceased, an employee, twisted his ankle, causing severe sprain or other internal injury to his right ankle; that this happened while he was carrying a case of dynamite over a rough, slick road, engaged in his regular line of duty at the time, and that the injury was by accident arising out of and in the course of his employment; and there was evidence of the wife as to the character of the injury and as to expressions of bodily feeling on the part of the deceased, showing the progress of the injury (*Howard v. Wright,* 173 N. C., 399); and the opinion of the medical expert that the death proximately resulted from the injury.

The report of the accident, made by the employer, was competent. *Russell v. Oil Co.,* 206 N. C., 341; 71 C. J., 1073. Even if the report signed by M. R. Bernhardt contained some statements of fact not of his personal knowledge, it was competent as a declaration against interest. *Tapp v. Dibrell,* 134 N. C., 546; 71 C. J., 1073-4.

Affirmed.

REMUS WALLACE v. ZEB V. WALLACE ET AL.

(Filed 4 November, 1936.)

1. Estoppel B a—

Where a party announces in open court that he is not attacking the validity of the mortgage involved in the action, but will rely solely upon his contention of payment, he is bound by the admission, and judgment in his favor declaring the mortgage void is error.

2. Mortgages A a: Guardian and Ward D a—

Since title is deemed to be in the ward when a guardian takes a deed or mortgage for the ward, whether a mortgage executed by an individual to himself as guardian is void for want of proper parties, *quære.*

APPEAL by plaintiff from *Grady, J.,* at February Term, 1936, of LENOIR.

Civil action to recover on promissory note and to foreclose mortgage.

The facts are these:

1. On 1 July, 1925, Zeb V. Wallace and wife executed to "Zeb V. Wallace, Guardian of Remus Wallace," note in the sum of $834.00, due in six months, and to secure the payment of same, executed and registered mortgage on 100 acres of land situate in Lenoir County. The relation between said guardian and ward was that of father and son.

2. On 24 September, 1927, when Remus Wallace became of age, he had a settlement with his guardian, and the same was duly recorded in the clerk's office—said note and mortgage being turned over to Remus Wallace—and reciting: "This settlement is made in part by notes now in my possession."

3. Thereafter, on 4 March, 1929, and again on 25 July, 1930, Zeb V. Wallace and wife executed notes, secured by deeds of trust on said land, to C. A. Broadway.

4. In this action to recover on the guardian's note of $834.00 and to foreclose mortgage given as security therefor, the defendant C. A. Broadway pleads the settlement between the plaintiff and his guardian *as payment,* and "announced, in open court, that he was not attacking the validity of the note or lien, but that he was only taking the position that the indebtedness had been paid and that the lien should be canceled because of the payment of the indebtedness."

5. The court held as a matter of law that the mortgage given to secure the guardian's note was void, "basing his conclusion, in part, upon the case of *Gorham v. Meacham,* 63 Vt., 231, which holds specifically that a mortgage deed made by a man to himself as 'Executor of A. W. Gorham's Estate' is absolutely void."

6. Verdict and judgment upon plaintiff's note, as against the makers, without security, from which the plaintiff appeals, assigning errors.

Jesse A. Jones for plaintiff, appellant.

John G. Dawson and Rouse & Rouse for defendant Broadway, appellee.

STACY, C. J. The jury found against the defendant Broadway upon his plea of payment. He announced in open court that he was not attacking the validity of plaintiff's lien. Nevertheless, the court held as a matter of law that plaintiff's mortgage was void, for want of proper parties, under authority of *Gorham v. Meacham,* 63 Vt., 231, 22 Atl., 572, 13 L. R. A., 676. The conclusion is a *non sequitur. Small v. Small,* 74 N. C., 16; *Younce v. McBride,* 68 N. C., 532.

In the first place, the validity of plaintiff's mortgage is not assailed on the present record; and in the next place, the authority cited has reference to a mortgage executed by one to himself as "executor," not as "guardian." The rule is, that where a guardian takes a deed or mortgage for his ward, the title is regarded as being in the ward, rather than in the guardian, *Small v. Small, supra,* 12 R. C. L., 1123, 28 C. J., 1155, while a different rule may prevail as to an executor or administrator. 11 R. C. L., 152, *et seq.* But, however this may be, the validity of plaintiff's mortgage is not challenged by the defendant. He specifically refused to do so on the trial, and we think he should be held to his plea and admission, or election, thus deliberately made. *Reed v. Reed,* 93 N. C., 462.

New trial.

DOLLIE C. LUPTON, ADMINISTRATRIX, v. M. S. HAWKINS ET AL.

(Filed 4 November, 1936.)

Appeal and Error C e—Affidavit of party appealing in forma pauperis must aver that counsel have advised that there is error in law in judgment.

The requirements of the statute regulating appeals *in forma pauperis* are mandatory and jurisdictional, C. S., 649, and where the affidavit fails to aver, as required by the statute, that appellant is advised by counsel learned in the law that there is error in matter of law in the decision of the lower court, the appeal must be dismissed, nor is there authority for granting an appeal upon such affidavit.

APPEAL by plaintiff from *Spears, J.,* at March Term, 1936, of CARTERET.

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

Plaintiff's intestate was killed in a crossing accident which occurred in Morehead City on the afternoon of 13 April, 1935.

At the close of plaintiff's evidence, the court being of opinion that plaintiff's intestate was contributorily negligent on plaintiff's own showing, sustained the demurrer to the evidence and dismissed the action as in case of nonsuit.

Plaintiff gave notice of appeal in open court, and was allowed to appeal *in forma pauperis* upon certificate of counsel and affidavit that she "is unable, by reason of her poverty, to make the deposit or to give the security required by law for said appeal."

Ward & Ward for plaintiff, appellant.
Moore & Moore for defendants, appellees.

STACY, C. J. The Court is without jurisdiction to entertain the appeal, due to the defective affidavit upon which plaintiff was allowed to appeal *in forma pauperis,* and the same is dismissed on authority of *Riggan v. Harrison,* 203 N. C., 191, 165 S. E., 358; *Hanna v. Timberlake,* 203 N. C., 556, 166 S. E., 733; and *Honeycutt v. Watkins,* 151 N. C., 652, 65 S. E., 762.

The plaintiff does not aver in her affidavit, as required by C. S., 649, that she "is advised by counsel learned in the law that there is error in matter of law in the decision of the Superior Court in said action." The requirements of the statute are mandatory, *McIntire v. McIntire,* 203 N. C,. 631, 166 S. E., 732, and jurisdictional, *Powell v. Moore,* 204 N. C., 654, 169 S. E., 281, "and unless the statute is complied with, the appeal is not in this Court, and we can take no cognizance of the case, except to dismiss it from our docket." *Honeycutt v. Watkins, supra.*

There is no authority for granting an appeal *in forma pauperis* without proper, supporting affidavit. *Powell v. Moore, supra; S. v. Stafford,* 203 N. C., 601, 166 S. E., 734.

Appeal dismissed.

STATE v. G. W. BATTS.

(Filed 4 November, 1936.)

1. **Criminal Law G m—Evidence of defendant's commission of other like offenses held competent when intent is essential element of offense charged.**

   In this prosecution defendant was charged with conspiring with others to damage his car with intent to defraud the insurance company. A witness was permitted to testify that on a former occasion he had seen defendant willfully damage another automobile belonging to him and that defendant had made claim for such damage. *Held:* Testimony of defendant's commission of a like offense on a prior occasion was competent on the question of intent constituting an essential element of the offense charged.

2. **Criminal Law I g—**

   An exception by defendant to the court's statement of the contentions of the State will not be sustained when defendant fails to call the matter to the court's attention in apt time.

APPEAL by defendant from *Grady, J.,* at June Term, 1936, of LENOIR. No error.

The defendant was convicted on one count in the bill of indictment charging him and others with criminal conspiracy to wreck and damage an automobile, the property of defendant, with intent to defraud the insurance company.

From judgment pronounced on a verdict of guilty, defendant Batts appealed.

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

Sutton & Greene and John G. Dawson for defendant.

DEVIN, J. There was evidence sufficient to be submitted to the jury that the defendant was guilty under the count in the bill of indictment on which he was convicted, and the charge of the court below was free from error.

But the defendant contends that in the course of the trial incompetent testimony was admitted, over his objection, warranting a new trial.

Defendant assigns as error the admission of testimony of a State's witness that he had seen the defendant deliberately damage another automobile of his on another occasion than that alleged in the bill of indictment, and that defendant made claim therefor, but this exception cannot be sustained on this record. The defendant was indicted for conspiracy to cheat and defraud. One of the elements of the offense with which the defendant was charged was the intent. In such case it is well established that evidence of other like offenses is competent. *S. v. Hardy,* 209 N. C., 83; *S. v. Miller,* 189 N. C., 695; *S. v. Simons,* 178 N. C., 679.

The exceptions to the court's charge to the jury relate to statements of the contentions of the State, as to which the judge's attention was not called at the time. *S. v. Johnson,* 207 N. C., 273. The contention that the charge contains expressions of opinion in violation of C. S., 564, cannot be sustained.

The other exceptions noted at the trial are without material significance.

On the record before us, we find

No error.

STATE v. JACK ATKINSON.

(Filed 4 November, 1936.)

1. **Criminal Law I j—**

A motion to nonsuit under C. S., 4643, will not lie merely for failure of the State to offer evidence in support of a nonessential averment in the indictment, C. S., 4623, when each essential element of the offense is supported by competent evidence.

2. **Intoxicating Liquor G a—Indictment for possession of liquor for sale need not allege that liquor did not bear stamp of A. B. C. Board.**

In an indictment sufficiently charging possession of liquor for the purpose of sale, C. S., 3379, an additional allegation that the whiskey did not bear the stamp of the A. B. C. Board of the county is an allegation of a nonessential fact, and will be regarded as surplusage or as a refinement within the meaning of C. S., 4623, and the State is not required to offer evidence of such additional allegation.

APPEAL by defendant from *Frizzelle, J.*, at March Term, 1936, of PITT.

Criminal prosecution, tried upon warrant charging the defendant with "having in his possession intoxicating liquors for the purpose of sale, and not bearing the stamp of the A. B. C. Board of Pitt County," etc., in violation of the statute.

The record discloses that on 25 December, 1935, two officers went to the home of the defendant and "found a five-gallon jug of liquor, and Jack Atkinson said it was his—corn whiskey."

There was other circumstantial evidence tending to show that the defendant had the liquor for the purpose of sale.

The defendant demurred to the evidence and moved for judgment as of nonsuit under the Mason Act, C. S., 4643, for that no evidence had been offered to support the allegation in the warrant, "and not bearing the stamp of the A. B. C. Board of Pitt County." Overruled; exception.

Verdict: Guilty.

Judgment: Eighteen months on the roads.

Defendant appeals, assigning errors.

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

S. J. Everett for defendant.

STACY, C. J. The gravamen of the charge against the defendant is, that he kept or had in his possession, for the purpose of sale, spirituous liquors in violation of C. S., 3379. *S. v. Langley,* 209 N. C., 178, 183

S. E., 526. The additional allegation, "and not bearing the stamp of the A. B. C. Board of Pitt County," was unnecessary and may be regarded as surplusage or as a refinement within the meaning of C. S., 4623. "A refinement is understood to be the verbiage which is frequently found in indictments in setting forth what is not essential to the constitution of the offense, and, therefore, not required to be proved on the trial"—*Gaston, J.*, in *S. v. Gallimore,* 24 N. C., 372. The prosecution was under no obligation to offer evidence of a nonessential averment. *S. v. Guest,* 100 N. C., 410, 6 S. E., 253.

In addition to the *prima facie* case, arising from the possession of more than a gallon of spirituous liquors, *S. v. Tate, ante,* 168, there was other circumstantial evidence tending to show its possession for the purpose of sale. *S. v. Rhodes, ante,* 473; *S. v. Hardy,* 209 N. C., 83, 182 S. E., 831. The case was properly submitted to the jury. *S. v. Ellis, ante,* 166.

No error.

R. E. MARTIN v. LESTER BOYD ET AL.

(Filed 4 November, 1936.)

Arrest B a—

Officers attempting to make an arrest without a warrant outside the district in which they are authorized to arrest without a warrant are liable in damages for wrongful assault in shooting plaintiff's tire in order to stop him.

APPEAL by defendants from *Alley, J.*, at March Term, 1936, of IREDELL.

Civil action to recover damages for wrongful assault.

Verdict and judgment for plaintiff, damages being assessed at $200.00, from which the defendants appeal, assigning errors.

A. A. Tarlton and Burke & Burke for plaintiff, appellee.
Zeb V. Turlington and Lewis & Lewis for defendants, appellants.

PER CURIAM. The trial court instructed the jury that under the facts in the instant case, the defendants did not have the right to shoot down plaintiff's tire in order to stop him. Exception.

Defendants say that had they been armed with process, this right would have existed, *ergo* the mere fact that they were not armed with

process would not make their conduct unlawful. The conclusion is a *non sequitur. Holloway v. Moser,* 193 N. C., 185, 136 S. E., 375. The defendants were outside the territory in which they are authorized to arrest without warrant. *S. v. Sigman,* 106 N. C., 728, 11 S. E., 520.

No error.

DEWITT JOYNER v. T. M. DAIL AND BERT MCCULLEN, PARTNERS, TRADING AS DAIL & MCCULLEN.

(Filed 4 November, 1936.)

1. **Automobiles C a—Driver must ascertain that left side of road is clear before driving to the left to pass cars going in same direction.**

   Evidence that the driver of a truck, in attempting to pass cars going in the same direction, pulled out in the center of the road and hit the car which plaintiff was driving in the opposite direction, causing damage to the car and injury to plaintiff, *is held* sufficient to be submitted to the jury on the question of the actionable negligence of the driver of the truck. N. C. Code, 2621 (55) (a).

2. **Trial E f—Misstatement of contentions must be brought to court's attention in apt time to be available on appeal.**

   The court, after asking counsel as to their contentions in respect to matters relating to one of the issues and receiving an affirmative reply from counsel, instructed the jury that the parties agreed that the issue should be answered in the affirmative. *Held:* If the instruction on the issue was not in accord with the contentions of the party, the matter should have been brought to the court's attention in apt time in order for an exception thereto to be considered on appeal.

APPEAL by defendants from *Frizzelle, J.,* at February Term, 1936, of PITT. No error.

This is an action for actionable negligence, brought by plaintiff against defendants, in which it is alleged that the plaintiff was injured by the negligence and carelessness of one Andrew Redmond, servant and employee of the defendants, in the operation of a motor vehicle on the public highways of Pitt County. The defendants denied the allegations of the complaint and pleaded contributory negligence.

The issues submitted to the jury and their answers thereto were as follows:

"1. Was Andrew Redmond, at the time alleged in the complaint, employed by the defendants, and acting within the scope of his employment in the furtherance of the business of said partnership? Answer: 'Yes.'

"2. Was the plaintiff injured by the negligence of the defendants' employee, as alleged in the complaint? Answer: 'Yes.'

"3. Did the plaintiff, by his own carelessness and negligence, contribute to his injury, as alleged in the answer? Answer: 'No.'

"4. What damage, if any, is the plaintiff entitled to recover of the defendants? Answer: '$650.00.' "

The defendants made numerous exceptions, assigned errors, and appealed to the Supreme Court.

Wm. J. Bundy for plaintiff.
R. T. Martin for defendants.

PER CURIAM. At the close of plaintiff's evidence and at the close of all the evidence the defendants made motions in the court below for judgment as in case of nonsuit. C. S., 567. The court below overruled these motions, and in this we can see no error.

The testimony of plaintiff is, in part, as follows: "I was on the highway just outside of Farmville town limit; I was driving an open Ford roadster; I was going from Farmville to Greenville; it was about seven or eight o'clock Sunday afternoon in October; Carrie Scott and Ada Daniel were with me; there were several cars on the road; I was driving about thirty miles an hour; I was coming from Farmville going to Greenville; there were a line of cars and I seen this truck and made for the shoulder of the road and held my arm out for the back car not to run into me, and by the time I got my arm out it come up and got my arm; I don't know what part of the truck hit me, it was done so quick; two of the wheels of my car were off the pavement; when I seen he was right on me he had come out in the center of the road to pass me and another car."

N. C. Code, 1935 (Michie), sec. 2621 (55) (a), is as follows: "The driver of a vehicle shall not drive to the left side of the center of a highway in overtaking and passing another vehicle proceeding in the same direction unless such left side is clearly visible and is free of oncoming traffic for a sufficient distance ahead to permit such overtaking and passing to be made in safety." Section 2621 (53).

As to the first issue, the following admission is in the record: When the court below was charging the jury—"Court: Do I understand you to contend that the truck was not jointly owned? Mr. Martin: No, sir; we do not. Court: Do you contend that the driver was not acting upon that occasion within the scope of his employment? Ans.: No, sir. Court: In other words, you agree that the first issue may be answered 'Yes'? The court will not discuss that further, gentlemen, counsel having said that the jury may answer the first issue 'Yes.' "

The exceptions and assignments of error made by defendants as to the charge of the court below cannot be sustained. (1) The defendants' complaint to the charge is to certain contentions which the court below set forth as made by defendants. If they were incorrect, defendants should at the time have called the court's attention to same, which was not done. It is too well settled that after verdict it is too late to be considered on appeal. (2) On the question of damages there was no error. *Shipp v. Stage Line,* 192 N. C., 475 (478-9).

In the judgment below we find

No error.

HUNTER MARTIN, ADMINISTRATOR OF G. T. AUSTIN, v. A. GARLAND JONAS, EXECUTOR OF ADOLPH GUSTAV JONAS, DECEASED.

(Filed 4 November, 1936.)

Receivers A a—

The appointment of a receiver is a harsh remedy, and the applicant for receivership must clearly show his right to the relief, and that no other safe and expedient remedy is available.

APPEAL by defendant from *Warlick, J.,* 4 April, 1936. From CALDWELL. Reversed.

The plaintiff, at November Term, 1935, recovered judgment against the defendant for $1,382, and interest from 18 February, 1929. The plaintiff makes a motion in that cause, 2/14/1936, on behalf of himself and all other creditors who may come in to have a receiver appointed. The prayer is as follows: "(1) That an order be entered appointing a receiver to take immediate charge of the estate of the said Adolph Gustav Jonas, with the end in view that the assets of the said estate may be protected and conserved to apply upon the indebtedness of the said estate. (2) That the receiver be authorized, directed, and empowered to take such steps as may be necessary to recover such assets as may have been sold, transferred, and conveyed in defraud of creditors. (3) For the costs of this motion. (4) For such other and further relief as the plaintiff may be entitled to in the premises."

The defendant answered the motion in the cause denying the material allegations: "That the motion does not state facts sufficient to constitute a cause of action for the appointment of a receiver. For that it appears upon the face of the motion that the court is without jurisdiction of the action, and the relief may be had only by an order of the clerk of the Superior Court of Caldwell County. Wherefore, this defendant, having

fully answered, prays the court: (a) That the demands of the plaintiff for the appointment of a permanent receiver in this cause be denied. (b) For such other and further relief as the facts may warrant, and to the court may seem just."

The court below appointed a receiver. The defendant excepted, assigned error, and appealed to the Supreme Court.

Squires & Strickland for plaintiff.

Ervin & Butler, Polikoff & McLennan, and Vaughn & Graham for defendant.

PER CURIAM. There are various contentions set forth in the briefs of the parties to this controversy, which we need not now consider. On the whole record, we do not think the facts justify the appointment of a receiver.

It is said in *Neighbors v. Evans, ante,* 550: "A receiver may be appointed where a party establishes an apparent right to property, and the person in possession is insolvent, and ordinarily a receiver will be appointed to take charge of the rents and profits during the pendency of the action. Plaintiff does not come within the above rule. The courts look with jealousy on the application for the appointment of a receiver. It is ordinarily a harsh remedy. The right to relief must be clearly shown, and also the fact that there is no other safe and expedient remedy. In some cases a bond is allowed the defendant instead of the appointment of a receiver. *Woodall v. Bank,* 201 N. C., 428."

For the reasons given, the judgment of the court below is

Reversed.

B. P. EGGLESTON, TRUSTEE, ET AL., v. GEORGE V. QUINN AND HIS WIFE, MABEL QUINN.

(Filed 4 November, 1936.)

Bills and Notes H b: Reformation of Instruments C d—Where party admits execution of note and fails to introduce evidence on affirmative defense upon which he prays reformation, directed verdict for holder is not error.

A party alleging that it was agreed that he should not be personally liable on a note executed by him, but that the maker agreed that his sole remedy should be by foreclosure of a deed of trust executed as security for the note, and that the agreement was omitted from the note and deed of trust by mutual mistake of the parties, and praying reformation of the

instruments, has the burden of proof on the issue, and when he fails to introduce evidence in support of such issue, and directed verdict for plaintiff on the note admittedly executed by defendant, is without error.

APPEAL by defendants from *Grady, J.*, at March Term, 1936, of DUPLIN. No error.

This is an action to recover on notes aggregating the sum of $1,500, and for the foreclosure of a deed of trust by which the payment of the notes described in the complaint is secured.

The defendants in their answer admit the execution of the notes and of the deed of trust, as alleged in the complaint. They allege that at the time of the execution of said notes and of the said deed of trust, it was agreed by and between the plaintiffs and the defendants that the defendants should not be held liable personally on said notes, and that the sole security for their payment should be the land conveyed by the deed of trust, and that said agreement was omitted from the notes and deed of trust by the mutual mistake of the plaintiffs and the defendants. They pray for the reformation of the notes and deed of trust.

The only issue submitted to the jury was answered as follows:

"At the time of the execution of the five notes and the deed of trust referred to in the complaint, was it understood and agreed by and between the parties that the defendants would not be held personally responsible for said notes, but that the land conveyed by said deed of trust should be the sole security held by said plaintiffs for said debt; and, if so, was said agreement omitted from the contract through the mutual mistake of the parties, as alleged in the answer? Answer: 'No.'"

From judgment on the admissions in the pleadings and the verdict of the jury, that plaintiffs recover of the defendants the sum of $1,500, with interest from 9 March, 1936, and the costs of the action, and for the foreclosure of the deed of trust described in the complaint, the defendants appealed to the Supreme Court, assigning as error the instruction of the court to the jury.

Beasley & Stevens for plaintiffs.
R. D. Johnson for defendants.

PER CURIAM. The burden on the issue submitted to the jury was on the defendants.

There was no evidence at the trial tending to support an affirmative answer to the issue, and for that reason there was no error in the instruction of the court to the jury that they should answer the issue "No."

The judgment is affirmed.

No error.

MRS. BEULAH PARKS v. BARNA ALLEN, ADMINISTRATOR OF J. C. ALLEN.

(Filed 4 November, 1936.)

1. **Bills and Notes H b—Introduction of note with further evidence of its execution and consideration entitles holder to go to the jury, although defendant introduces evidence that signature was a forgery.**

   Where plaintiff introduces in evidence the note sued on with evidence of its execution by defendant's intestate, and that the note was given as consideration for a deed to lands executed to intestate, defendant's evidence that the signature to the note was a forgery, and that it was not given in consideration for the deed, raises an issue of fact for the jury, and defendant's motion to nonsuit is properly denied.

2. **Appeal and Error E b—**

   Where the charge of the court is not in the record, it will be presumed on appeal that the court correctly charged the law applicable to the evidence.

APPEAL by the defendant from *Oglesby, J.,* at April Term, 1936, of MONTGOMERY. No error.

Paul R. Raper and B. S. Hurley for plaintiff, appellee.
L. L. Moffitt and R. T. Poole for defendant, appellant.

PER CURIAM. This was an action instituted upon an alleged note for $5,000, less a credit of $50.00, in which the defendant sets up the defense of forgery, and also the lack of consideration. The note was introduced by the plaintiff who introduced further evidence tending to show that the signature thereto was in the handwriting of the defendant's intestate, J. C. Allen, and that the note was given in consideration for a deed from the plaintiff and her husband to the intestate for a certain tract of land in Biscoe Township, Montgomery County. The defendant offered evidence tending to show that the signature to the note introduced was not in the handwriting of his intestate, J. C. Allen, and that the deed, for which it was contended the note sued upon was given, bore a different date and named a different amount of consideration from said note, and was not given in consideration of said note. This adverse evidence raised a clear issue of fact for the jury and rendered the motion to dismiss the action at the close of all the evidence untenable.

The jury returned the following verdict: "What amount, if any, is the defendant indebted to the plaintiff? Answer: '$4,950, with interest according to note."

We have examined the exceptions taken to the evidence and to portions of the charge and find no reversible error.

The charge is not set forth in full in the record, and it is therefore presumed that it stated in a clear and correct manner the evidence given in the case and declared and explained the law arising thereon.

The judgment of the Superior Court is

Affirmed.

MRS. SUSAN BYRD v. J. H. WALDROP AND WIFE, LOIS Z. WALDROP; FRANK BRIGHT AND WIFE, LUCY BRIGHT.

(Filed 4 November, 1936.)

1. **Pleadings D e—**

   A demurrer admits relevant facts pleaded, but not the pleader's conclusions of law.

2. **Mortgages F c—Where record does not show that transfer by mortgagor was to holder of notes, transferee of holder obtains good title in the absence of notice or want of consideration.**

   Where a mortgagor transfers title to the holder of the notes secured by the mortgage, who had purchased the notes from the mortgagee, and the holder cancels the mortgage and transfers title to a third person, the mortgagor has a right of action against the holder, but not against the purchaser from the holder in the absence of allegation that the purchaser had notice of the mortgagor's equity and that the purchaser's deed was not supported by consideration, the record not being notice since it showed the cancellation of the mortgage and failed to show that the mortgagor's deed was made to the holder of the notes, the holder not appearing of record as the mortgagee.

3. **Pleadings E d—**

   Where the Supreme Court affirms the judgment of the court below sustaining the demurrer of one of defendants, the decision is without prejudice to plaintiff's right to amend the complaint, if so advised. C. S., 546.

APPEAL by plaintiff from *Frizzelle, J.*, at March Term, 1936, of PITT. Affirmed.

J. A. Jones for plaintiff, appellant.
J. B. James for defendants, appellees.

PER CURIAM. The plaintiff executed a mortgage on described land to Mrs. Louisa Wall to secure an indebtedness, evidenced by six notes payable to Mrs. Wall. This was in November, 1927. Two years later defendant Waldrop advised plaintiff that he was then the owner and holder of the unpaid notes and demanded payment. The plaintiff,

unable to do so, conveyed the land to defendant Waldrop, pursuant to an alleged agreement between them. Subsequently, the mortgage was canceled of record. On 22 December, 1933, defendant Waldrop executed a deed for the land to Frank Bright, the deed (which appears in the record on appeal filed by plaintiff) reciting a valuable consideration. There was no allegation that defendant Bright had notice of any equity between plaintiff and defendant Waldrop, nor was there allegation of want of consideration for the deed to Bright.

The demurrer admits the relevant facts pleaded (*Ramsey v. Furniture Co.,* 209 N. C., 165), but not the pleader's conclusions of law. McIntosh Prac. & Proc., sec. 445; *Board of Health v. Comrs.,* 173 N. C., 250; *Lane v. Graham County,* 194 N. C., 723. The complaint is sufficient as against the defendant Waldrop, but does not allege sufficient facts to make out a case for the cancellation of the deed as against defendant Bright. On the contrary, it would seem that the record title was clear at the time of the conveyance to Bright, and there are no allegations of notice or of want of consideration so as to invalidate the deed.

While a conveyance by a mortgagee ordinarily leaves his grantee in the same condition as himself, this salutary rule has no application where the mortgage has been canceled on the record, and where the conveyance was made by one not appearing of record as mortgagee, to one who purchases for value and without notice. *Cole v. Boyd,* 175 N. C., 555; *Lockridge v. Smith,* 206 N. C., 174; *Bailey v. Stokes,* 208 N. C., 114.

There was no error in sustaining the demurrer on the part of defendant Bright; this, however, without prejudice to right of plaintiff to amend her complaint if so advised. C. S., 546.

Affirmed.

W. HASSELL GURGANUS, VELMA L. GURGANUS, AND FRANCES V. GURGANUS v. BETTIE BULLOCK.

(Filed 4 November, 1936.)

Deeds C c—Rule in Shelley's case held not to apply to deed in this case.

A deed to G. for life "and then to his heirs, if any; if no heirs, to return to his brothers, . . . to have and to hold during his lifetime and then to his lawful heirs of his body, tho, if the said G. should die without a lawful heir of his body, then the aforesaid tract or parcel of land shall return to his brothers," *is held* to grant a life estate to G., the rule in *Shelley's case* not applying, and upon his death his children take title thereto in fee as against the grantee in a deed in fee executed by G.

APPEAL by the defendant from *Sinclair, J.*, at September Term, 1936, of PITT. Affirmed.

S. J. Everett for plaintiffs, appellees.
Elbert S. Peel for defendant, appellant.

PER CURIAM. This is a controversy without action, submitted to the court under C. S., 626.

The salient facts are that on 9 October, 1903, George D. Gurganus and wife, Anis Gurganus, conveyed a certain piece and parcel of land to H. D. Gurganus by deed, the material parts of which are as follows:

"That I, Geo. D. Gurganus and wife, Anis Gurganus, for the love and affection that the said Geo. D. Gurganus and wife, Anis, have for the said H. D. Gurganus, they do lend unto the said H. D. Gurganus, a certain tract or parcel of land unto the said H. D. Gurganus, his lifetime and then to his heirs, if any; if no heirs, to return to his brothers, viz.: (Here follows description of the land.)

"To have and to hold during his lifetime and then to his lawful heirs of his body, tho, if the said H. D. Gurganus should die without a lawful heir of his body, then the aforesaid tract or parcel of land shall return to his brothers."

H. D. Gurganus executed a deed purporting to convey a fee simple title to the land described in the aforementioned deed, and the grantee therein held the said land under said deed until the death of the said H. D. Gurganus.

H. D. Gurganus, after the execution of the aforesaid deed, died, leaving the plaintiffs as his children and bodily heirs.

The plaintiffs agreed to sell and the defendant agreed to purchase the land, and the plaintiffs have tendered a deed therefor in regular form, properly executed, and have demanded the payment of the agreed price. The defendant has refused to accept the deed, contending that under the wording of the above quoted deed to H. D. Gurganus, he, the said H. D. Gurganus, took a fee simplè title to the land, and that the deed which he subsequently executed passed a fee simple title to the land, and that the plaintiffs, his children and bodily heirs, have no interest therein.

The question presented on this appeal is whether, under the above quoted deed to H. D. Gurganus, he took a life estate or a fee simple title to the land therein described.

The defendant contends that the rule in *Shelley's case* applies and that H. D. Gurganus took a fee simple title to the land described in the above quoted deed, and the plaintiffs contend that the rule in *Shelley's case* does not apply and that H. D. Gurganus took only a life estate to said land.

His Honor was of the opinion that the rule in *Shelley's case* did not apply, and that H. D. Gurganus took only a life estate in the land described and upon his death the plaintiffs, as the children and bodily heirs of the said H. D. Gurganus, held a fee simple title to the land, and adjudged "that the plaintiffs are the holders of the title to the land in fee and can convey title therein in fee simple, and upon the plaintiffs tendering a duly executed deed in fee simple, the defendant is directed to accept same and pay the agreed consideration."

Upon the authority of *Puckett v. Morgan,* 158 N. C., 344, and cases therein cited, the holding and judgment of his Honor are

Affirmed.

MRS. J. P. SMITH v. DR. HUGH THOMPSON.

(Filed 25 November, 1936.)

1. **Torts C a: Physicians and Surgeons C b—Release of tort-feasors signed after treatment of injury by a physician held to bar action against the physician for alleged malpractice in treating the injury.**

In this action against a physician for alleged malpractice, the pleadings disclosed that plaintiff released the parties causing the accident of all claims growing out of the accident, including medical expenses, that the release was signed for a valuable consideration after plaintiff had employed the services of defendant physician, and after his treatment of her constituting the basis of the claim for malpractice, and that plaintiff paid the physician out of money received as consideration for the release for his services rendered before and after the execution of the release. *Held:* The tort-feasors causing the accident would be liable for injuries resulting from malpractice in treating the injuries if plaintiff had exercised due care in the selection of the physician, and the release, covering by its terms and the interpretation given it by the parties, all medical expenses incurred before and after the execution of the release for the treatment of the injury, bars plaintiff from maintaining the action against defendant physician for alleged malpractice, and his motion for judgment on the pleadings was properly granted.

2. **Contracts B a—**

Courts will generally adopt the construction given a contract by the parties thereto.

APPEAL by plaintiff from *Barnhill, J.,* at Third March Term, 1936, of WAKE. Affirmed.

The plaintiff brought this action for damages against the defendant for malpractice. The plaintiff was injured in a motorcycle accident on 11 July, 1929, which resulted in a broken leg. The defendant, a physician, was called in to treat her.

The defendant, in his answer, among other things, says: "It is specifically denied that the defendant did any negligent act or negligently omitted to do any act in connection with the treatment and care of the plaintiff, and it is specifically denied that the said injuries to the plaintiff and her said disabilities, or any of them, were in any way caused by any negligent act or omission by the defendant, but, on the contrary, it is alleged that each and all of the said injuries and disabilities of the plaintiff were caused by the aforesaid automobile accident, and that the treatment furnished by the defendant to the plaintiff had no effect upon the plaintiff's said injuries or upon her general physical condition, except that the said treatment furnished by the defendant greatly lessened and decreased the pain, suffering, and disabilities resulting to the plaintiff from the said accident."

In an amended answer, allowed by the court, the defendant alleges: "That, as the defendant is informed and believes, and therefore alleges, the plaintiff was injured in an accident and collision with a motorcycle, driven by one W. J. Andrews, while in the employment of P. D. Gattis, on 11 July, 1929, and for which the said W. J. Andrews and P. D. Gattis were responsible and liable, and that as a result of said accident and collision the plaintiff sustained a very serious injury to her leg, described as a compound comminuted fracture of both bones of the leg, the large bone or tibia penetrating and protruding out of the skin approximately two inches and being covered with dirt. That on or about 3 October, 1929, the plaintiff executed and delivered, for valuable consideration, to the parties responsible for the said accident and collision, from which plaintiff's injury resulted, to wit, the aforesaid P. D. Gattis and W. J. Andrews, a release and discharge in settlement and in satisfaction of all claims which she then had or might have for any injury arising out of or resulting from said accident, or which might thereafter arise therefrom. That after the careful and skillful treatment rendered by the defendant, and after the date of the alleged occurrence of the matters complained of in the complaint, plaintiff was satisfied with the care and skill employed in her treatment by the defendant, even to the extent that she was willing to execute the aforesaid release; and the defendant hereby pleads the execution of the aforesaid release by the plaintiff in bar of this action."

In answer to the amended answer, the plaintiff admits the release, reiterates malpractice on the part of defendant, and that it was signed on the fraudulent representation of defendant. "That he advised plaintiff that her limb would be practically as good as new within a few months, and that at the time said release was signed releasing said P. D. Gattis and W. J. Andrews for their negligence in causing the original injury to her

limb, the said defendant wrote a letter to the then plaintiff's attorney assuming the after care of plaintiff upon the payment of a further sum of money to him for professional services rendered and to be rendered in his treatment of her. Plaintiff alleges further that said amount which the defendant claimed was due him for his professional services to that time and for the after care necessary in the treatment of her limb was paid out of the small recovery which she received. Plaintiff alleges further that she never would have accepted such a small compromise except for the advice of the defendant, who was then her physician and in whose care she was. Plaintiff alleges that she had confidence in his statement to the effect that she would completely recover within a short while."

The release is as follows:

"General Release.

"IN CONSIDERATION of the sum of TWENTY-FOUR HUNDRED AND NO/100 DOLLARS, received by me this 3rd day of OCTOBER, 1929, We, Mrs. Dora Smith and husband, J. P. Smith, of the County of WAKE and the State of NORTH CAROLINA, have released and discharged and do hereby for myself, my heirs, executors and administrators, release and discharge P. D. GATTIS and W. J. ANDREWS, executors and administrators, successors and assigns, of and from any and all claims for damages of any kind or character whatsoever and all causes of action, claims and demands whatsoever which I ever had, now have, or may hereafter have by reason of personal injuries sustained by me on or about the 11th day of July, 1929, or by reason of any cause, matter or thing whatsoever, including all medical expenses. It is hereby expressly understood and agreed that it is the intention of the parties hereto and they do hereby settle and compromise the aforesaid claim for damages and that the said sum of TWENTY-FOUR HUNDRED AND NO/100 DOLLARS, is the sole consideration of this release, and all agreements and understandings between the parties are hereto embodied and expressed therein. THUS DONE AND SIGNED at the City of RALEIGH, State of NORTH CAROLINA, on this 3rd day of OCTOBER, 1929.

"THOMAS RUFFIN, Witness,
Raleigh, N. C.

"SELETA FELTON, Witness,
Notary Public,
909 Citizens Nat'l Bank Bldg.,
Raleigh, N. C.

MRS. DORA SMITH,
210 South Blount Street,
Raleigh, N. C.

J. P. SMITH,
210 South Blount Street,
Raleigh, N. C."

The judgment of the court below is as follows: "This cause coming on to be heard, and being heard before his Honor, M. V. Barnhill, and a jury, at the Third March Term, 1936, and upon motion by the defendant for judgment upon the pleadings, and it appearing from the pleadings filed herein that on 11 July, 1929, the plaintiff suffered a broken left leg just above her ankle as result of collision with the motorcycle driven and operated by P. D. Gattis and W. J. Andrews; that the defendant herein was engaged to treat and treated the plaintiff for said injuries resulting from said collision; that thereafter, on or about 3 October, 1929, and subsequent to the date of the alleged acts of the defendant herein complained of, which are in connection with treatment rendered plaintiff by the defendant for her injuries resulting from the aforesaid collision, the plaintiff executed and delivered to said P. D. Gattis and W. J. Andrews, the parties originally responsible for plaintiff's accident and injuries complained of herein, a full release, settlement, and discharge, releasing said P. D. Gattis and W. J. Andrews from all liability for their negligence in causing plaintiff's injuries and from any and all claims for damages of any kind or character whatsoever which she then had or might thereafter have by reason of personal injuries sustained by her as result of said motorcycle collision, or which might thereafter result from said injuries and in satisfaction of said claims, and the court being of the opinion that the aforesaid release and discharge of said P. D. Gattis and W. J. Andrews by the plaintiff, as set forth by defendant in his further answer and plea in bar, and admitted by the plaintiff, constitutes a good and sufficient release of defendant herein, and a bar to this action, and that the plaintiff is not entitled to recover anything of the defendant in this action: It is therefore considered, ordered, and adjudged that the plaintiff take nothing of the defendant in this action, and that this action be and the same is hereby dismissed, that the defendant go hence without day, and that the costs of this action be taxed against the plaintiff.

(Signed) M. V. BARNHILL,
Judge Presiding."

To the foregoing judgment as signed the plaintiff excepted and assigned error and appealed to the Supreme Court.

W. Brantley Womble and R. B. Templeton for plaintiff.
Smith, Leach & Anderson for defendant.

CLARKSON, J. Did the court err in rendering judgment upon the pleadings in favor of the defendant? We think not.

Plaintiff was injured in a motorcycle accident on 11 July, 1929. On 3 October, 1929, represented by her counsel, plaintiff settled all her

claims for damages against the operators of the motorcycle which struck her, receiving the sum of $2,400 in full compensation for all injuries resulting from said collision, or which might thereafter result therefrom. In consideration of said settlement and compensation, plaintiff and her husband executed a "General Release," witnessed by plaintiff's counsel and a notary public, in which plaintiff released P. D. Gattis and W. J. Andrews, operators of the motorcycle, from "*any and all claims for damages of any kind or character whatsoever and all causes of action, claims and demands whatsoever which I ever had, now have, or may hereafter have by reason of personal injuries sustained by me on or about the 11th day of July, 1929, or by reason of any cause, matter or thing whatsoever, including all medical expenses.*" Almost three years after the injury complained of, plaintiff brought this action, on 9 July, 1932, *in forma pauperis,* against defendant.

The rule of law in actionable negligence cases of this kind for damages is well settled. In *Ledford v. Lumber Co.,* 183 N. C., 614 (616-17), is the following: "In cases like the one at bar, if the plaintiff be entitled to recover at all, he is entitled to recover as damages one compensation—in a lump sum—for all injuries, past and prospective, in consequence of the defendant's wrongful or negligent acts. These are understood to embrace indemnity for actual nursing and medical expenses and loss of time, or loss from inability to perform ordinary labor, or capacity to earn money. Plaintiff is to have a reasonable satisfaction (if he be entitled to recover at all) for loss of both bodily and mental powers, or for actual suffering, both of body and mind, which are the immediate and necessary consequences of the injury. And it is for the jury to say, under all the circumstances, what is fair and reasonable sum which the defendant should pay the plaintiff by way of compensation for the injury he has sustained. The age and occupation of the injured party, the nature and extent of his business, the value of his services, the amount he was earning from his business, or realizing from fixed wages, at the time of the injury, or whether he was employed at a fixed salary, or as a professional man, are matters properly to be considered. *Rushing v. R. R.,* 149 N. C., 158. The sum fixed by the jury should be such as fairly compensates the plaintiff for injuries suffered in the past and those likely to occur in the future. The award is to be made on the basis of a cash settlement of the plaintiff's injuries, past, present, and prospective. *Penny v. R. R.,* 161 N. C., 528; *Fry v. R. R.,* 159 N. C., 362." *Murphy v. Lumber Co.,* 186 N. C., 746 (748); *Cole v. Wagner,* 197 N. C., 692 (698-9); *Shipp v. Stage Lines,* 192 N. C., 475; *Campbell v. R. R.,* 201 N. C., 102 (108).

In *Lane v. R. R.,* 192 N. C., 287 (291-2), we find: "In *Sears v. R. R.,* 169 N. C., 446, it is held that where there is some evidence that as the

result of a personal injury, which was alleged to have been negligently inflicted by the defendant on its employee, two surgical operations were performed, and that the second one was made necessary by reason of the defendant's negligence and as a proximate result thereof, it is proper for the trial judge to refuse to instruct the jury that in no view of the case was the defendant liable for the additional suffering, etc., caused by the second operation. It has further been held that where the injured person has received unskillful treatment by a physician or surgeon, increasing the damages, defendant may be liable for such consequences where the person injured has used reasonable care in selecting the physician or surgeon. 17 C. J., 738, note 56, and cases cited."

In *Sircey v. Rees' Sons*, 155 N. C., 296 (299), we find: "We cannot agree with the learned counsel that the plea of a release is technical and does not present a meritorious defense. Plaintiff thereby acknowledged full satisfaction of his claim, and he is entitled to have no more. Nor can we assent to the suggestion that a plaintiff should be allowed two satisfactions for one and the same demand. Such a doctrine would shock the moral sense and violate a cardinal maxim of the law, if not the defendant's constitutional right." At p. 302: "A plaintiff is entitled to but one satisfaction of his cause of action, whether but one or many may be liable, or whatever the form of action may be." *Elmore v. R. R.*, 189 N. C., 658 (666-7); *Scott v. Bryan, ante,* 478 (480).

In *Holland v. Utilities Co.*, 208 N. C., 289 (292), it is said: "Both reason and justice decree that there should be collected no double compensation, or even over compensation, for any injury, however many sources of compensation there may be."

Plaintiff in an action for actionable negligence against P. D. Gattis and W. J. Andrews, joint tort-feasors, under the law in this jurisdiction could recover (*Ledford case, supra*), "as damages one compensation—in a lump sum—for all injuries, past and prospective, in consequence of defendant's wrongful or negligent acts. These are understood to embrace indemnity for actual nursing and medical expenses," etc. Plaintiff did not bring an action for actionable negligence, but in consideration of $2,400 made the release before mentioned. At the time this release was made, the plaintiff had employed the defendant to treat her injuries. In law the physician's charges were a part of any damage she may recover in an action for actionable negligence. In her release for $2,400, she assumed to pay as part of her settlement "including all medical expenses," the physician's charges. This obligation was a part of the settlement. In fact, in her pleadings, she says: "That said amount which the defendant claimed was due him for his professional services to that time and for the after care necessary in the treatment of her limb was paid out of the small recovery which she received."

Courts will generally adopt parties' construction of contract. *Albert Pick & Co. v. Morehead Bluffs Hotel Co.*, 197 N. C., 110. Plaintiff construed the contract that part of the release settlement included medical expenses and paid the defendant physician out of the compromise settlement.

In *Edmonson v. Hancock* (Ga.), 151 S. E. Rep., 114 (116), speaking to the subject, it is said: "The case of *Martin v. Cunningham,* 93 Wash., 517, . . . is one in which the facts and pleadings were almost identical with those in the case at bar. In that case it appeared that the plaintiff had been injured in a train wreck and was attended by a physician in the employ of the railroad company. After the plaintiff released the railroad company from all liability to him arising out of the injury, he sued the physician for alleged negligent treatment. In that opinion the Court said: 'Conceding malpractice on respondent's part, as charged by the complaint, we think appellant is precluded from a recovery against him. The railway company was liable not only for the injury and resulting suffering of the appellant, but also for the malpractice of the attending surgeon and for the expenses of medical attendance. Having that liability in view, the company settled with him, paying him a substantial sum for a release from further liability. At the date of the release the appellant had already suffered from the alleged malpractice and had employed another surgeon to remedy it, to whom he had paid $500 for the service. These were all matters that could be enforced against the railway company under its liability for damages, and the settlement was clearly made with a view to covering all those elements of damages. They were known to exist by the parties to the release, and the settlement was made with reference to them. The release, having been made in full satisfaction of all existing claims, precludes the appellant from bringing a second action for malpractice against the surgeon, occupying somewhat the position of a joint tort-feasor, to recover double compensation for what he has already been satisfied. It is a well settled doctrine of the law that complete satisfaction for an injury received from one person in consideration of his release operates to discharge all who are liable therefor, whether they be joint or several wrongdoers,' " citing numerous authorities. *Feinstone v. Allison Hospital* (Fla.), 143 So., 251. The almost unanimous decisions in the nation are in accord with the position here taken.

Plaintiff does not bring an action for fraud or mistake to set aside the release she signed, but has waited nearly three years before suing defendant for malpractice. In *Pendergraft v. Royster,* 203 N. C., 384 (393), it is said: "A doctor is neither a warrantor of cures nor an insurer."

It may be that on plaintiff's pleadings there was no actionable negligence charged against defendant, but defendant did not demur. On the whole record, we think plaintiff is estopped by her release from bringing this action.

For the reasons given, the judgment of the court below is

Affirmed.

ERNEST F. BOHANNON, JR., v. WACHOVIA BANK AND TRUST COMPANY, EXECUTOR AND TRUSTEE OF LAURA WEBB BOHANNON, AND MAUDE BOHANNON TROTMAN.

(Filed 25 November, 1936.)

1. Appeal and Error J a—

This appeal from the refusal of the court to set aside an order of the clerk for the examination of an adverse party under C. S., 900, *is held* not premature, the appeal presenting the question of whether plaintiff's affidavit upon which the order was made states facts sufficient to constitute a cause of action.

2. Wills F i—Third person wrongfully inducing testator to alter plans to devise person lands is liable to such person for damages.

Plaintiff alleged that his grandfather had formed a fixed intention to settle a large part of his estate on plaintiff, that defendants conspired together to deprive plaintiff of his share of the estate, and by false and fraudulent representations induced his grandfather to abandon his intention to leave plaintiff a large part of his property, and that but for such false and fraudulent representations plaintiff's grandfather would have carried out his previous intention and would have devised for the benefit of plaintiff a large part of the estate. *Held:* The facts alleged are sufficient to constitute a cause of action against defendants, the cause being analogous to the right of action for wrongful interference with contractual rights by a third person.

3. Bill of Discovery B b—

An order for the examination of an adverse party under C. S., 900, may be granted upon proper affidavit before the filing of a complaint.

4. Venue D a—

Where an order for the examination of an adverse party is granted before the filing of the complaint, a motion for change of venue as a matter of right may be denied without prejudice to defendant's right to move for change of venue after the filing of the complaint, the right of defendant to object to venue, N. C. Code, 470, applying after complaint is filed.

STACY, C. J., and CONNOR, J., dissent.

APPEAL by defendants from *Cowper, Special Judge,* at 14 September, 1936, Extra Term of MECKLENBURG. Affirmed.

The summons in this action was issued 15 June, 1936, and served on defendants 16 June, 1936. Time for filing complaint of plaintiff was duly allowed. The following affidavit and amended affidavit of plaintiff were filed in the action:

"Ernest F. Bohannon, Jr., plaintiff, being duly sworn, says:

"1. That this action is brought for the recovery of damages from the defendants upon the ground that Laura Webb Bohannon and Maude Bohannon Trotman, by a conspiracy and false and fraudulent representations, deprived the plaintiff of a share in the estate of F. M. Bohannon, which would have been given him except for the wrongful acts of the defendants; that summons has been issued in this action and an extension of time to file complaint has been granted to 3 July, 1936.

"2. That the defendant Maude Bohannon Trotman, as the plaintiff is informed and believes, has certain facts within her knowledge, which facts are not otherwise available to the plaintiff, and which facts are material to the plaintiff's case; that it is necessary for the plaintiff to examine said defendant in order to obtain said information and to enable him to properly draft and file his complaint against the defendants in this action; that the said information is peculiarly within the knowledge of the defendant Maude Bohannon Trotman, and the plaintiff seeks said information in good faith for the purpose of enabling him to file his complaint, and that this affidavit is not made for the purpose of vexation or harassment.

"Wherefore, the plaintiff prays that an order issue in this cause requiring the defendant Maude Bohannon Trotman to be and appear before a commissioner appointed by the court and give evidence necessary and required by the plaintiff for the purpose of filing his complaint, and that notice issue and be served upon the defendants giving the defendants at least 5 days notice of said examination.

ERNEST F. BOHANNON, JR., *Affiant.*

(Sworn to 26 June, 1936.)

"Ernest F. Bohannon, Jr., plaintiff, being duly sworn, says:

"1. That he has instituted this action for the recovery of damages from the defendants, upon the ground that Laura Webb Bohannon and Maude Bohannon Trotman conspired to deprive the plaintiff of a share of the estate of his grandfather, F. M. Bohannon, and by false and fraudulent representations made to the said F. M. Bohannon, and by fraud practiced upon him and upon this plaintiff, prevailed upon the said F. M. Bohannon to change a definite plan which he had made to leave to the plaintiff, either by will or a trust instrument, a large share in his estate; that summons has been issued in this action.

"2. That the plaintiff now has information upon which to base an allegation in his complaint that F. M. Bohannon had formed the fixed intention and settled purpose of providing for the plaintiff in the distribution of his estate, and would have carried out this intention and purpose but for the wrongful acts of Laura Webb Bohannon and Maude Bohannon Trotman; however, the plaintiff does not know definitely whether or not the said F. M. Bohannon actually made a will providing for this plaintiff, or a trust instrument giving him a part of his estate, which will or trust instrument he was caused to revoke by the wrongful acts of the defendants, and that the facts in regard thereto are peculiarly within the knowledge of the defendant Maude Bohannon Trotman; that said facts are material to the plaintiff's cause and are not otherwise available to the plaintiff except by an examination of said defendant. The plaintiff has information as to certain wrongful acts and misrepresentations made by Laura Webb Bohannon and Maude Bohannon Trotman calculated to influence the said F. M. Bohannon against the plaintiff, which acts were done and statements made in the presence of other persons. However, the plaintiff believes that other acts were done and statements made by Laura Webb Bohannon and Maude Bohannon Trotman when no one was present except the said persons and F. M. Bohannon; that the facts in regard thereto are peculiarly within the knowledge of the defendant Maude Bohannon Trotman, and are not otherwise available to the plaintiff except by an examination of said defendant, both F. M. and Laura Webb Bohannon being dead; that the application of the plaintiff heretofore made to examine the defendant Maude Bohannon Trotman was made for the purpose, in good faith, of obtaining the information hereinbefore outlined and which is peculiarly within the knowledge of Maude Bohannon Trotman for the purpose of enabling the plaintiff to properly file his complaint, and that this amended affidavit is made to set out more fully the information sought, and the necessity therefor, and this affidavit is not made for the purpose of vexation or harassment.

"Wherefore, the plaintiff prays that the motion of the defendant Maude Bohannon Trotman to vacate the order of examination be denied, and that she be required to appear and be examined in accordance with the orders heretofore made herein.

ERNEST F. BOHANNON, JR."

(Sworn and subscribed to 27 August, 1936.)

Under the above set forth affidavits, an order was made by the clerk of the Superior Court to examine the defendant Maude Bohannon Trotman. The defendants excepted and assigned error to the order, and appealed to the Superior Court. The orders in the court below were as follows:

"This cause coming on to be heard before the undersigned judge presiding at the 14 September, 1936, Extra Term of Mecklenburg Superior Court, upon the appeal of the defendants from the order of the clerk, dated 2 September, 1936, in which the clerk denied the motion of the defendants to set aside various orders in reference to the examination of the defendant Maude Bohannon Trotman, and upon a consideration of the original affidavit and the amended affidavit filed by the plaintiff, the court being of the opinion that the plaintiff is entitled to examine the defendant Maude Bohannon Trotman, for the purpose of obtaining the information referred to in said affidavits to enable him to properly file his complaint.

"It is thereupon ordered that the order of the clerk be and is hereby affirmed, and the motion of the defendants to set aside the orders in reference to the examination of the defendant Maude Bohannon Trotman is denied; and it is further ordered that the commissioner heretofore appointed by the clerk proceed to hold said examination at the office of the clerk of the Superior Court of Forsyth County, or such other place as may be designated by the commissioner, at 11 a.m. on 16 October, 1936, unless the time is changed by consent of the parties. This 22 September, 1936.

G. V. COWPER, *Judge Presiding.*"

Order (of Cowper, Special J.): "This cause coming on to be heard before the undersigned judge presiding at the 14 September, 1936, Extra Term of Mecklenburg Superior Court, upon the appeal of the defendants from the order of the clerk denying the defendants' motion for change of venue, and the court being of the opinion that said motion is prematurely made: It is thereupon ordered that the order of the clerk in reference to change of venue be and it hereby is denied, with leave, however, to the defendants to renew said motion after the complaint is filed. This 22 September, 1936.

G. V. COWPER, *Judge Presiding.*"

The defendants excepted and assigned error as follows: "The judge of the Superior Court erred in affirming the judgment of the clerk of the Superior Court for Mecklenburg County denying the defendants' motion that the action be removed to the Superior Court for Forsyth County, under section 465, C. S., for that the defendants say that it sufficiently appears from the application for extension of time in which to file complaint that the action is against the defendant Wachovia Bank and Trust Company, trustee and executor of the estate of Laura Webb Bohannon, deceased, in its representative and official capacity as such

executor and trustee, and that it is unnecessary to wait the filing of the complaint before making such motion. The judge presiding at said term of the Superior Court erred in affirming the order of the clerk of said court, dated 22 September, 1936, denying the motion of the defendants to set aside various orders in reference to the examination of the defendant Maude Bohannon Trotman for that these defendants say that the affidavits on which the application for such examination was based are insufficient, and also for that the application for such examination shows that the plaintiff is attempting to maintain this action on grounds not recognized by law as constituting a cause of action."

John M. Robinson and Hunter M. Jones for plaintiff.
Parrish & Deal for defendants.

CLARKSON, J. (1) The plaintiff contends that the appeal from the order of examination is premature. We cannot so hold under the facts and circumstances of this case.

In *Ward v. Martin,* 175 N. C., 287 (289-290), is the following: "A motion was made to dismiss this appeal on the ground that it is premature. There are decisions of this Court holding that a party cannot appeal from an order to appear before the clerk to be examined under oath concerning the matters set out in the pleadings. *Pender v. Mallett,* 122 N. C., 163; *Holt v. Warehouse Co.,* 116 N. C., 480; *Vann v. Lawrence,* 111 N. C., 32. In the exercise of our discretion, as the point presented is of first importance here, we have concluded to deny the motion and to consider the appeal on its merits." *Chesson v. Bank,* 190 N. C., 187. In certain cases the appeal is premature and will be dismissed. *Johnson v. Mills Co.,* 196 N. C., 93; *Brown v. Clement Co.,* 203 N. C., 508.

(2) The serious contention of defendants is that "The plaintiff's application for order of examination not only fails to state a cause of action, but clearly shows that plaintiff cannot state a cause of action recognized by the law." On this aspect we cannot hold with the defendants.

It is conceded by plaintiff that defendants are right if the application of plaintiff for the order of examination did not disclose a cause of action. The plaintiff contends that the following facts appear in the application: "(1) The plaintiff was a grandson of F. M. Bohannon. (2) F. M. Bohannon 'had formed the fixed intention and settled purpose of providing for the plaintiff in the distribution of his estate.' (3) Laura Webb Bohannon and Maude Bohannon Trotman 'conspired to deprive the plaintiff of a share of the estate of his grandfather, F. M. Bohannon.' (4) The said defendants, 'by false and fraudulent repre-

sentations made to the said F. M. Bohannon, and by fraud practiced upon him and upon this plaintiff, prevailed upon the said F. M. Bohannon to change a definite plan which he had made to leave to the plaintiff, either by will or a trust instrument, a large share in his estate.' (5) The said F. M. Bohannon had formed the fixed intention and settled purpose of providing for the plaintiff and in the distribution of his estate, and would have carried out this intention and purpose but for the wrongful acts of Laura Webb Bohannon and Maude Bohannon Trotman."

In *Lewis v. Bloede,* 202 Fed. Rep., 7 (15, 16, 17), (written for the Court by *H. G. Connor,* District Judge), is the following: "The recognition by the courts, both in England and in this country, of the right of action to the party injured by reason of the malicious and wrongful interference by third persons with contract rights is well settled. The principle is clearly stated by *Justice Brewer* in *Angle v. Chicago, St. Paul, etc., Ry. Co.,* 151 U. S., 1; 13, 14 Sup. Ct., 240, 245 (38 L. Ed., 55), wherein he says: 'It has been repeatedly held that, if one maliciously interfere in a contract between two parties, and induce one of them to break that contract, to the injury of the other, the party injured can maintain an action against the wrongdoer.' This is but a recognition and application of the principle: 'That whenever a man does an act which, in law and in fact, is a wrongful act, and such an act as may, as a natural and probable consequence of it, produce such an injury, an action on the case will lie.' . . . It having been settled that an action, as for a tort, would lie for a malicious—that is, wrongful—interference with the performance of an executory contract, the question naturally arose whether the principle extended to a case in which a third party, with like motive and without lawful excuse, by his interference prevented one from entering into, or making, a contract. . . . It is true that the right is more difficult to establish—requiring another link in the process of proof—than where the contract has been entered into. When the parties have entered into a contract, the terms of which are fixed, the plaintiff is only required to show the malicious interference and the damage proximately resulting; whereas, if the ground of complaint is that he was about to make a contract, he is required to go further and show that he was not only 'about to,' but would, but for the malicious interference of defendants, have entered into the contract, etc." *Dulin v. Bailey,* 172 N. C., 608.

In *Mitchell v. Langley,* 143 Ga., 827, 85 S. E., 1050, *Lumpkin, J.,* at p. 1053, says: "Is it possible that where a will has been made, leaving a devise, a third person can fraudulently and maliciously cause the testator to revoke the devise, and thus cause a loss to the devisee, without any redress on the part of the latter? Or, if a father should make a

deed of gift to his son, but before delivery another should falsely and maliciously represent that the son was a fugitive from justice, or was in penal servitude, or had died without issue, and so cause the father to destroy the deed without delivery, could it be contended that the son would have no redress for the loss occasioned to him, because the deed had not been delivered and the title had not actually vested in him? And, likewise, if a member of a benefit society has caused one of his family to be named in a certificate as the beneficiary thereof, can it be successfully contended that a third party can, by malicious and fraudulent representations, cause the member to change the certificate, and thus cut off and divert to himself a benefit which would have arisen to the beneficiary, with no redress to the latter, merely because the member had the power to change the beneficiary? Would not a man have the right to receive gifts or insurance, or the like, if they were in process of being perfected, and would have come to him but for malicious and fraudulent interference? A bare possibility may not be within the reason for this position. But where an intending donor, or testator, or member of a benefit society, has actually taken steps toward perfecting the gift, or devise, or benefit, so that if let alone the right of the donee, devisee, or beneficiary will cease to be inchoate and become perfect, we are of the opinion that there is such a status that an action will lie, if it is maliciously and fraudulently destroyed, and the benefit diverted to the person so acting, thus occasioning loss to the person who would have received it." The above cases cite numerous authorities which are unnecessary to repeat.

If the plaintiff can recover against the defendant for the malicious and wrongful interference with the making of a contract, we see no good reason why he cannot recover for the malicious and wrongful interference with the making of a will. It is true that such a cause of action may be difficult to prove—but that does not touch the existence of the cause of action, but only its establishment.

(3) The ruling of the court as to venue, we think correct. In the order of the court below is the following: "It is thereupon ordered that the order of the clerk in reference to change of venue be and it hereby is affirmed, and the motion for change of venue is denied, with leave, however, to the defendants to renew said motion after the complaint is filed."

N. C. Code, 1935 (Michie), section 470, is 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."

The procedure under C. S., secs. 900 and 901, is a substitute for the old bill of discovery. By proper averment in affidavits, as in the present case, it can be resorted to before the complaint is filed. *Pender v. Mallett,* 123 N. C., 57; *Bailey v. Matthews,* 156 N. C., 78; *Ward v. Martin,* 175 N. C., 287. The venue statute, *supra,* applies after the complaint is filed. The rights of defendants are preserved in the order of the court below.

C. S., sec. 465, is as follows: "All action upon official bonds or against executors and administrators in their official capacity must be instituted in the county where the bonds were given, if the principal or any surety on the bond is in the county; if not, then in the plaintiff's county." *Montford v. Simmons,* 193 N. C., 323.

The question of venue is not now before us. There is an old maxim of the law, "No wrong without a remedy." The plaintiff, under his affidavits, has a right to "fish" in defendants' pond—whether he catches anything is yet to be seen.

For the reasons given, the judgment of the court below is

Affirmed.

STACY, C. J., and CONNOR, J., dissent.

STATE v. MARTIN MOORE.

(Filed 25 November, 1936.)

1. Criminal Law L a—

The right of appeal must be exercised in accordance with the established rules and procedure governing appeals.

2. Criminal Law L b—Appellant failing to file case on appeal within time prescribed loses right to appeal in absence of extension or waiver.

Where a defendant fails to file his statement of case on appeal within the time allowed, and fails to make application for extension of time or for waiver of failure to file within the time prescribed, defendant loses his right to bring up the "case on appeal," and the purported case on appeal filed after expiration of the prescribed time is properly stricken from the files by the trial judge, on motion of the solicitor.

3. Same—

Both the statement of case on appeal and exceptions and countercase must be filed within the time allowed or extension of time granted in order to be effective.

4. Criminal Law L c—To obtain writ of certiorari, applicant must negative laches and show merit.

Where an application for writ of *certiorari* in the nature of a writ of error is made for the purpose of bringing up an appeal when the right of appeal is lost in the trial court by failure to file statement of case on appeal within the time allowed (N. C. Constitution, Art. IV, sec. 8), applicant must negative laches and show merit.

5. Criminal Law G 1—

Voluntary confessions are admissible in evidence against the party making them; involuntary confessions are inadmissible, and a confession is voluntary in law when, and only when, it is in fact voluntarily made.

6. Same—

When a prior confession is obtained under circumstances rendering it involuntary, a subsequent confession is presumed to flow from the same vitiating circumstances, but the presumption is rebuttable, and it is for the court to determine from the evidence whether the later confession is competent as being in fact voluntary.

7. Same—Evidence held to support court's ruling that second confession was voluntary and competent, although prior confession was incompetent.

It appeared that defendant's first confession made to the sheriff was excluded as incompetent because of the promise of the sheriff to tell the trial judge and that "maybe it would help" defendant. Thereafter defendant made another confession to the psychiatrist examining him, and defendant himself testified that the psychiatrist offered no reward, and did not threaten him, but that defendant was scared that if he did not tell the psychiatrist the same thing he told the sheriff, the sheriff would not keep his promise to help him. *Held:* The evidence was sufficient to support the court's finding that the second confession was competent as being voluntary, and the court's ruling is conclusive, since it is supported by the evidence.

8. Criminal Law L c—Record filed by defendant held not to show merit, and motion for certiorari is disallowed.

On defendant's motion for *certiorari* in the nature of a writ of error it appeared from the *ex parte* case on appeal made up by defendant and filed in the Supreme Court as the basis of his motion that the sole assignment of error was to the admission of the confession of defendant in evidence, and the case on appeal so filed showed that there was no error of law in the court's ruling that the confession was competent as being voluntarily made. *Held:* Motion for *certiorari* must be disallowed for failure to show merit, and the question of laches on the part of defendant need not be considered.

APPEAL by defendant from *Phillips, J.*, at August Term, 1936, of BUNCOMBE.

Criminal prosecution, tried upon indictment charging the defendant with the murder of one Helen Clevenger.

Verdict: Guilty of murder in the first degree.

Judgment: Death by asphyxiation.

Defendant appeals.

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

Sanford W. Brown for defendant.

STACY, C. J. The chronology of this case is as follows:

1. The defendant was tried, convicted of murder in the first degree, and sentenced to death at the August Term, 1936, of Buncombe Superior Court, which convened 17 August and adjourned 22 August.

2. Notice of appeal was duly given in open court, and the defendant allowed 45 days to prepare and serve his statement of case on appeal. The solicitor was allowed 30 days thereafter to file exceptions or serve countercase.

3. The appeal was due to be heard at the next succeeding term of this Court following the trial in the Superior Court, which was the present Fall Term as it commenced 31 August. *S. v. Trull,* 169 N. C., 363, 85 S. E., 133; *Pentuff v. Park,* 195 N. C., 609, 143 S. E., 139.

4. On 9 September, at the call of the docket from the Nineteenth District, the district to which the case belongs, it appearing that nothing had been done to perfect the appeal, the Attorney-General lodged a motion to docket and dismiss the defendant's appeal under Rule 17. This motion was held in abeyance. *S. v. Moore, ante,* 459.

5. On the following day, 10 September, the defendant filed a countermotion for *certiorari* to preserve his right of appeal or to have the case brought up and heard on appeal. This motion was allowed and the case set for hearing at the end of the Seventh District. *S. v. Moore, supra.*

6. The time for serving defendant's statement of case on appeal expired 6 October. *S. v. Moore, supra.*

7. Return to the writ of *certiorari* was made by the clerk of the Superior Court of Buncombe County on 15 October, in which he certifies "that the time designated by the trial judge and given to the defendant to make up and serve his case on appeal to the Supreme Court has expired, and that the said defendant has not made up or caused to be made up a case on appeal to the Supreme Court, or filed the same in this office; and I further certify that there has been no enlargement or

extension of time for making up and serving the defendant's case on appeal to the Supreme Court."

8. Thereafter, on 20 October, the defendant served on the solicitor of the district his purported statement of case on appeal.

9. The solicitor excepted to the statement on the dual ground of inaccuracy and untimeliness of serving—fourteen days after time for service had expired—and motion was lodged before the trial judge to strike said purported statement from the file of the papers in the case. This motion was allowed 26 October under authority of *Edwards v. Perry,* 208 N. C., 252, 179 S. E., 892; *Roberts v. Bus Co.,* 198 N. C., 779, 153 S. E., 398; *Hicks v. Westbrook,* 121 N. C., 131, 28 S. E., 188; and *S. v. Ray,* 206 N. C., 736, 175 S. E., 109.

10. Upon the call of the case at the end of the Seventh District on 6 November, the record proper and the return to the writ of *certiorari* was all that properly appeared on the docket. No case was before the Court for argument, albeit the defendant had sent up his purported statement of case on appeal, accompanied by brief. The State moved to affirm the judgment, as there is no error apparent on the face of the record.

11. In a second application, filed 12 November, the defendant again invokes the aid of the Court, and seeks to have the case reviewed on "*certiorari* in the nature of a writ of error" under authority of *S. v. Stamey,* 209 N. C., 581, 183 S. E., 736; *S. v. Tripp,* 168 N. C., 150, 83 S. E., 630; *S. v. Lawrence,* 81 N. C., 522; *S. v. Green,* 85 N. C., 600; *S. v. McGimsey,* 80 N. C., 377; *S. v. Jefferson,* 66 N. C., 309; *Ex parte Biggs,* 64 N. C., 202; *Brooks v. Morgan,* 27 N. C., 481.

The unlimited right of appeal, which for all practical purposes obtains in this jurisdiction (*habeas corpus* excepted), carries with it the necessity of conforming to the established rules of procedure, when such right is sought to be exercised. *Mimms v. R. R.,* 183 N. C., 436, 111 S. E., 778. Indeed, it was said in *S. v. Butner,* 185 N. C., 731, 117 S. E., 163, that "an appeal is not a matter of absolute right, but conditioned upon the observance of the requirements for presenting the appeal in this Court."

It is apparent from the foregoing chronology that the defendant has twice lost his right to bring up the "case on appeal," first on 9 September, and again on 6 October. It was preserved to him the first time because our rules alone were involved, which were relaxed in his favor, but we are powerless to save him from the second default. No application was made to the solicitor for an extension of time before it expired, nor to waive it afterwards, and defendant's purported statement of case on appeal was ordered stricken from the files by the trial judge. The right to bring up the "case on appeal" is gone. *S. v. Allen,* 208 N. C.,

672, 182 S. E., 140; *Edwards v. Perry, supra; Pruitt v. Wood,* 199 N. C., 788, 156 S. E., 126.

It is axiomatic among those engaged in appellate practice that a "statement of case on appeal not served in time" may be disregarded or treated as a nullity. *Edwards v. Perry, supra; Hicks v. Westbrook,* 121 N. C., 131, 28 S. E., 188; *Hardee v. Timberlake,* 159 N. C., 552, 75 S. E., 799; *Guano Co. v. Hicks,* 120 N. C., 29, 26 S. E., 650; *Peebles v. Braswell,* 107 N. C., 68, 12 S. E., 44; *Simmons v. Andrews,* 106 N. C., 201, 10 S. E., 1052; *Mfg. Co. v. Simmons,* 97 N. C., 89, 1 S. E., 923. The same rule applies to appellee's exceptions or countercase when served too late. *S. v. Ray, supra; Smith v. Smith,* 199 N. C., 463, 154 S. E., 737; *Cummings v. Hoffman,* 113 N. C., 267, 18 S. E., 170. It was held in *S. v. Humphrey,* 186 N. C., 533, 120 S. E., 85, that the trial judge was without authority to change appellant's case, though regarded by him as erroneous, when appellee's exceptions were not served in time. To like effect is the decision in *S. v. Ray, supra.* Of course, where there is a controversy as to the time of service, "that's a difference matter," as the late *Justice Brogden* was wont to quote his Durham friend of French descent and accent. *Smith v. Smith, supra; Holloman v. Holloman,* 172 N. C., 835, 90 S. E., 10. Here, there is no such controversy. The facts are admitted.

In appellate matters, as in others, "There's a time for all things." *Comedy of Errors,* Act II, Sc. 2, L. 66.

Conceding that his right to have the case brought up and heard on appeal has been lost, the defendant invokes the supervisory power of the Court under Art. IV, sec. 8, of the Constitution, which provides that "The Supreme Court . . . shall have the power to issue any remedial writs necessary to give it a general supervision and control over the proceedings of the inferior courts."

It is suggested by the Attorney-General that, under this provision, writs are issuable only to determine the sufficiency of the proceedings as they appear of record. *S. v. Tripp, supra; S. v. Webb,* 155 N. C., 426, 70 S. E., 1064; *King v. Taylor,* 188 N. C., 450, 124 S. E., 751.

Speaking to the matter in *Ex parte Biggs,* 64 N. C., 202, *Pearson, C. J.,* delivering the opinion of the Court, said: "The writ of *certiorari* is used for two purposes: *One,* as a substitute for an appeal, where the opportunity for bringing up the matter by appeal is lost without laches. . . . *The other* is where the writ of *certiorari* is in the nature of a writ of error, and it is used where the writ of error proper does not lie. *Brooks v. Morgan,* 27 N. C., 481; *Comrs. v. Kane,* 47 N. C., 288. By this writ only the record proper is brought up for review, and no *postea* or *case* is to be made up."

And in *S. v. Stamey, supra,* where the scope of the writ was apparently enlarged (*S. v. Tripp, supra*), it was said upon the return to the *certiorari* that "the writ was improvidently granted."

Without making definite ruling on the question of power, or the appropriateness of defendant's application for "*certiorari* in the nature of a writ of error," we proceed to a consideration of the application itself.

In *S. v. Angel,* 194 N. C., 715, 140 S. E., 727, it is said: "*Certiorari* is a discretionary writ, to be issued only for good or sufficient cause shown, and the party seeking it is required, not only to negative laches on his part in prosecuting the appeal, but also to show merit or that he has reasonable grounds for asking that the case be brought up and reviewed on appeal. Simply because a party has not appealed, or has lost his right of appeal, even through no fault of his own, is not sufficient to entitle him to a *certiorari.* 'A party is entitled to a writ of *certiorari* when—and only when—the failure to perfect the appeal is due to some error or act of the court or its officers, and not any fault or neglect of the party or his agent.' *Womble v. Gin Co., supra.* Two things, therefore, should be made to appear on application for *certiorari:* First, diligence in prosecuting the appeal, except in cases where no appeal lies, when freedom from laches in applying for the writ should be shown; and, second, merit, or that probable error was committed on the hearing. *S. v. Farmer,* 188 N. C., 243, 124 S. E., 562."

To obtain the writ, then, the applicant must (1) negative laches, and (2) show merit. The first requirement is sought to be met in the petition, while the second is omitted. However, passing for the moment the question of laches, we go to the defendant's *ex parte* statement of case on appeal, filed in this Court as noted in paragraph 10 above, to see if, by any chance, he could probably make a showing of merit. In this, he sets out but a single nonexceptive assignment of error: "The court erred in the following ruling: 'The court having heard all the evidence introduced by the State and the defendant, including that of the defendant himself, finds as a fact that the statements made by the defendant to the witness, Dr. Griffin, in the presence of the witness, Mr. Bridgewater, were made without fear or compulsion, reward or hope of reward, and are admissible in evidence.' "

It appears that a prior confession, made to the sheriff of the county on 8 August, had been excluded for involuntariness, *S. v. Anderson,* 208 N. C., 771, 182 S. E., 643; *S. v. Livingston,* 202 N. C., 809, 164 S. E., 337, and it is the contention of the defendant that his subsequent confession, made to Dr. Griffin on 12 or 13 August, should likewise have been excluded upon the presumption that it, too, had been made under the same influence or inducement. *S. v. Drake,* 113 N. C., 624, 18 S. E., 166.

The confession made to the sheriff is alleged to have been induced by the promise that if the defendant would tell him the truth, he, the sheriff, "would tell the judge that he did tell the truth about it, and possibly it might help him." *S. v. Anderson, supra; S. v. Livingston, supra. Quære:* Did such promise perforce render the confession involuntary? *S. v. Myers,* 202 N. C., 351, 162 S. E., 764; *S. v. Harrison,* 115 N. C., 706, 20 S. E., 175; 16 C. J., 721.

Voluntary confessions are admissible in evidence against the party making them; involuntary confessions are not. A confession is voluntary in law when—and only when—it was in fact voluntarily made. *S. v. Gosnell,* 208 N. C., 401, 181 S. E., 323; *S. v. Newsome,* 195 N. C., 552, 143 S. E., 187.

During the week preceding the trial, Dr. Mark Griffin, a psychiatrist, was requested by the solicitor to examine the defendant and report on his mental condition. It was during this examination that the defendant made the confession in question. The defendant himself says: "Dr. Griffin did not threaten me. He didn't offer me any reward. . . . I thought the sheriff sent him up there, and I was still scared for fear that if I didn't tell him what I told the sheriff, the sheriff wouldn't keep his promise to help me. . . . I was not scared of Dr. Griffin. He treated me nice. Mr. Bridgewater didn't threaten me. I was not afraid of him." *S. v. Bohanon,* 142 N. C., 695, 55 S. E., 797.

It is true that where a confession has been obtained under circumstances rendering it involuntary, a presumption arises which imputes the same prior influence to any subsequent confession, and this presumption must be overcome before the subsequent confession can be received in evidence. *S. v. Drake,* 82 N. C., 592; *S. v. Lowhorne,* 66 N. C., 638; *S. v. Roberts,* 12 N. C., 259.

On the other hand, it is equally well established that although a confession may have been obtained by such means as would exclude it, a subsequent confession of the same or like facts may and should be admitted, if it appear to the court, from the length of time intervening or from other facts in evidence, the prior influence had been removed at the time of the subsequent confession. *S. v. Lowry,* 170 N. C., 730, 87 S. E., 62; *S. v. Fisher,* 51 N. C., 478; *S. v. Scates,* 50 N. C., 420; *S. v. Gregory, ibid.,* 315; 16 C. J., 722.

In this jurisdiction, the competency of a confession is a preliminary question for the trial court, *S. v. Andrew,* 61 N. C., 205, to be determined in the manner pointed out in *S. v. Whitener,* 191 N. C., 659, 132 S. E., 603. The court's ruling thereon will not be disturbed, if supported by any competent evidence. *S. v. Stefanoff,* 206 N. C., 443, 174 S. E., 411; *S. v. Christy,* 170 N. C., 772, 87 S. E., 499; *S. v. Page,* 127 N. C., 512, 37 S. E., 66; *S. v. Gosnell, supra.*

In other words, to state it compendiously, the presumption that a subsequent confession was brought about by the same controlling influence which induced a prior one is subject to be rebutted, and whether it is still active or has spent its force is a question of fact for the trial court in determining the competency of the later confession. *S. v. Stefanoff, supra; S. v. Drake,* 113 N. C., 624, 18 S. E., 166; *S. v. Lowhorne, supra.*

A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, but a confession wrung from the mind by the flattery of hope, or by the torture of fear, comes in such questionable shape as to merit no consideration. *S. v. Patrick,* 48 N. C., 443. "Confessions are to be taken as *prima facie* voluntary, and admissible in evidence, unless the party against whom they are offered allege and show facts authorizing a legal inference to the contrary"—*Dillard, J.,* in *S. v. Sanders,* 84 N. C., 729. See, also, *S. v. Grier,* 203 N. C., 586, 166 S. E., 595.

It appears from the defendant's *ex parte* statement that the trial court heard evidence *pro* and *con* on the alleged involuntariness of the confession in question, found that it was made freely and voluntarily, and ruled it admissible. This ruling is supported by the evidence set out in defendant's statement. *S. v. Gray,* 192 N. C., 594, 135 S. E., 535. Indeed, it may be doubted whether the defendant himself more than feebly testifies to the contrary as a matter of fact. His principal reliance is upon the presumption arising from the prior involuntary confession. This is amply refuted by the State's evidence as detailed in defendant's purported statement of the case.

So, after giving the defendant the benefit of all and perhaps more than he could hope to obtain from the issuance of the writ he seeks, we conclude that his second application should be denied. *In re Snelgrove,* 208 N. C., 670, 182 S. E., 335. On his own showing, his efforts must ultimately end in failure. It would serve no useful purpose to execute a fruitless run around. To avoid such performance is the reason for requiring the appearance of probable error. *Lex nil facit frustra,* "The law does nothing in vain." The defendant neither alleges nor shows merit, and we refrain from again discussing the question of laches. *S. v. Moore, supra.*

The motion to affirm will be allowed.

Certiorari disallowed.

Judgment affirmed.

KEMP P. HILL AND WIFE, BETTIE B. HILL, v. C. L. LINDSAY AND WIFE, MARY McCAULEY LINDSAY,

and

K. P. HILL AND JAMES A. HILL v. C. L. LINDSAY,

and

K. P. HILL AND WIFE, BETTIE B. HILL, v. C. L. LINDSAY.

(Filed 25 November, 1936.)

1. **Appeal and Error J e—**

   Where the parties waive a jury trial and consent that the court shall find the facts, the court's findings are conclusive on appeal when supported by evidence.

2. **Limitation of Actions B e—Annual visits for appreciable length of time will not start running of statute in favor of nonresident.**

   A finding that at the time of the accrual of the cause of action and continuously thereafter, defendant was a resident of another state, but spent three to five months each year within the State, *is held* not to support a conclusion of law that the applicable statute of limitations barred the action, since the statute would not begin to run in defendant's favor until he returns to the State for the purpose of residence, and annual visits here, even for appreciable lengths of time, are insufficient to start the running of the statute in his favor, and this rule is not affected by the ownership of property in this State or by the maintenance of an agent here. C. S., 411.

3. **Usury B e—In order for execution of renewal note to waive usury, parties must agree to new amount as compromise and settlement of usury.**

   A usurious contract is not purged of the usury by the execution of renewals or by a change in the form of the contract, or by the giving of a separate note for the usurious charge, and in order for an agreement as to the total debt and the execution of a new note therefor to constitute a waiver of the right to plead usury, the new amount arrived at must be agreed to by the debtor as just and due the creditor, taking into consideration his claim of usury, and be in the nature of a compromise and settlement and be a novation rather than a renewal, and findings of fact that the parties agreed upon the total amount of the debt after an accounting involving the credit of sums obtained from the sale of collateral given for the debt, but not involving the question of usury, and that the debtor executed a new note for the balance thus arrived at, *is held* insufficient to support the court's conclusion of law that the debtor waived the right to claim usury, the transaction being a renewal rather than a novation.

APPEAL by plaintiffs K. P. Hill and James A. Hill from *Barnhill, J.*, at June-July Special Term, 1936, of WAKE. Reversed and remanded.

These actions were originally begun 20 July, 1933, and complaint filed. Nonsuit was thereafter entered and the suits for same causes

begun 20 July, 1934. The actions, instituted to recover the penalty for usury and for an accounting, were consolidated and referred to John N. Duncan, referee. Thereafter, on motion of the plaintiffs, judgments of nonsuit were entered in two of the above styled cases, leaving for consideration only the case of "K. P. Hill and James A. Hill *v.* C. L. Lindsay," in which it is agreed the questions determinative of the entire controversy between the parties are presented.

The action is brought for the recovery of the penalty for usury prescribed by C. S., 2306, for the forfeiture of interest on certain loans made plaintiffs by the defendant, and for the resultant accounting. The pleadings and evidence detail many transactions between the parties during the years 1928, 1929, and 1930.

The referee heard the evidence and reported his findings of fact and conclusions of law thereon, and exceptions were filed by both plaintiffs and defendant.

Upon the hearing before the judge of the Superior Court, jury trial was waived and it was agreed that the court should hear the case on the referee's report and the evidence taken before him.

The court below made certain findings of fact and declared certain conclusions of law, resulting in a judgment in favor of the defendant, that plaintiffs recover nothing by their actions. The plaintiffs, having noted numerous exceptions to the court's findings of fact and conclusions of law, appealed to this Court.

W. C. Lassiter, Willis Smith, and MacLean, Pou & Emanuel for plaintiffs, appellants.

Murray Allen for defendant.

DEVIN, J. While the record is voluminous, only two material questions are presented by this appeal.

1. Is the plaintiffs' cause of action for usury barred by the statute of limitations?

2. Are the plaintiffs prevented from pleading usury by reason of the execution of a new note for the balance due on previous transactions involving usury?

The parties having waived jury trial and consented that the court should find the facts, his findings, if supported by evidence, are conclusive. *Odum v. Palmer,* 209 N. C., 93; *Buchanan v. Clark,* 164 N. C., 56.

I. It is not controverted that the transactions between the parties consisted of lendings and borrowings in which usury was charged and paid, and it is admitted that all these transactions took place more than two years before the institution of these actions.

The plaintiffs contend, however, that prior to and during the period of these entire transactions the defendant C. L. Lindsay was a nonresident of the State, and that under C. S., 411, the statute of limitations would not run in his favor.

The pertinent portions of this statute are as follows:

"If, when the cause of action accrues . . . against a person, he is out of the State, action may be commenced within the times herein limited, after the return of the person into this State; and if, after such cause of action accrues . . . such person departs from and resides out of this State, or remains continuously absent therefrom for one year or more, the time of his absence shall not be a part of the time limited for the commencement of the action."

This statute has been construed by this Court, in *Armfield v. Moore,* 97 N. C., 34, and *Lee v. McKoy,* 118 N. C., 518, to mean that where the debtor is a nonresident at the time the cause of action accrues, the statute does not begin to run in his favor until he shall return to the State for the purpose of residence, not simply on a visit.

"While he is a nonresident, and from the time he becomes such, the statute is *ipso facto* suspended. . . . Nor would occasional visits to the State put the statute in motion." *Lee v. McKoy, supra.*

In the case at bar the defendant alleged in his answer "that he is now and has been for about 12 years a resident of the District of Columbia," and there was a finding by the referee, approved by the judge, "that the defendant C. L. Lindsay has his legal residence in Washington, D. C., and since 1927 has spent seven to nine months of each year there, and from three to five months of each year in the State of North Carolina."

Being a nonresident of the State, he may not be permitted to invoke the protection of the statute of limitations, even though he may spend some time each year in the State.

Nor could this rule be affected by the fact that he owned property in North Carolina (*Grist v. Williams,* 111 N. C., 53), or had an agent in this State (*Williams v. Building & Loan Assn.,* 131 N. C., 267; *Green v. Ins. Co.,* 139 N. C., 309); *Volivar v. Cedar Works,* 152 N. C., 34.

II. The defendant contends that by a settlement of previous transactions and the execution of a new note at the legal rate of interest the plaintiffs are estopped now to set up claim of usury.

It appeared that on 29 April, 1929, plaintiffs executed a note to another for the benefit of the defendant in the sum of $5,850, covering the balance due defendant on a previous note and other items, and as security therefor executed deed of trust on certain real estate and placed in the hands of the defendant's attorney certain collaterals as additional security; that on this note $175.50, in addition to the legal rate of interest, was charged and included in the total; that when this note became

delinquent foreclosure was threatened; that the payments on the note had reduced the amount to $3,599.19; that pursuant to an examination of the credits and ascertainment of balance due, on 29 May, 1930, a new note in the sum of $4,000 was executed by plaintiffs to defendant's attorneys, and by them endorsed to defendant, to cover the balance due on the $5,850 note and a discount of 1½%, or $60.00 in excess of the legal rate of interest, was charged by defendant and included therein. It was found, however, that the difference between the amount of the new note and the ascertained balance of old note was due to a mutual mistake, and that the discount was not in fact paid.

In *Beck v. Bank,* 161 N. C., 201, *Walker, J.,* writing the opinion of the Court, quoted with approval from 39 Cyc., 1024, as follows: "The statutes of usury being enacted for the benefit of the borrower, he is at liberty to waive his right to claim such benefit and pay his usurious debt, if he sees fit to do so. It is therefore held that when the debtor becomes a party to a general settlement of preceding usurious transactions, made fairly and without circumstances of imposition, his recognition of the amount agreed to be due as a new obligation will preclude his setting up the old usury in defense of the new debt. This rule is not held to apply, however, unless it is clear that the debtor has fully accepted the settlement as a just debt separate and distinct from the preceding usurious obligations."

The facts in that case were that the parties came to a settlement and the negotiations resulted in an agreement to compromise, reduced to writing, wherein it was agreed in consideration of a sum of money the borrower would release the lender from all liability on account of usurious transactions.

In *Ector v. Osborne,* 179 N. C., 667, a similar holding was based upon *Beck v. Bank, supra,* and the same authority was quoted. In the case of *Ector v. Osborne, supra,* the facts were that an action for usury was by agreement settled and compromised by the elimination of usurious interest and paying six per cent on the loan, and pursuant to the settlement the borrower paid part in cash and executed notes for the balance. This settlement was approved by the judgment of the court. In a new action on the last notes it was held that usury could not be set up in defense; "that effect should be given to a compromise and settlement in which the usury is eliminated and which is approved by the court."

In *Ghormley v. Hyatt,* 208 N. C., 478, the action was on a note given in settlement of previous transactions in which usury was charged, the plaintiffs bringing an equitable proceeding for injunction alleging usury. It was held, *Clarkson, J.,* speaking for the Court, that plaintiffs were required to pay the principal and lawful interest, and that the cause of action for usury was barred by the two-year statute of limitations. The

cases of *Ector v. Osborne, supra,* and *Beck v. Bank, supra,* were cited with approval.

In *Dixon v. Osborne,* 204 N. C., 480, the plaintiffs there were denied relief on their stated cause of action for usury, it being held that by reason of a compromise settlement and judgment, bonds payable to bearer and containing a usurious charge would not retain the taint in the hands of third parties.

In the instant case, the court below approved findings of the referee and made certain additional findings on this point, as follows:

"That K. P. Hill, on or about 23 May, 1930, requested R. W. Winston, Jr., to give him a statement of amounts collected on the collateral which he held for defendant Lindsay, and of the balance due on the $5,850 note, but no satisfactory statement was furnished him. That at the time of the execution of the note for $4,000, dated 23 May, 1930, and the mortgage securing the same of even date therewith, the transaction between Winston and plaintiff in connection with collections made on said collateral had been terminated and the plaintiff, with knowledge of the unsatisfactory condition of the record kept by Winston, executed said note and mortgage, and the trust deed securing the note for $5,850 was canceled of record, but the said note was not surrendered until the hearing before the referee.

"Finding of fact No. 42 is set aside and vacated, and the court finds in lieu thereof that on the $5,850 note executed 5 April, 1929, the defendant Lindsay charged and received from plaintiff Hill and plaintiff Hill paid to the defendant the sum of $175.50, representing 3 per cent discount on said note over and above 6 per cent legal interest. The court further finds that the plaintiff Hill, by negotiation of a renewal of said note and by striking and agreeing to a balance due thereon and by executing a renewal note and mortgage is now estopped to set up and assert any claim thereto.

"That the said note was a balance then due by Hill to Lindsay, duly arrived at between the parties and acknowledged and approved by the plaintiff by the execution and delivery of said note and the mortgage securing same..

"The $4,000 note was executed after a conference between the plaintiff and the said Winston, and after they had agreed to the balance due on said note, and the same was executed by the plaintiff voluntarily without any fraud or oppression or willful deceit on the part of the defendant or his agent, and the same was executed to represent an agreed balance then due upon the indebtedness of the plaintiff to the said C. L. Lindsay, and the execution of said note and mortgage constitutes a satisfaction and accord of all transactions theretofore had between the plaintiff and the defendant."

These findings of fact and conclusions of law of the court below fail to bring this case within the rule laid down in *Beck v. Bank, supra,* and *Ector v. Osborne, supra.*

The execution of the $4,000 note was in effect evidence of obligation for the balance due on the $5,850 note, which included a charge for the use of money in excess of the legal rate of interest. It evidenced an agreement as to the balance due after the allowance of credits, but there was no controversy or opposing claims, then, as to transactions involving usury which were compromised and settled, so as to constitute a waiver on the part of the plaintiffs of the right to invoke the penalty prescribed by the usury statute. It was a renewal rather than a novation.

It has been uniformly held by the courts that a usurious contract cannot be purged of the usury by renewals or by a change in the form of the contract. *Ragan v. Stephens,* 178 N. C., 101; *Ervin v. Bank,* 161 N. C., 42; *Riley v. Sears,* 154 N. C., 509; *Faison v. Grandy,* 126 N. C., 827; *Allen v. Fogg,* 66 Iowa, 229; *Neal v. Rouse,* 93 Ky., 151; 66 C. J., 291.

The forfeiture declared by the statute is not waived or avoided by giving a separate note for the interest or by giving a renewal note in which is included usurious interest. *Brown v. Bank,* 169 U. S., 416.

In 13 A. L. R., 1213, *Ector v. Osborne, supra,* is reported with notes containing citations of many cases from other jurisdictions in support of this principle.

"It is true that if, after a usurious transaction has been completely settled and closed, a new loan is made, the borrower will not be allowed to set up the usury in the former transaction against the new loan. Usury in one transaction cannot be availed of in another. But settlement and agreement upon the amount due and the giving of a new note do not preclude the defense of usury existing in the original transaction. So long as any part of the original debt remains unpaid the debtor may insist upon the deduction of the usury." *Cobe v. Guyer,* 237 Ill., 568.

"Being merely renewals of obligations which had been given in connection with numerous usurious transactions, the taint of usury attaches to them." *McDonald v. Aufdengarten,* 41 Neb., 40.

Usury statutes are designed to protect the borrower whose necessity and importunity may place him at a disadvantage with respect to the exactions of the lender, and the borrower's consent to the payment of usury, or even his subsequent approval of it, will not debar him from subsequently asserting claim for the penalty prescribed by our broadly remedial statute. *MacRackan v. Bank,* 164 N. C., 24.

The plaintiffs have excepted to the findings and judgment of the court below that their cause of action is barred by the statute of limitations, and that they are estopped to set up claim for the penalty for usury.

Both these exceptions must be sustained, and the case is remanded to the Superior Court for judgment in accord with this opinion, upon the facts found from the evidence reported by the referee.

Reversed and remanded.

STATE v. LEROY CREECH.

(Filed 25 November, 1936.)

Automobiles G b—In absence of evidence that owner knew driver was intoxicated, owner may not be held criminally liable.

The evidence of the State tended to show that defendant was the owner of the car which struck and killed a pedestrian, that defendant was drunk and was riding in the car at the time, and that the driver thereof was intoxicated. Defendant's evidence tended to show that he did not know the driver had taken a drink, that he was so drunk when he and the driver left an inn that he did not know when they left or where the driver was going. *Held:* The burden was on the State to prove that defendant knew of the driver's condition and was directing him in the operation of the automobile, and in the absence of any evidence that defendant knew the driver was intoxicated, defendant's motion to nonsuit in this prosecution for manslaughter should have been granted.

CLARKSON, J., dissenting.

APPEAL by the defendant Creech from *Daniels, Emergency Judge,* at April Term, 1936, of SAMPSON. Reversed.

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

Faircloth & Fisher, W. I. Godwin, and L. L. Levinson for defendant, appellant.

SCHENCK, J. The appellant and one A. H. Lewis were tried jointly and convicted of manslaughter, upon a bill of indictment charging them with the felonious slaying of C. L. Thaggard.

The evidence for the State was to the effect that about 5 o'clock a.m., on 22 March, 1936, near Clinton, an automobile, driven by Lewis and owned by the appellant Creech, ran upon Thaggard, who was walking on Highway No. 23, and carried him seven-tenths of a mile into the town of Clinton before stopping; that when the car stopped Lewis and Creech got out and reported to the officers of the town that they had run over something up the street and wanted them to go see what it was, and upon investigation the dead body of Thaggard was found lying in front of

the automobile where it had stopped; that Lewis was under the influence of liquor, and "Creech was a whole lot drunker than Lewis was"; that Lewis stated he was driving the car and he thought Creech was asleep. The State offered no eye-witness to the actual collision of the automobile with the deceased.

When the State had produced its evidence and rested its case, the defendant moved to dismiss the action and for judgment of nonsuit, which motion was refused, and defendant excepted. C. S., 4643.

The defendant then introduced evidence tending to prove that he left his home in Johnston County about 7:30 p.m. and went to his brother's store; that he was driving his own car, and that the codefendant Lewis, his tenant, was in the car with him; that they stayed at his brother's store till about 10:30 p.m., and then went to Catch-Me-Eye Inn, and that Lewis drove the car from his brother's store to the inn; that they stayed at the inn until around 2 o'clock in the morning; that before leaving home the appellant "drank a couple of swallows before supper and two more after," and that he "drank some more" at his brother's place, and at the inn he drank beer, and when Lewis drove the car off from Catch-Me-Eye Inn he (appellant) was drunk and didn't know what time they left or where Lewis intended to drive; that Lewis refused a proffered drink before they left home, and that appellant never saw Lewis take a drink during the trip and did not know that Lewis was drinking on the trip; that appellant did not know anything that happened on the trip of about 38 miles from Catch-Me-Eye Inn to Clinton until Lewis waked him up and told him he had struck something.

After all of the evidence in the case was concluded, the defendant renewed his motion to dismiss the action and for judgment of nonsuit, which motion was denied, and defendant excepted. C. S., 4643.

We think, and so hold, that the motion to dismiss the action and for judgment of nonsuit should have been granted. Viewing the evidence in the light most favorable to the State, all that it establishes is that the car that struck the deceased was the property of the appellant, and that he was in the car at the time, and that the driver of the car was intoxicated. There is no evidence that the appellant ever saw the driver, his codefendant, take a drink or knew that the driver was under the influence of liquor, or that the appellant was in any way directing the driving of the car. Mere ownership of the car is not sufficient to fix the owner with liability for the negligent acts of the driver. *Linville v. Nissen,* 162 N. C., 95; *White v. McCabe,* 208 N. C., 301.

This case is distinguishable from *S. v. Trott,* 190 N. C., 674, relied upon by the State. In that case Trott was the owner of the car and he and his codefendant, Michael, had been drinking together, and upon the appearance of an officer Trott directed Michael "to get on the wheel and

get away," while in this case there is no evidence tending to show that the appellant Creech had any knowledge of the fact that his codefendant, the driver of the car at the time it collided with the deceased, was drinking, or that the appellant was in any way directing the driving of the car. In the absence of any evidence tending to show that at any time before Lewis took the wheel or during the time Lewis was driving the appellant had any knowledge of the intoxicated condition of Lewis, he cannot be held for any criminal negligence growing out of such condition.

The burden of establishing knowledge of the intoxicated condition of the driver on the part of the appellant was upon the State. This knowledge is not shown by the mere fact that the appellant owned the car and was in it at the time, since the undisputed evidence, both of the State and of the appellant, tends to show that appellant was too drunk to be conscious of what was going on.

The judgment of the Superior Court is

Reversed.

CLARKSON, J., dissenting: There are two classes of evidence, direct and circumstantial. I think if only the direct evidence is considered the majority opinion is correct, but the circumstantial evidence is fully sufficient to submit the case to the jury, and I think the judgment of the court below correct.

In *S. v. Newton,* 207 N. C., 323 (327), speaking to the subject, it is said: "Circumstantial evidence is not only recognized and accepted instrumentality in ascertainment of truth, but in many cases is quite essential to its establishment." *S. v. Coffey, ante,* 561 (563).

It is well settled in this and other jurisdictions that where the owner of an automobile consents to its being operated in his presence by a driver whom he knows to be intoxicated or otherwise incompetent, he may be held criminally responsible for the culpable negligence of that driver. This doctrine is supported by an abundance of cases.

In *S. v. Trott,* 190 N. C., 674 (677-8), it is said: "That the defendant was intoxicated may be conceded; but his intoxication was voluntary, and voluntary drunkenness usually furnishes no ground of exemption from criminal responsibility. In Clark's Criminal Law it is said: 'When a person voluntarily drinks and becomes intoxicated, and while in such condition commits an act which would be a crime if he were sober, he is nevertheless responsible, the settled rule being that voluntary drunkenness is no excuse. A person may be so drunk when he commits an act that he is incapable, at the time, of knowing what he is doing; but in case of voluntary intoxication a man is not the less responsible for the reasonable exercise of his understanding, memory, and will.' C. 5, sec. 27. And in *S. v. John,* 30 N. C., 330: 'All the writers of the

criminal law from the most ancient to the most recent, so far as we are aware, declare that voluntary drunkenness will not excuse a crime committed by a man, otherwise sane, whilst acting under its influence,'" citing numerous authorities.

A. H. Lewis, the driver of the car, was convicted with LeRoy Creech of manslaughter. Lewis did not appeal. Was there such circumstantial evidence for the jury to consider that the defendant Creech knew, or in the exercise of ordinary care ought to have known, that Lewis was under the influence of liquor?

N. C. Code, 1935 (Michie), sec. 2621 (44), is as follows: "It shall be unlawful and punishable, as provided in section 2621 (101) of this act, for any person, whether licensed or not, who is an habitual user of narcotic drugs, or any person who is under the influence of intoxicating liquor or narcotic drugs to drive any vehicle upon the highway within this State."

Under C. S., 4643, the evidence is to be taken in the light most favorable to the State, and it is entitled to the benefit of every reasonable intendment and every reasonable inference to be drawn therefrom. If there is any evidence on the whole record of defendant's guilt, the conviction will be sustained. Defendant's evidence is discarded. *S. v. Lawrence,* 196 N. C., 562 (564).

The defendant LeRoy Creech was the owner of a Master-6 Chevrolet automobile. He lived in Johnston County, about 9 miles from his brother's filling station, and the same distance from "Catch-Me-Eye" (a road house). He took two drinks before supper and two more after, he then, about 7:30 o'clock, drove his car to his brother's filling station. He drank some liquor at his brother's place. Then Lewis took the wheel of the car and drove to "Catch-Me-Eye." Both he and Lewis were in the dining room at "Catch-Me-Eye" many hours, Creech claiming he was drunk from beer drinking. Lewis had talked to him about taking a trip to Sampson County to see his son. They left about 2:00 o'clock, or after, Lewis at the wheel. No one put Creech in the car, the natural conclusion is that he was sober enough to walk to the car when he left "Catch-Me-Eye." Was Lewis under the influence of liquor and did Creech know it? The natural conclusion is that they were drinking at "Catch-Me-Eye" together, and when Creech entered the car Lewis was under the influence of liquor. Why? Because when Lewis struck C. L. Thaggard (the deceased), he must have been driving at a terrific speed. The front of the car was all mashed in. The deputy sheriff testified: "The radiator pushed back, right-hand light knocked out, bumper almost broken in two, fender bent down, and windshield shattered on the right-hand side. I asked those fellows where they struck him and they said, 'Up the street about 30 steps.' . . . Mr. Lewis was under the influ-

ence of liquor and Mr. Creech was more so than Lewis. . . . Mr. Lewis said he was driving the car. Mr. Creech said the car belonged to him."

The deceased's body was carried on the bumper of the car for 7/10 of a mile before the car was brought to a halt. Both legs were broken below the knees, chest crushed, neck broken, and also back and left arm broken.

Carlyle Jackson testified: "Lewis said they went to Creech's brother's filling station and stayed until about 10:30 or 11:00 o'clock, and then came on to 'Catch-Me-Eye' and stayed there until they left for Clinton. Mr. Lewis said he thought he struck something and that he told Creech that he had struck a dog, hog, or something on the road. They came on and the radiator began to leak. They stopped the car and saw a man's hand sticking up."

Dr. J. S. Brewer testified: "I saw both the defendants that morning and Mr. Lewis made a statement that he was driving the car and when they got out of the car they thought they had hit something 25 or 30 feet back up the street. I had a conversation with Mr. Creech and he said practically the same thing Mr. Lewis did."

There is other circumstantial evidence. The jury of 12 was composed of men "of good moral character and of sufficient intelligence." They convicted both Lewis and Creech of manslaughter. Creech left his home and his wife and four children, on Saturday evening, in an automobile, and took with him his tenant, Lewis. He started drinking before he left, drank at his brother's filling station, turned the wheel over to his tenant, Lewis, and went to "Catch-Me-Eye" and was drunk, as he says, on beer. But he got into the automobile early Sunday morning. The natural inference is that Lewis was under the influence of liquor, and Creech knew it, for his speed was so terrific shortly afterwards that when he struck Thaggard it crushed him worse than a cannon ball would, and carried him 7/10 of a mile (3,696 feet), and when Thaggard was dropped from the bumper of the car, they thought they had run over something and did not know whether it was a "dog, hog, or something." Day was just breaking that Sabbath morning when these drunken men, Lewis at the wheel and Creech, the owner of the car, crushed out the life of an innocent man. Judge Daniels tried the case with his usual great care, applying the law applicable to the facts. Twelve men convicted them. The tenant goes to the penitentiary and Creech, the landlord, goes unwhipped of justice. I respectfully disagree with the nonsuit.

LESTER J. WEINER AND MILTON WEINER, TRADING AS SIOUX SPORTWEAR, v. EQUEL'S STYLE SHOP, INC.

(Filed 25 November, 1936.)

1. **Pleadings C b—Counterclaim in tort in this action held not to have arisen from contract sued on, and demurrer to counterclaim was proper.**

Plaintiff sued to recover the balance alleged to be due on a contract for the sale of goods to defendant. Defendant denied the debt in the sum demanded, alleged tender of the correct amount, and set forth a counterclaim for libel, alleging that plaintiffs had written a wholesaler and a credit association letters containing statements injuring defendant's credit and standing, and that the statements were untrue and malicious. *Held:* The counterclaim in tort for libel did not arise out of the contract on transaction sued on, and was not connected with the same subject of action within the meaning of N. C. Code, 521, and plaintiffs' demurrer to the counterclaim was properly sustained.

2. **Pleadings D e—**

A demurrer admits relevant facts properly pleaded together with inferences of fact reasonably deducible therefrom, but does not admit conclusions or inferences of law.

APPEAL by defendant from *Barnhill, J.*, at Second June Term, 1936, of WAKE. Affirmed.

This action was brought on 17 January, 1935, by plaintiffs against defendant for the price of goods, wares, and merchandise sold and delivered to it in October and November, 1933, amounting to $470.01, with credits amounting to $156.50, leaving a balance due of $313.51, and interest. In the answer defendant admits that it promised and agreed to pay for the said goods, wares, and merchandise so sold and delivered $470.01, less 8 per cent trade discount. That it made payments on the account amounting to $156.50, as alleged. That it is entitled to an additional credit of $25.08, which represents the trade discount of 8 per cent. The defendant further says: "It is denied that the defendant has refused to pay any part thereof, as alleged by the plaintiffs; on the contrary, the defendant, on 30 December, 1933, tendered to the plaintiffs the sum of $288.43, which represented the full amount then owing to the plaintiffs, and said amount was refused by the plaintiffs and check therefor was wrongfully returned to this defendant. That on account of the matters and things hereinafter alleged, the plaintiffs should not be permitted now to recover anything whatsoever from this defendant."

The defendant, as a further defense, counterclaim, set-off, and as a cross action against plaintiffs, among other things, alleges: "That practically all of the merchandise purchased by the defendant for its said store in the said city of Raleigh was purchased on the New York market.

That on 7 August, 1934, the plaintiffs wrongfully, wantonly, maliciously, and libelously, and with intent to injure and damage the defendant and its good name, fame, reputation, and credit, wrote Handcraft Sportwear Company, Inc., of New York City, to whom the defendant had applied for credit, of and concerning the defendant Equel's Style Shop, Inc., the following: 'Would not ship under any condition.' Meaning thereby that shipments of merchandise should not be made to the defendant on credit. 'Unjust returner.' Meaning thereby that the defendant would not act honestly and in good faith in returning merchandise for credit. 'We are now suing,' meaning thereby that the plaintiffs were then suing the defendant for merchandise, which was untrue inasmuch as no suit had then been brought; 'and cannot collect,' meaning thereby that the defendant was insolvent, which is untrue. 'Very unscrupulous,' meaning thereby that the defendant was unreliable and would not deal honestly in its business transactions. All of which said publication was false, malicious, and unwarranted, and was and is libelous, and was, as hereinbefore alleged, made with intent to injure and damage the defendant in its said business. That the defendant is informed and believes, and therefore alleges, that the plaintiffs made the same or similar false, malicious, unwarranted, and libelous statements to the Credit Clearing House Adjustment Corporation of and concerning the defendant Equel's Style Shop. That the libelous publication made by the plaintiffs grew out of the same transaction sued upon by the plaintiffs, and was connected with the subject of the action. That the defendant has, as a direct and proximate result of the plaintiffs' aforementioned wrongful and illegal conduct, been injured and damaged in its good name, fame, reputation, and credit to the extent of at least $5,000. Wherefore, the defendant prays: (A) That the plaintiffs recover nothing herein. (B) That the defendant recover from the plaintiffs the sum of $4,711.57, and the costs of this action, to be taxed by the clerk; and (C) for such other and further relief as to the court may seem just and proper."

The plaintiffs demurred to the further defense as follows: (1) The cause of action alleged and set forth in said further defense, counterclaim, set-off, and cross action against the plaintiffs is not a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiffs' claim, or connected with the subject of the action. (2) The said alleged further defense, counterclaim, set-off, and cross action against the complaint is not such demand as can be set up as a counterclaim in this action. Wherefore, plaintiffs pray that this, their demurrer, be sustained, that said alleged further defense, counterclaim, set-off, and cross action against the plaintiffs be stricken out, and that plaintiffs be granted the relief prayed for in the complaint."

The court below rendered the following judgment: "This cause coming on at the Second January, 1936, Term of Wake County Superior Court, before his Honor, M. V. Barnhill, to be heard upon the demurrer filed by the plaintiffs to the counterclaim of the defendant, and being heard, and the court being of opinion that said demurrer should be sustained and said counterclaim dismissed: It is thereupon considered, ordered, and adjudged that the demurrer filed by the plaintiffs to the counterclaim of the defendant be and the same is hereby sustained, and the said counterclaim is dismissed. M. V. Barnhill, Judge presiding." To the foregoing judgment defendant excepted and assigned error, and appealed to the Supreme Court.

On the action by plaintiffs against defendant for the price of goods, wares, and merchandise sold and delivered to defendant, the issue submitted to the jury and their answer thereto were as follows: "Is the defendant indebted to plaintiffs, and if so, in what amount? Answer: '$313.51, with interest from 10 December, 1933.' "

On the verdict, judgment was rendered for the amount found by the jury to be due, and the cost of action.

Allen J. Barwick and Smith, Leach & Anderson for plaintiffs.
R. L. McMillan and Douglass & Douglass for defendant.

CLARKSON, J. N. C. Code, 1935 (Michie), sec. 521, is as follows: "The counterclaim mentioned in this article 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 claim, or connected with the subject of the action. (2) In an action on contract, any other cause of action arising also on contract, and existing at the commencement of the action."

The plaintiffs sued defendant to recover the price for goods, wares, and merchandise sold and delivered to it. The debt is not denied, but defendant sets up a counterclaim—a tort action for slander occurring some time after the sale. We do not think the above section, construed liberally, is elastic enough to permit a counterclaim for slander—a tort action—under the facts and circumstances of this case. In fact, we think the case of *Milling Co. v. Finlay,* 110 N. C., 411, decisive of the question. At p. 412, speaking to the subject, it is said: "The plaintiff complains that the defendants being indebted to it, accepted a draft drawn on them by the plaintiff, and have failed to pay it. The defendants allege that the plaintiff slandered them as to their pecuniary standing, and injured their credit and business, and seek damages therefor by way

of counterclaim. This did not arise out of contract, and therefore could not be pleaded under subsection 2 of section 244 of The Code (N. C. Code [Michie], section 521, *supra*); nor could it be pleaded under the first subsection thereof, because it did not 'arise out of the contract or transaction which was the ground of the plaintiff's claim,' nor was it 'connected with the subject of the action'—the contract made by the acceptance of plaintiff's draft. *Byerly v. Humphrey,* 95 N. C., 151." *Thompson v. Buchanan,* 195 N. C., 155 (158).

In the case of *Price v. Kobacker Furniture Co.,* 152 N. E., 301, 20 Ohio App., 464, plaintiff brought action against defendant on account of goods sold and delivered, and defendant filed a counterclaim setting forth a cause of action for injuries which he claimed to have sustained through being blacklisted as to his credit by reason of adverse information having been given by his creditor to a credit association. In its opinion the Court said: "Assuming that the counterclaim states facts sufficient to constitute a cause of action, let us inquire whether or not the facts pleaded are such as to be the basis of a counterclaim under the provisions of section 11317 above quoted. There are two classes of counterclaim provided for in that section, first, those arising out of the contract or transaction set forth in the petition as the foundation of plaintiff's claim, and, second, those connected with the subject of the action. The contract or transaction set forth in the petition was that involved in the selling to defendant of certain goods on account. It could hardly be said by any stretch of the imagination that the blacklisting arose out of the sale of the goods or the contract on which such sale was based. We may, therefore, dismiss that part of the statute from further consideration. Whether or not the blacklisting was connected with the subject of the action is a question presenting, at first blush, more difficulty. We are of the opinion that the principle enunciated in the case of *Williams v. Ederer,* 18 Ohio Cir. Ct. R. (N. S.), 515, is applicable. In that case Ederer sued Williams on an account for goods sold and delivered. Williams counterclaimed, setting up a tort growing out of the sending of a letter by Ederer's attorney, who had the claim for collection, to Williams' employer, by reason of which Williams lost his job. It was held that such a tort was not the proper subject of the counterclaim, and that a cause of action based thereon was insufficient in law. If the debtor refuses to pay the amount which his creditor claims is due him, the latter may become aggravated and blacklist the defendant, commit an assault and battery upon him, wrongfully write a letter to his employer bringing about his discharge, or commit some other similar tort. If that result follows, can it be said that such tort is connected with the subject of the action? We think it is not even remotely so connected. The failure to pay the account is, in such cases, merely the motive for

the commission of the tort." *Columbia Nat. Bank v. Rizer,* 150 S. E., 316 (S. C.); *Watts v. Gantt,* 61 N. W., 104, 107 (Neb.); *Bank of Charleston v. Bank of Neeses,* 119 S. E., 841 (S. C.); *Hendrickson v. Smith,* 189 P., 550 (Wash.); *Lyric Piano Co. v. Purvis,* 241 S. W., 69 (Ky.).

The defendant contends that the demurrer admits the allegation in the complaint, viz.: "That the libelous publication made by the plaintiffs grew out of the same transaction sued upon by the plaintiffs, and was connected with the subject of the action."

It is well settled in this jurisdiction that a demurrer filed admits the relevant facts set out and such relevant inferences of fact as may be deducible therefrom, but does not admit conclusions or inferences of law. *Andrews v. R. R.,* 200 N. C., 483 (484). We think the allegation relied on a conclusion of the pleader. *Baker v. R. R.,* 205 N. C., 329 (333).

For the reasons given, the judgment of the court below is

Affirmed.

MRS. ADDIE T. DOYLE v. CITY OF CHARLOTTE.

(Filed 25 November, 1936.)

1. **Municipal Corporations E c—Evidence of negligence and proximate cause held sufficient for jury in this action for injuries from fall on sidewalk.**

Evidence that plaintiff fell when her foot caught in a broken place in the cement of a sidewalk over a drain pipe, that the broken place was about an inch deep and left the drain pipe exposed, that a small hole had been worn in the drain pipe, and that the edges of the broken place in the pipe were rusty, indicating the defect had existed for a long period of time, *is held* sufficient to be submitted to the jury on the issues of the city's negligence in failing to keep its sidewalk in a reasonably safe condition, and that such negligence was the proximate cause of plaintiff's injuries.

2. **Same—Evidence held not to disclose contributory negligence as matter of law in action to recover for injuries resulting from fall on sidewalk.**

Evidence that the broken place in defendant city's sidewalk in which plaintiff's shoe caught, causing her to fall and sustain serious injury, was in a business part of the city, and that the sidewalk carried a heavy pedestrian traffic, that the broken place was not readily observable because of its small size and the heavy traffic, *is held* not to disclose contributory negligence as a matter of law in plaintiff's failure to see and avoid the danger.

DEVIN, J., dissenting.

CONNOR, J., concurs in dissent.

APPEAL by the plaintiff from *Shaw, J.*, at April Special Term, 1936, of MECKLENBURG. Reversed.

A. A. Tarlton and H. Campbell Miller for plaintiff, appellant.
Scarborough & Boyd for defendant, appellee.

SCHENCK, J. This is an action to recover damages for personal injuries to the plaintiff, alleged to have been caused by the negligence of the defendant. At the close of the plaintiff's evidence, the court sustained the motion of the defendant for judgment of nonsuit, to which the plaintiff excepted and appealed.

The sole question presented for our consideration is as to whether the court erred in entering judgment of nonsuit without allowing the case to be submitted to the jury.

The plaintiff alleges that while she was walking north on South Tryon Street in the city of Charlotte, and crossing West Fourth Street where it intersects with South Tryon Street, "she stepped into an open, defective, and unguarded drain pipe and hole near the edge of the sidewalk, whereby her left foot caught and hung therein, causing her to be suddenly and without warning thrown violently to the pavement or curbing, resulting in her serious, painful, and permanent bodily injuries," and that her injuries were proximately caused by the negligence of the defendant "in permitting its sidewalks, curbing, and street, at the place alleged, to become worn, cracked up, defective, and out of repair, allowing thereby a large and jagged hole to be made and worn in said sidewalk and street, as well as in the iron drain pipe therein, and in permitting such hazardous conditions to exist and to continue for a long period of time open, exposed, unguarded, and unremedied, then and thereby creating and continuing a dangerous trap to pedestrians and a menace to human life, and especially to this plaintiff, the defendant, its agents and servants and governing authorities well knowing that its said street, sidewalk, curbing, and drain pipe, at the place alleged, were in such defective, dangerous, and unsafe condition, or by the exercise of due care and continuing supervision the defendant would have known it."

The plaintiff testified: "On 2 November, 1935, I started up town and went up the west side of South Tryon Street. This was on Saturday, between 10:00 and 11:00 o'clock in the morning. When I got to Fourth Street, I noticed the red light was on. This was in front of the Commercial National Bank and the Charlotte National Bank was on the other side of Fourth Street. There was some ten or fifteen persons waiting to cross Fourth Street on Tryon, going in a northerly direction. I was on the west side of the crowd. When the light changed, I started to go across Fourth Street from the southerly side to the northerly side, or from the Commercial National Bank to the Charlotte National Bank.

When I got across Fourth Street, I stepped up on the curb and stepped in a rough place in the cement and hung my foot on the rough place in the cement over a drain pipe. I did not step in the end of the hollow pipe, but on the top in a ragged part of the cement, and hung my shoe in the top of the iron pipe. The left side of my shoe got hung and when I fell I didn't see anybody on that side of me and I didn't see any automobile there. I do not know who picked me up, but I was picked up. I first saw the place where my foot was hung after I was raised up. My foot came out of it when I fell. It twisted my leg and toes. I was then carried into the Charlotte National Bank, but I don't know by whom." And on cross-examination: "I think I stepped up on the curb with my right foot and when I brought my left one up, it hung on that. I do not know how far up on the curbing I had my right foot. I guess about the length of a foot. There was nothing there obstructing my view. I was looking where I was going but I did not see this cement chipped off over the pipe. There was nothing obstructing my view at all and my eyesight is good."

R. C. Doyle, a son of the plaintiff, testified: "I saw two gentlemen carrying a lady out of the Charlotte National Bank, and I discovered that it was my mother. She said she had hung her foot in a broken place in the cement of the curb at the corner of South Tryon and Fourth streets, on the west side of South Tryon Street, at the corner of the Charlotte National Bank. She showed me the place where she hung her foot. There is a drain pipe that leads down under the sidewalk from the Charlotte National Bank into the street. There is an iron pipe under the sidewalk and in building the street the cement was placed over the top of the pipe about one-half to two inches thick. At the edge of the curbing over the end of the pipe the cement was broken in a 'V' shape and the top of the iron pipe was exposed, and the top of the iron pipe had rusted out in a 'V' shape. The cement showed that it was not freshly broken. This broken place over the pipe must have been about an inch deep. You could see how her shoe could have caught in there. The side of the 'V' shape in top of the pipe had little teeth-like edges and was rusty from having been exposed for some time. The teeth-like edges in the top of the 'V' shape in the pipe had little fragments of leather on them. She showed me where she caught her shoe in the 'V' shape place in the top of the iron pipe. This is the shoe that mother said she had on. The shoe and broken place was measured by me and the shoe would just fit in the broken place."

Taking the evidence in the light most favorable to the plaintiff, we are constrained to hold that there may be drawn therefrom a reasonable inference that the defendant was negligent, as alleged in the complaint, and that such negligence was the proximate cause of the plaintiff's injuries.

We are also constrained to hold contrary to the argument contained in the brief of the appellee that the plaintiff's own evidence establishes contributory negligence on her part. This case is distinguishable from *Burns v. Charlotte, ante,* 48, cited by the appellee, in that the defect complained of in that case was obvious and in a street whereon the traffic was very light, whereas the defect complained of in the instant case required close observation to discover it, and was located on a street upon which the traffic, both vehicular and pedestrian, was very heavy.

In our opinion, the evidence raised a question for the jury on both an issue as to negligence of the defendant and as to contributory negligence of the plaintiff, and for that reason the court erred in refusing to allow the case to be submitted to the jury and in entering the judgment of nonsuit.

The judgment of the Superior Court is

Reversed.

DEVIN, J., dissenting: The mere fact that the plaintiff, an adult, at ten o'clock in the morning, in stepping up from the street to the sidewalk, stuck her foot in a small broken place, an inch deep, in the cement covering the curbing, was not, in my opinion, sufficient to show a negligent breach of duty on the part of the city to exercise ordinary care after notice of the defect, or that the accident was one which the city was chargeable with the duty of foreseeing and avoiding.

The plaintiff had a safe way to step up on the sidewalk and avoid stepping on the broken place if she had looked, and had, herself, exercised due care and precaution for her own safety. I think the learned and experienced judge who presided over the trial below was correct in entering judgment of nonsuit under the authority of *Burns v. Charlotte, ante,* 48, and other similar cases.

CONNOR, J., concurs in dissent.

GIDEON HINTON AND HIS WIFE, MARY HARRIS HINTON, v. PAUL C. WEST AND SAUL WEST.

(Filed 25 November, 1936.)

Betterments A c—Mortgagee in possession under deed from mortgagor held entitled to betterments under facts of this case.

In an action between the parties it was determined that the relation between plaintiff and defendant was in effect that of mortgagor and mortgagee, although the form of the instrument executed by plaintiff was a

deed of trust, and under the presumption raised by the relationship a deed in fee thereafter executed by plaintiff to defendant was set aside, and judgment rendered for defendant for the amount of the debt constituting a lien against the land. After the execution of the deed and prior to the institution of action defendant went into possession and made improvements on the land, and this proceeding was instituted to recover the value of such improvements against plaintiff. *Held:* In the action setting aside the deed in fee no actual fraud was proven against defendant, but the deed was set aside under the presumption raised by the relationship between the parties, and defendant is entitled to recover against the plaintiff the value of the improvements under the doctrine that he who seeks equity must do equity.

APPEAL by plaintiffs from *Barnhill, J.*, at June-July Special Term, 1936, of WAKE. Affirmed.

This is an action for the cancellation of a deed dated 20 January, 1932, and recorded in the office of the register of deeds of Wake County, in Book 614, at page 487, by which the plaintiffs conveyed to the defendant Saul West the land described in the complaint, which had theretofore been conveyed by the plaintiffs to the defendant Paul C. West by a deed of trust dated 15 November, 1930, and recorded in the office of the register of deeds of Wake County, in Book 599, at page 323, to secure the payment of their note to the defendant Saul West for the sum of $1,020. The said note was due and payable on 15 November, 1931. It has not been paid or satisfied.

The action was begun in the Superior Court of Wake County on 16 January, 1934, and was tried at March Term, 1936, of said court on issues raised by the pleadings. These issues were answered as follows:

"1. Was there existing on 20 January, 1932, a fiduciary relation between the defendant Paul C. West and the plaintiffs, as alleged? Answer: 'Yes.'

"2. If so, in procuring the deed for the property in controversy, was the said Paul C. West acting in behalf of himself and the defendant Saul West, as alleged? Answer: 'Yes.'

"3. Was the transaction between the plaintiffs and Paul C. West, resulting in the execution by the plaintiffs of the deed dated 20 January, 1932, conveying the property described in the complaint, open, fair, *bona fide,* free from oppression, and made for a fair consideration? Answer: 'No.'

"4. Was the execution of said deed procured by actual fraud and coercion, as alleged? Answer: 'No.'

"5. Have the plaintiffs, by their conduct, ratified said transaction, so that they are now estopped to assert title to said land? Answer: 'No.' "

On the verdict, it was ordered and decreed by the court that the deed from the plaintiffs to the defendant Saul West, dated 20 January, 1932,

be and the same was canceled, and that the plaintiff Gideon Hinton is now the owner in fee of the land described in the complaint, subject to the deed of trust from him and his wife to the defendant Paul C. West, dated 15 November, 1930, and duly recorded in the office of the register of deeds of Wake County.

On admissions in the pleadings, it was ordered, considered, and adjudged by the court that the defendant Saul West recover of the plaintiffs the sum of $1,020, with interest from 15 November, 1931, and the sum of $96.06, the amount paid by said defendant as taxes on the land described in the complaint.

It was further ordered, considered, and decreed that the judgment rendered herein is and shall be a lien on the land described in the complaint as of 15 November, 1930.

It was further ordered that the questions, as to whether the defendants are entitled to recover in this action any sum for improvements made by them on the land described in the complaint prior to the commencement of this action, and if so, what sum, be and the same were reserved for future determination.

There was no exception to or appeal from said judgment.

The action was heard at June-July Special Term, 1936, of the Superior Court of Wake County on the petition of the defendants for an allowance for improvements made by them, prior to the commencement of the action, and subsequent to the date of the deed from plaintiffs to the defendant Saul West, and the answer of the plaintiffs to said petition. It was admitted in the answer that defendants had made improvements as alleged in the petition; it was denied that said improvements were made by the defendants while in possession of the land under color of title.

At the hearing, a trial by jury was waived. It was agreed that the court should hear the evidence and personally inspect the property in controversy, and render judgment on the facts found by it from all the evidence, and from its inspection of the property.

Accordingly, the court found the facts pertinent to the controversy between the parties to the action with respect to the improvements made by the defendants on the land described in the complaint, which are substantially as follows:

1. On 20 January, 1932, the defendant Saul West was the holder of a note for the sum of $1,020, which was executed by the plaintiffs and payable to his order. This note was dated 15 November, 1930, and was secured by a deed of trust of even date with the note, which was executed by the plaintiffs to the defendant Paul C. West. The note was due and payable on 15 November, 1931. The plaintiffs had defaulted in its payment.

2. After the plaintiffs had defaulted in the payment of said note, the defendant Paul C. West, as trustee, at the request of the defendant Saul West, the holder of said note, advertised the land conveyed by the deed of trust for sale under the power of sale contained therein. Prior to the date of the sale, the plaintiffs and the defendants entered into an agreement by which the plaintiffs executed a deed dated 20 January, 1932, by which they conveyed the land described in the deed of trust to the defendant Saul West, in fee, and thereafter, on 30 January, 1932, the defendant Saul West reconveyed six acres of said land to the plaintiffs. The note held by the defendant Saul West was marked "paid and satisfied," and the deed of trust was canceled on the records in the office of the register of deeds of Wake County. Pursuant to said agreement, the plaintiffs remained in possession of said land for two years from and after the date of their deed to the defendant Saul West, to wit: 20 January, 1932, paying no rent therefor to the defendants, or either of them.

3. While the plaintiffs were in possession of the land under their agreement with the defendants, and prior to the commencement of this action, the defendant Saul West caused to be constructed on said land permanent improvements, which have enhanced the value of the land in the sum of $380. The plaintiff Gideon Hinton, by his labor, aided in the construction of said improvements, and received compensation for his labor from the defendant Saul West. He made no objection to the construction of said improvements because at the time they were constructed he recognized the title of the defendant Saul West, under the deed to him from the plaintiffs, as valid in all respects.

4. On the verdict of the jury at the trial of this action, it has been adjudged and decreed that the deed under which the defendant Saul West claimed title to said land at the time the improvements thereon were constructed, be and the same has been canceled, and that the deed of trust by which the note held by the defendant Saul West is secured is in legal effect a mortgage.

On the foregoing facts it was ordered, considered, and adjudged by the court that the defendant Saul West is entitled to an allowance for the improvements made by him on the land described in the complaint, and that he recover of the plaintiffs on account of said improvements the sum of $380.00, with interest from 21 March, 1936, and the costs of the hearing of his petition.

The plaintiffs excepted to the judgment and appealed to the Supreme Court, assigning the judgment as error.

W. C. Lassiter, John H. Anderson, Jr., and Willis Smith for plaintiffs.
Clem B. Holding and Little & Wilson for defendants.

CONNOR, J. On a former appeal in this action a judgment as of nonsuit dismissing the action was reversed. It was held that there was sufficient evidence at the trial to support the allegations of the complaint which constitute plaintiffs' cause of action for the cancellation of the deed from the plaintiffs to the defendant Saul West, and that from this evidence a presumption arose that the transaction which resulted in the execution of the deed was not fair and free from oppression. The burden to rebut this presumption was on the defendants. *McLeod v. Bullard,* 84 N. C., 515. The action was remanded to the Superior Court of Wake County for trial upon the issues raised by the pleadings. *Hinton v. West,* 207 N. C., 708, 178 S. E., 556.

A subsequent trial was had, which resulted in a judgment for the plaintiffs. There was no exception to or appeal from this judgment. This appeal is from the judgment that the defendant Saul West recover of the plaintiffs for improvements made by him on the land after the execution of the deed and prior to the commencement of the action. The only exception is to the judgment. There was no exception to the findings of fact made by the court, on which the judgment was rendered.

The judgment is supported by *Wilson v. Fisher,* 148 N. C., 536, 62 S. E., 622. In that case it is said: "While it is the general rule that a mortgagee in possession is not entitled to pay for improvements, we are of opinion that as plaintiffs in this action are asking equitable relief, after so many years, they should account in diminution of rents for such enhancement in value of the property as may be found by reason of permanent improvements put therein by the defendant. There should be a reference to state an account between the parties upon the principle indicated in this opinion."

Hall v. Lewis, 118 N. C., 509, 24 S. E., 209; *Southerland v. Merritt,* 120 N. C., 318, 26 S. E., 814; and *Hallyburton v. Slagle,* 132 N. C., 957, 44 S. E., 659, are distinguishable from the instant case. In this case the jury has found that the execution of the deed which has been canceled by the court was not procured by the actual fraud of the defendants. The deed was canceled because the defendants failed to rebut the presumption which arose solely because of the relationship of the parties that the transaction which resulted in the execution of the deed was not fair and free from oppression.

On the facts found by the court, the judgment is in accord with the principle that he who seeks equity must do equity. The judgment is

Affirmed.

STELLA K. BARBEE ET AL. v. BOARD OF COMMISSIONERS OF WAKE COUNTY ET AL.

(Filed 25 November, 1936.)

1. Injunctions A f: Elections I c—Injunction, and not quo warranto, is proper remedy to test validity of tax levied under authority of popular election.

Plaintiff taxpayers instituted this suit to restrain the levy of a school tax in a special tax district on the ground that the result of the election authorizing the levy was erroneous because the votes of disqualified persons were included in the returns and a majority of the qualified voters did not vote in favor of the tax. Defendants demurred on the grounds that the court was without jurisdiction of the action and that there was a defect of parties plaintiff, contending that the sole remedy to test the validity of the election is by *quo warranto*, C. S., 870, 871. *Held:* The demurrer was properly overruled, since, unless otherwise provided by statute, injunction at the instance of a taxpayer is an appropriate remedy to resist the levy of a tax upon a *prima facie* showing of illegality, and since *quo warranto* is the sole remedy to test the validity of an election to public office, but not to test the validity of a tax even though it is levied under the authority of a popular election. C. S., 858, 7979.

2. Elections I a—Complaint held to sufficiently allege that result of election, as declared, was erroneous.

A complaint alleging upon information and belief that votes of disqualified persons were counted in the returns of an election, and that less than a majority of the qualified voters cast their ballots in favor of the tax being voted on, but later alleging without qualification that by reason of the matters alleged, a majority of the qualified voters did not vote in favor of the levying of the tax, and that the returns were incorrect, *is held* to sufficiently state a cause of action contesting the validity of the election irrespective of the allegations upon information and belief, and a demurrer thereto on the ground that the complaint failed to state a cause of action for that allegations upon information and belief are unavailing against a demurrer, is properly denied.

3. Pleadings D e—

A demurrer admits facts well pleaded. As to whether facts alleged upon information and belief are availing against a demurrer, *quære.*

APPEAL by defendants from *Barnhill, J.,* at June Special Term, 1936, of WAKE.

Civil action to contest validity of special school tax election and to restrain levy of alleged illegal or unauthorized tax.

The complaint, in substance, alleges:

1. That the plaintiffs are taxpayers in Raleigh Township, Wake County, and bring this action on behalf of themselves and all others similarly situated, who desire to be made parties plaintiff.

2. That a special election was duly called and held on 21 March, 1936, within the territorial jurisdiction of the "School Committee of Raleigh Township" upon the question as to whether "there shall be levied a special annual *ad valorem* tax upon property within said territorial jurisdiction, not to exceed a maximum of twenty-five cents (25c) on the $100 valuation."

3. That "plaintiffs are informed and believe, and upon such information and belief allege," at said election less than a majority of the qualified registered voters, eligible to vote in said election, cast their ballots in favor of said proposed levy, notwithstanding the returns from said election indicate upon their face that the proposal was carried by a majority of forty-eight votes.

4. That "plaintiffs are informed and believe and upon such information and belief allege," at said election "large numbers of persons, at least 200 or more, who were not qualified to register and vote in said election did actually . . . cast ballots in favor of the levying of the tax, . . . and that the votes of such persons, so disqualified, . . . were included in the returns," etc.

5. That "by reason of the matters and things hereinbefore alleged, a majority of the qualified voters . . . did not vote in favor of the levying of said tax; that the returns . . . are incorrect; that the tabulation and the result of said election . . . are incorrect; and that in truth and in fact a majority of the qualified and registered voters . . . voted against the imposition and levy of said tax." (Par. 17.)

Wherefore, plaintiff prays that the election be declared invalid, void, and of no effect, and that the proposed tax levy be restrained.

Demurrer interposed upon the ground (1) that the court has no jurisdiction of the subject of the action, (2) that there is a defect of parties plaintiff, and (3) that the complaint does not state facts sufficient to constitute a cause of action.

From judgment overruling the demurrer the defendants appeal, assigning errors.

Ruark & Ruark, Manning & Manning, Shepherd & Shepherd, Jones & Brassfield, and Douglass & Douglass for plaintiffs, appellees.

R. L. McMillan, J. M. Broughton, Charles U. Harris, and I. M. Bailey for defendants, appellants.

STACY, C. J. The demurrer to the jurisdiction is interposed upon the ground that the proper remedy for "contesting the validity of an election" is a proceeding by information in the nature of a *quo warranto*, brought by the Attorney-General of the State, C. S., 870, or by a private relator with leave of the Attorney-General, C. S., 871. *Cooper v. Crisco,*

201 N. C., 739, 161 S. E., 310. In support of this position, the defendants rely chiefly upon the decisions in *Saunders v. Gatling,* 81 N. C., 298, and *Britt v. Bd. Canvassers,* 172 N. C., 797, 90 S. E., 1005. The authorities cited are inapposite. The present action is not to try title to office, but to contest the validity of a special school tax election. *Forester v. N. Wilkesboro,* 206 N. C., 347, 174 S. E., 112; *Murphy v. Greensboro,* 190 N. C., 268, 129 S. E., 614. The form of the action, or the appropriateness of the proceeding, is sanctioned by a long line of decisions, of which the following may be cited as illustrative: *Hill v. Skinner,* 169 N. C., 405, 86 S. E., 351; *Clark v. Statesville,* 139 N. C., 490, 52 S. E., 52; *Jones v. Comrs.,* 107 N. C., 248, 12 S. E., 69; *Rigsbee v. Durham,* 99 N. C., 341, 6 S. E., 64; *Rigsbee v. Durham,* 98 N. C., 81, 3 S. E., 749; *McDowell v. Const. Co.,* 96 N. C., 514, 2 S. E., 351; *Smith v. Wilmington,* 98 N. C., 343, 4 S. E., 489; *Wood v. Oxford,* 97 N. C., 227, 2 S. E., 653; *Smallwood v. New Bern,* 90 N. C., 36; *Perry v. Whitaker,* 71 N. C., 475. "Where a taxpayer shows *prima facie* that an illegal tax is about to be levied by the county authorities, . . . courts of equity will restrain such abuse of power at his instance"—*Avery, J.,* in *Vaughn v. Comrs.,* 118 N. C., 636, 24 S. E., 425.

Title to office is properly triable by information in the nature of *quo warranto,* because the prerogatives of sovereignty are at stake, *Ames v. Kansas,* 111 U. S., 449, but not so in an action to test the validity of a tax sought to be levied, even with popular approval. *Eaton v. Graded School,* 184 N. C., 471, 114 S. E., 689; *Proctor v. Comrs.,* 182 N. C., 56, 108 S. E., 360; *Woodall v. Highway Com.,* 176 N. C., 377, 97 S. E., 226.

Unless otherwise provided by statute, injunction at the instance of a taxpayer is regarded as an appropriate remedy to resist the levy of an invalid assessment, *McDowell v. Const. Co., supra,* or to restrain the collection of an illegal tax. *Reynolds v. Asheville,* 199 N. C., 212, 154 S. E., 85. The position finds support, not only in the decisions, but also in the statutes on the subject. C. S., 858; C. S., 7979; *Ragan v. Doughton,* 192 N. C., 500, 135 S. E., 328; *R. R. v. Comrs.,* 188 N. C., 265, 124 S. E., 560; *Sherrod v. Dawson,* 154 N. C., 525, 70 S. E., 739; *Lbr. Co. v. Smith,* 146 N. C., 199, 59 S. E., 653.

It follows, therefore, that the demurrer was properly overruled on the first and second grounds.

The third ground of the demurrer is, that allegations made only "on information and belief" are bad as against a demurrer. In support of this position, the defendants cite, among others, the decisions in *So. Ry. Co. v. Rollins,* 45 Ga. App., 270, 164 S. E., 216, and *Moore v. Standard Accident Ins. Co.,* 48 Ga. App., 508, 173 S. E., 481.

Without pausing to debate the sufficiency of the allegations made on information and belief, and to distinguish or point out the inapposite-

ness of the authorities cited, it is enough to say that the allegations of paragraph seventeen of the complaint are good as against a demurrer. *Calahan v. Roberts,* 208 N. C., 768, 182 S. E., 657; *Linker v. Linker,* 167 N. C., 651, 83 S. E., 736. In this view of the matter, the third ground of the demurrer becomes academic.

The demurrer admits facts well pleaded. *Bank v. Gahagan, ante,* 464; *Sutton v. Ins. Co.,* 209 N. C., 826, 184 S. E., 821; *Oliver v. Hood, Comr., ibid,* 291, 183 S. E., 657; *Distributing Corp. v. Maxwell, ibid.,* 47, 182 S. E., 724; *Phifer v. Berry,* 202 N. C., 388, 163 S. E., 119. It was properly overruled on all three grounds.

Affirmed.

STATE v. ALBERTUS SYLVESTER GRIER.

(Filed 25 November, 1936.)

Criminal Law L e—The record is conclusive on appeal to the Supreme Court.

The record proper as contained in the statement of the case on appeal is conclusive, and where the record proper discloses that the trial court withdrew incompetent testimony from the jury and charged the jury fully and correctly upon the verdicts of murder in the first degree, murder in the second degree, manslaughter, and not guilty, which the jury might return upon the evidence, defendant's assignments of error based upon his contentions that the court did not withdraw the incompetent evidence from the consideration of the jury, and that the court instructed the jury that they could render one of two verdicts, guilty of murder in the first degree or not guilty, are not supported by the record and cannot be sustained.

APPEAL by defendant from *Hill, Special Judge,* at April Special Term, 1936, of MECKLENBURG. No error.

This is a criminal action in which the defendant Albertus Sylvester Grier was tried on an indictment in which he was charged with the murder of Waddell Mackey in Mecklenburg County, on 18 April, 1936.

At the trial the evidence for the State tended to show that between 7 and 8 o'clock, on the night of 18 April, 1936, the defendant went into a cafe in the city of Charlotte, and there found Waddell Mackey and others with whom he had shortly before had a quarrel; that as he was leaving the cafe, the defendant requested Waddell Mackey to come out of the cafe to the sidewalk, saying that he wished to talk with him; that as Waddell Mackey came out of the cafe to the sidewalk, where the defendant was standing, he grabbed a shotgun from a bystander, and as

Waddell Mackey started to walk down the sidewalk away from him the defendant shot Waddell Mackey and thereby inflicted a wound from which he died within about 20 minutes. Both within the cafe and on the sidewalk the defendant cursed Waddell Mackey and his companions. After the defendant had shot Waddell Mackey, two police officers of the city of Charlotte, who had been sitting in an automobile about 50 feet from the scene of the homicide, started toward the defendant, who thereupon raised his gun and shot at the officers, who returned the shots. The defendant then fled. He was subsequently arrested under a criminal warrant charging him with murder.

The evidence for the State tended to show further that shortly before the homicide the defendant met Waddell Mackey, who was walking on a street in the city of Charlotte with a girl, who had been going with the defendant and other friends. The defendant attempted by force to get the girl to leave Waddell Mackey and to go off with him. In consequence of Waddell Mackey's assistance to the girl, the defendant threw rocks at him and his friends, who in turn threw rocks at the defendant. After this occurrence, Waddell Mackey and his friends, including the girl, went to a picture show, where they remained about 30 minutes. After leaving the picture show they went to the cafe, where the defendant found them shortly before the homicide.

Witnesses for the State testified that when the deceased came out of the cafe, in response to the request of the defendant, and while he was on the sidewalk, immediately before the defendant shot him, Waddell Mackey had no knife or other weapon in his hands, and that at the time he was shot he was walking away from the defendant, who was cursing him and demanding that he stop.

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

"On Saturday night before Easter, I was going up a street in the city of Charlotte. I saw Bessie Foust, Waddell Mackey, and Sandy Pettis together. Sandy and I had been together earlier that night. I had seen Bessie Foust on McDowell Street, and had talked with her alone. I saw her later at Smoky's. Waddell Mackey came into Smoky's house and stayed a good while. I left him there. Later Waddell Mackey, Robert Pettis, Joe Stanly, and Bessie Foust caught up with me on the street. I called Bessie Foust, and asked her to come with me. She did not come. Waddell Mackey said, 'She is not coming to you.' He cursed me and then he and Robert Pettis threw rocks at me. I threw a rock back at them, and then went on down the street. I next saw them at Moore's Cafe. I did not know that they were in the cafe when I went in. After I saw them in the cafe, I left because I was afraid they would jump on me. As I left the cafe they followed me. Waddell Mackey had a knife in his hands while I was in the cafe. He cursed me and said he would

cut my head off. When he came out of the cafe to the sidewalk I got a gun from a man standing by whom I knew as Jim. When I shot Waddell Mackey he had a knife and was coming on me. I shot only once, and then ran. As I ran I threw the gun away. The officers shot at me as I was running. I had never had any trouble before that night with Waddell Mackey. I knew Bessie Foust. I had been going with her for some time. I never stayed with her, although I admit I had had sexual relations with her. I was not jealous because she was going with Waddell Mackey that night. When I left the cafe that night before the shooting, Waddell Mackey and his friends followed me. I did not shoot but one time. I shot Waddell Mackey because he was coming on me with a knife. I did not shoot at the officers. I had not threatened to shoot or kill anyone."

There was evidence offered by the defendant tending to corroborate his testimony. There was also evidence tending to show that the general character of the defendant is good.

In his charge to the jury, the court instructed them that they should return a verdict of guilty of murder in the first degree, or guilty of murder in the second degree, or guilty of manslaughter, or not guilty, as they should find the facts to be from all the evidence submitted to them by the court.

The jury returned a verdict of guilty of murder in the first degree.

From judgment that he suffer death by means of asphyxiation, as prescribed by statute, the defendant appealed to the Supreme Court, assigning errors in the trial.

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

A. A. Tarlton for defendant.

CONNOR, J. A careful examination of the record proper in this Court, and of defendant's assignments of error in his appeal to this Court, fails to disclose any error in the trial of the action in the Superior Court or in the judgment from which the defendant has appealed to this Court.

The record of the trial as contained in the statement of the case on appeal does not support the contentions of the defendant that there was error in the failure of the trial court to withdraw testimony from the jury which was inadmissible as evidence because the testimony was hearsay, or that there was error in the charge for that the jury were instructed to return a verdict of guilty of murder in the first degree or not guilty The record shows that the testimony of the witness, which his examination showed was hearsay, was withdrawn by the court from the jury, and that the jury were instructed fully and correctly with

respect to the verdict which they should return upon the facts as the jury should find them to be from all the evidence.

In the absence of any error in the record proper, or in the trial of the action, the judgment must be affirmed.

No error.

ATLANTIC ICE AND COAL COMPANY v. A. J. MAXWELL, COMMISSIONER OF REVENUE.

(Filed 25 November, 1936.)

Taxation B b—Coal yards held "mercantile establishments" within meaning of sec. 162, ch. 445, Public Laws of 1933.

A corporation operating coal and ice yards at established places of business in several cities of the State, one or more yards being operated in each of the cities, and maintaining scales, bins, etc., and a staff composed of a yard foreman and other employees at each establishment, *is held* liable for the tax imposed by sec. 162, ch. 445, Public Laws of 1933, since such business operates "two or more stores or mercantile establishments where goods, wares, and/or merchandise is sold or offered for sale at wholesale or retail," the coal and ice yards being "mercantile establishments" within the meaning of the act, and it not being necessary to decide whether such establishments constitute "stores" in the common acceptation or the legal meaning of the word, since the application of the statute is not limited to stores.

APPEAL by plaintiff from *Barnhill, J.*, at July Term, 1936, of WAKE. Affirmed.

Manly, Hendren & Womble and W. P. Sandridge for plaintiff, appellant.

Attorney-General Seawell and Assistant Attorneys-General McMullan and Bruton for the defendant, appellee.

SCHENCK, J. This is an action to recover State license taxes paid under protest by the plaintiff to the defendant under section 162, chapter 445, Public Laws 1933 (Revenue Act of 1933), which reads: "Sec. 162. *Branch or chain store.* Every person, firm, or corporation engaged in the business of operating or maintaining in this State, under the same general management, supervision, or ownership, two or more stores or mercantile establishments where goods, wares, and/or merchandise is sold or offered for sale at wholesale or retail shall be deemed a branch or chain store operator, shall apply for and obtain from the Commissioner of Revenue a State license for the privilege of engaging in such business

of a branch or chain store operator, and shall pay for such license a tax according to the following schedule:"

By consent, the case was heard upon an agreed statement of facts. The facts agreed upon were substantially these: The plaintiff, a Georgia corporation, duly domesticated in this State, is engaged in the business of selling coal and ice at wholesale and retail in the State of North Carolina. All ice sold by it is of its own individual manufacture. In nine cities of the State the plaintiff operates one or more coal and ice yards, thirteen in all. "In these established places of business there is a man in charge known as yard foreman. His duty is to weigh the coal or ice and bill same to the purchaser, make cash sales, and collect any cash sale that he makes from the yard at which the sale is made. This collection, with duplicate copy of bill, is turned in at the close of each day to the main office. Coal or ice in any quantity requested by the purchaser is sold at all of these places of business, some of which sales are wholesale in excess of one ton or more, and some of them merely a few sacks of coal or a few pounds of ice—any amount the purchaser wants is sold by this company at the place of business. . . . In the cities where they (the plaintiff) have more than one location, the delivery is made from the location nearest to the purchaser. Merchandise is delivered by the seller, if requested; otherwise, the purchaser can haul his own purchase." At the respective places of business a local trade name is used. The plaintiff has paid to the State of North Carolina a total of $600, representing a license tax for each location (separate yards in the same city being counted as separate locations), at which the defendant does business. The license taxes so imposed are prescribed by sec. 112, ch. 445, Public Laws 1933 (Revenue Act of 1933).

The Commissioner of Revenue has required the plaintiff to pay a branch or chain store tax under sec. 162, ch. 447, Public Laws 1933. The chain store tax so required to be paid was paid under protest, demand was duly made within thirty days after such payment for its refund, and refund was refused. The amount of the chain store tax paid by the plaintiff under protest to the defendant was $720.00. This action was brought to recover the amount so paid under protest.

His Honor was of the opinion that the plaintiff was not entitled to recover, and from judgment so adjudging the plaintiff appealed, assigning error.

In the appellant's brief is the statement: "This brief does not raise any question of the constitutionality of the chain store license tax. The question here raised is solely a question of statutory construction and legislative intent," and at another place in the brief appellant says: "It is true that double taxation is not prohibited."

The decision of this case turns upon the legislative intent carried by the words "two or more stores or mercantile establishments where goods, wares, and/or merchandise is sold or offered for sale at wholesale or retail." If these words include the thirteen separate places of business where the plaintiff sells coal and ice, called "coal yards," then the tax was properly collected and the plaintiff is not entitled to recover; if, on the other hand, these words do not include these various separate places of business, then the tax was improperly collected, and plaintiff is entitled to recover the amount paid, under protest, by it to the defendant.

The appellant in its brief seems to rest its appeal more upon the meaning of the word "stores" than upon the words "mercantile establishments." While there may be considerable divergence of opinion as to the common acceptation of the word "stores," and of its legal meaning, we are of the opinion that the words "mercantile establishments," followed by the words "where goods, wares, and/or merchandise is sold or offered for sale," clearly include coal yards where coal and ice are sold in the manner shown by the agreed statement of facts.

Webster's New International Dictionary, Second Edition (1935), defines the word "establishment" as an "institution or place of business with its fixtures and organized staff," and defines the word "mercantile" as "characteristic of, or befitting, a merchant; having to do with, or engaged in, trade." The plaintiff's coal yard is its "place of business," with its "fixtures," scales, bins, etc., and, with its "staff," a yard foreman and other employees; and is clearly a "mercantile" place of business since it "has to do with" and is "engaged in, trade"—the wholesale and retail trade in coal and ice.

The judgment of the Superior Court is

Affirmed.

McCANLESS MOTOR COMPANY v. A. J. MAXWELL, COMMISSIONER OF REVENUE.

(Filed 25 November, 1936.)

1. Taxation B d—

Provisions of a statute exempting property or transactions from the general tax therein levied will be strictly construed in favor of the State.

2. Taxation B b—Second-hand automobiles taken in as part payment on other second-hand automobiles held subject to tax.

Second-hand automobiles taken in by a dealer in part payment on other second-hand automobiles *are held* subject to the tax levied by secs. 400, *et seq.*, of ch. 445, Public Laws of 1933, upon resale of such second-hand cars by the dealer, the exemption from the tax provided by subsec. 11 of

sec. 404 of the act applying, by its terms, only to second-hand automobiles taken in by the dealer in part payment on new automobiles sold by the dealer.

3. Statutes B a—

Where a statute is not ambiguous, but expresses the legislative intent clearly, no means of interpretation other than the language of the statute may be used in its construction, and the legislative intent as expressed in the statute must be given effect.

APPEAL by defendant from *Small, J.*, at October Term, 1936, of WAKE. Reversed.

I. M. Bailey and Hayden Clement for plaintiff, appellee.
Attorney-General Seawell and Assistant Attorneys-General McMullan and Bruton for defendant, appellant.

SCHENCK, J. This was an action instituted by the plaintiff, a corporation engaged in the retail sale of automobiles in the city of Salisbury, against the defendant Commissioner of Revenue for the refund of $1,454.75 paid by the plaintiff to the defendant under protest, being taxes levied and collected by the defendant from 25 May, 1934, to 1 July, 1935, on the resale of second-hand or used automobiles taken in exchange for other second-hand or used automobiles which had been taken in part payment of new automobiles sold by the plaintiff and upon the sales of which new automobiles the maximum tax of $10.00 on the sale of any single article had been paid. The case was heard upon an agreed statement of facts and presents the question as to whether under the Emergency Revenue Act of 1933, ch. 445, Public Laws 1933, secs. 400, *et seq.*, sales of second-hand or used automobiles, other than the sales of those second-hand or used automobiles taken in part payment in the sales of new automobiles are exempt from sales tax. The answer to the question involves an interpretation of section 404, subsection 11, of said act, which reads:

"When in the sale of a new article a second-hand or used article is taken in part payment, the sale of the new article shall be reported at the full gross sales price. The resale of second-hand or used articles, taken in part payment in the sale of new articles, or the resale of articles repossessed by the vendor, may be excluded from gross sales taxable under this act if separate record is kept of all such transactions in such manner as may be prescribed or approved by the Commissioner of Revenue."

The trial judge was of the opinion, and entered judgment accordant therewith, that the resales of second-hand or used automobiles taken in exchange and part payment of other second-hand or used automobiles

which had been taken in part payment in the sales of new automobiles, upon the sales of which new automobiles the maximum tax of $10.00 on the sale of any single article had been paid, were exempt from sales tax. The defendant appealed to the Supreme Court, assigning as error the judgment of the Superior Court. We think, and so hold, that such assignment of error is well founded.

Section 406 of the Emergency Act of 1933 provides for the payment to the Commissioner of Revenue by retail merchants of one dollar for a license to engage in and conduct business, and for additional tax as follows: "Upon every retail merchant, as defined in this article, a tax of three per cent (3%) of total gross sales by every such person." Section 404, subsection 12, provides that the maximum tax on the sale of any single article shall be $10.00.

Section 406 imposes a tax upon each sale made by a retail merchant in this State, unless a sale be excepted from the provision of the statute. It is contended by the plaintiff that the sales upon which the tax sought to be recovered was paid were so excepted by section 404, subsection 11. ". . . It has been generally held that exemption from taxation must be strictly construed in favor of the taxing power." *Stedman v. Winston-Salem,* 204 N. C., 203 (205). ". . . No claim to exemption can be sustained unless it is clearly within the scope of the exempting clause." 37 C. J., 237. The language relied upon by the plaintiff is: "The resale of second-hand or used articles, taken in part payment in the sale of *new* articles, . . . may be excluded from gross sales taxable under this act if separate record is kept of all such transactions. . . ."

It appears from the agreed facts that the tax sought to be recovered in the instant case was not collected on the resale of second-hand or used automobiles taken in part payment of *new* automobiles sold, but was collected on the resale of second-hand or used automobiles taken in part payment or exchange of other second-hand or used automobiles which had been taken in part payment in the sales of new automobiles. The express wording of the exempting subsection of the statute, taken in its ordinary and commonly accepted meaning, includes only sales of second-hand or used articles taken in part payment in the sales of *new* articles, and does not include sales of second-hand or used articles taken in part payment of other second-hand or used articles, although such last mentioned articles had been taken in part payment of the sales of new articles.

There is really no ambiguity in the wording of the exempting subsection of the statute (subsection 11, section 404, ch. 445, Public Act 1933). It expresses plainly and clearly the intent of its framers and there is no occasion to resort to any means of interpretation other than to follow such intent. "This meaning and intention must be sought first

of all in the language of the statute itself. For it must be presumed that the means employed by the Legislature to express its will are adequate to the purpose and do express that will correctly. If the language of the statute is plain and free from ambiguity, and expresses a single, definite, and sensible meaning, that meaning is conclusively presumed to be the meaning which the Legislature intended to convey." *School Commissioners v. Aldermen,* 158 N. C., 191 (196).

The judgment of the Superior Court is

Reversed.

J. C. BALLARD v. TOWN OF CHERRYVILLE.

(Filed 25 November, 1936.)

Municipal Corporation E f—Right to recover damages resulting to land from sewage disposal plant is predicated upon title and not possession.

In this action to recover damages to land resulting from defendant municipality's sewage disposal plant, defendant municipality pleaded the three-year statute of limitations, C. S., 441 (3). It appeared that plaintiff executed a deed of trust on the land and thereafter deeded his equity of redemption to his sons, that the deed of trust was foreclosed and bid in by the *cestui que trust,* all more than three years before the institution of the action, and that plaintiff did not again acquire title until less than a year before the institution of the action by deed from the transferee of the purchaser at the foreclosure sale, although plaintiff had been in possession of the land for more than three years next before the institution of this action. *Held:* The measure of damages should have been predicated upon the difference in value at the time plaintiff again acquired title and the date of the institution of the action, and an instruction that the jury should assess as damages the difference in the market value of the land on the date of the institution of the action and the date three years prior thereto, constitutes reversible error.

APPEAL by defendant from *Harding, J.,* at February Term, 1936, of GASTON. New trial.

Ernest R. Warren, John G. Carpenter, and R. R. Carpenter for plaintiff, appellee.

M. A. Stroupe and A. C. Jones for defendant, appellant.

SCHENCK, J. This is a civil action, instituted 22 November, 1935, to recover damages alleged to have been caused to the land of the plaintiff by a municipal sewage disposal plant maintained by the defendant on land adjacent thereto.

The following verdict was rendered by the jury:

"1. Did the defendant wrongfully damage the premises of the plaintiff, as alleged in the complaint? Answer: 'Yes.'

"2. What damage, if any, is the plaintiff entitled to recover of the defendant by reason of the said wrongful acts of the defendant, as alleged? Answer: '$2,500.'"

From judgment based upon the verdict the defendant appealed, assigning as error the following excerpt from the charge, viz.:

"The court charges you, gentlemen of the jury, whatever the plaintiff has shown to you in damages to his property at any time within three years, if any, then he would be entitled to recover as compensation for such damages and the measure of that damage would be the difference between the reasonable market value of the property three years prior to November, 1935, which would be November, 1932, and the date of the commencement of this action. Plaintiff contends he has shown that this action was commenced November, 1935. The court charges you the difference would be the reasonable market value in November, 1932, and the reasonable market value in November, 1935—that means the difference between that value, provided you shall find that the depreciation, if you find that there is any depreciation, was brought about by the wrongful acts of the defendant in maintaining a nuisance there, damaging the plaintiff's property. He would not be entitled to recover any difference brought about by economic conditions."

Since the defendant pleaded the three-year statute of limitations, C. S., 441 (3), the charge as given would have been correct under the authority of *Lightner v. Raleigh,* 206 N. C., 496, but for the uncontradicted evidence to the effect that the plaintiff did not hold title to the land alleged to have been damaged during the entire period of three years next preceding the institution of the action.

The evidence, record and oral, establishes that the plaintiff originally was vested with title to the land alleged to have been damaged, having bought a part of it in 1918 and a part in 1920; on 6 October, 1926, plaintiff conveyed the land by mortgage deed to the Greensboro Joint Stock Land Bank, and upon default by plaintiff the mortgage deed was foreclosed and the mortgagee executed deed to J. S. Duncan, purchaser, which was recorded 26 June, 1933. Later Duncan conveyed the land to the said Land Bank and the said Land Bank thereafter conveyed it to Howard Ballard by deed dated 1 June, 1934, and Howard Ballard, by deed dated 26 June, 1934, and recorded 23 October, 1935, conveyed the land to the plaintiff; and further, on 23 July, 1928, plaintiff divested himself of all legal or equitable interest in the land by conveying the same to his sons, T. A., Roy, and Will Ballard, and did not again acquire title thereto until he did so by the deed of Howard Ballard purporting

to be executed 26 June, 1934, and actually recorded 23 October, 1935. The plaintiff was not vested with title to the land from 23 July, 1928, to 26 June, 1934.

Notwithstanding the plaintiff was in possession of the land alleged to have been damaged during the three years next preceding the institution of the action, under the factual situation established by the evidence relative to the title of said land the measure of damages suffered by the plaintiff would be the difference, caused by the municipal sewage disposal plant maintained by the defendant, in the market value of said land at the time plaintiff reacquired title thereto, namely, 26 June, 1934, and the market value thereof at the date of the institution of this action, namely, 22 November, 1935.

The assignment of error must be sustained, and a new trial ordered.

New trial.

J. O. HUGHES, ADMINISTRATOR OF ESTATE OF CLYDE REID HUGHES, DECEASED, v. SOUTHERN RAILWAY COMPANY, JOHN W. BLANTON, T. E. SHARP, JUNIUS B. LAMB, AND CHARLES R. McCLURE.

(Filed 25 November, 1936.)

1. Removal of Causes C b—

Whether a separable controversy is alleged is to be determined by the complaint, and whether the resident defendants are fraudulently joined to prevent removal to the Federal Court is to be determined by the petition, which must allege facts leading to that conclusion apart from deductions by the pleader.

2. Same—Petition held to allege facts leading to conclusion that resident defendants were fraudulently joined to prevent removal.

In this action against a nonresident railroad company and its resident employees defendant railroad company filed a petition for removal, alleging that the individuals charged in the complaint with concurrent negligence in failing to keep defendant's warning signals at the grade crossing in question in proper working order, were a train conductor, a roadmaster, and a superintendent, and one of them not even an employee of defendant railroad at the time of the injury, and that none of them had any duty in regard to the inspection and maintenance of the warning signals in question. *Held:* The facts alleged in the petition show a want of causal connection between the employment of the resident defendants and the negligence alleged in the complaint, and defendant railroad company's motion for removal should have been granted.

APPEAL by defendant Southern Railway Company from *Harding, J.*, at April Term, 1936, of MECKLENBURG. Reversed.

Action for damages for wrongful death, alleged to have been caused by the negligence of the defendants.

The complaint alleged that plaintiff's intestate was struck by a train of defendant Southern Railway Company on a street crossing in the city of Charlotte, on the night of 19 March, 1935, and that as a result the intestate suffered an injury from which he shortly thereafter died; that defendant railway company maintained at said crossing a signal light, showing red when train was approaching and green when crossing was clear, and that a bell was attached to said device to give warning of the approach of a train; that the individual defendants, residents of North Carolina, were employees of the railway company and had control and supervision of said signal device, and were charged with the duty to maintain it in working condition at all times for the protection of the public; that on the occasion alleged, and for several days previous thereto, the said signals were out of order, so that a green light was shown when a red light should have been shown, and *vice versa,* and that defendants permitted said defective condition to remain with knowledge thereof. Plaintiff alleged damages in the sum of one hundred thousand dollars.

In apt time the defendant Southern Railway Company, a corporation organized and existing under the laws of the State of Virginia, with proper bond, filed its duly verified petition for removal of said action to the District Court of the United States on the ground of separable controversy, and that the joinder of the individual resident defendants was not in good faith, but for the sole and fraudulent purpose of attempting to prevent the defendant railway company from removing the case to the Federal Court.

The petitioner further set out in its petition that one of the individual defendants was the train conductor, another roadmaster, another a superintendent, neither of them being charged with any duty of inspection or maintenance of the said signaling device, or with any duty with respect thereto for the protection of the public using said crossing, and that the fourth individual defendant was not at the time an employee of defendant and in no way connected with the alleged injury.

The petition for removal was denied by the clerk, and the clerk's ruling on appeal was affirmed by the judge of the Superior Court, and the defendant railway company appealed to this Court.

Kirkpatrick & Kirkpatrick and Walter Hoyle for plaintiff.
John M. Robinson for Southern Railway Company, appellant.

DEVIN, J. The appeal presents the single question whether the facts set forth in the petition of the corporate defendant are sufficient to entitle it to have the case removed to the United States District Court.

The petition for removal is based on the averment that as to the individual resident defendants no cause of action will lie, and that they

were joined as parties defendant for the fraudulent purpose of preventing the exercise by the nonresident defendant of its right of removal to the Federal Court.

It seems to be well settled that whether there is a separable controversy is to be determined by the complaint, and that whether resident defendants are joined fraudulently for the purpose of preventing removal of the cause to the United States Court is to be determined by the facts alleged in the petition for removal. *Morganton v. Hutton,* 187 N. C., 736; *Culp v. Ins. Co.,* 202 N. C., 87; *Tate v. R. R.,* 205 N. C., 51; *Trust Co. v. R. R.,* 209 N. C., 304; *Powers v. R. R.,* 169 U. S., 92; *Southern Ry. v. Lloyd,* 239 U. S., 496; *Wilson v. Iron Co.,* 257 U. S., 92.

The petitioner must not only allege fraudulent joinder, but must state facts leading to that conclusion, apart from the pleader's deduction. *Crisp v. Fibre Co.,* 193 N. C., 77.

Here the appellant has set out in detail the facts upon which it bases its plea for removal, showing want of causal connection between the employment of the resident defendants and the negligence alleged in the complaint.

"The State Court may pass upon the sufficiency of the bond and petition, but the petitioner's allegations of fact are deemed to be true, and if the plaintiff wishes to do so he may traverse the jurisdictional facts in the Federal Court on a motion to remand." *Tate v. R. R., supra; Rea v. Mirror Co.,* 158 N. C., 24; *Lloyd v. R. R.,* 162 N. C., 485; *Smith v. Quarries Co.,* 164 N. C., 338.

There was error in denying the motion for removal.

Reversed.

JOHN MITCHEM v. NATIONAL WEAVING COMPANY.

(Filed 25 November, 1936.)

1. **Malicious Prosecution A e—Want of probable cause does not raise presumption of malice, although jury may infer malice therefrom.**

Malice as an essential element of a right of action for malicious prosecution may be inferred by the jury from want of probable cause, but want of probable cause raises no presumption of malice, the matter being for the determination of the jury from the evidence, while malice sufficient to support a verdict for punitive damages must be shown by plaintiff by positive evidence beyond the inference of malice from want of probable cause, malice necessary to support the issue of punitive damages being actual ill will or a reckless and wanton disregard of plaintiff's right, and an instruction that the law presumed malice from want of probable cause entitles defendant to a new trial.

2. Malicious Prosecution A d—

A *nolle prosequi* taken by the solicitor upon the finding by the grand jury of "not a true bill" after the committing magistrate had bound the defendant over, is a sufficient termination of the prosecution to support an action for malicious prosecution.

3. Malicious Prosecution A c—

The fact that the committing magistrate had bound defendant over is competent evidence on the question of probable cause in an action thereafter instituted by the defendant in the criminal action for malicious prosecution, but such fact is not conclusive. The distinction between instances where the magistrate has jurisdiction to try the defendant is pointed out.

4. Malicious Prosecution A a—

Plaintiff in an action for malicious prosecution must allege and prove malice, want of probable cause and termination of the proceeding upon which the action is based.

APPEAL by defendant from *Harding, J.*, at March Term, 1936, of GASTON.

Civil action for malicious prosecution.

On 3 September, 1935, a hearing was had before a justice of the peace on a warrant sworn out by an officer of the defendant company, charging the plaintiff with obtaining goods from the defendant under false pretense, and plaintiff was bound over to the Superior Court. Thereafter, the grand jury returned "not a true bill," and the solicitor took a *nolle prosequi.*

Plaintiff sues for malicious prosecution.

From verdict and judgment awarding both actual and punitive damages, the defendant appeals, assigning errors.

J. L. Hamme for plaintiff, appellee.
Emery B. Denny for defendant, appellant.

STACY, C. J. The following excerpt, taken from the charge, forms the basis of one of defendant's exceptive assignments of error:

"Now, under this issue, if you shall find that it was done without probable cause, the law implies that it was done with implied malice—a wrongful act done without legal justification."

This instruction is not supported by the decisions on the subject.

It is true that malice, in the sense the term is used in actions for malicious prosecution, may be inferred from want of probable cause, but it is not presumed from such fact alone. *Johnson v. Chambers,* 32 N. C., 287.

Speaking to the identical question, in *Bell v. Pearcy,* 27 N. C., 83, where a similar instruction was held to be erroneous, *Ruffin, C. J.,*

delivering the opinion of the Court, said: "We think there is error in the point excepted to by the defendant. . . . Hence, it has been properly said that malice may be inferred from the want of probable cause. *Sutton v. Johnston,* 1 Term, 493, 545. It is equally apparent that it is not necessarily to be inferred therefrom. On the contrary, it must in every case be properly an inquiry for the jury as to the actual fact, under explanations from the court. If it were not so, it should be said at once that the action lies for a prosecution without probable cause, for it is obviously idle to add that there must also be malice in the prosecutor, if the want of probable cause proves malice. The law draws no such presumption; for, though it often might be true, it would often be untrue in point of fact."

Again, in *Turnage v. Austin,* 186 N. C., 266, 119 S. E., 359, it was said: "The absence of probable cause is not the equivalent of malice, nor does it establish malice *per se,* though it is evidence from which malice may be inferred, and the existence of probable cause does not make the existence of malice. The presence or absence of malice in its final analysis is a question of fact to be determined by the jury, while probable cause is a mixed question of law and fact."

And in *McGowan v. McGowan,* 122 N. C., 145, 29 S. E., 97, it was held (as stated in headnote which accurately digests the opinion): "While, in some cases, malice may be inferred from the want of probable cause, the law makes no such presumption, and, in the trial of an action for malicious prosecution, it is for the jury and not the court to make such inference of fact."

The kind of malice required to support a verdict for actual as well as punitive damages in actions for malicious prosecution was the subject of extensive investigation in *Downing v. Stone,* 152 N. C., 525, 68 S. E., 9; *Stanford v. Grocery Co.,* 143 N. C., 419, 55 S. E., 815; *Motsinger v. Sink,* 168 N. C., 548, 84 S. E., 847; and *Humphries v. Edwards,* 164 N. C., 154, 80 S. E., 165. See, also, *Dickerson v. Refining Co.,* 201 N. C., 90, 159 S. E., 446; *Merrell v. Dudley,* 139 N. C., 57, 51 S. E., 777; *Kelly v. Traction Co.,* 132 N. C., 369, 43 S. E., 923; 38 C. J., 478; 18 R. C. L., 28.

In *Brown v. Martin,* 176 N. C., 31, 96 S. E., 642, *Allen, J.,* delivering the opinion of the Court, said: "The rule is established in *Stanford v. Grocery Co.,* 143 N. C., 419, that legal malice, which must be present to support an action for malicious prosecution, may be inferred by the jury from the want of probable cause, and that it is sufficient as a basis for the recovery of compensatory damages, but that when punitive damages are claimed, the plaintiff must go further and offer evidence tending to prove that the wrongful act of instituting the prosecution 'was done from actual malice in the sense of personal ill will, or under cir-

cumstances of insult, rudeness, or oppression, or in a manner which showed the reckless and wanton disregard of the plaintiff's right.'"

The *nolle prosequi* taken by the solicitor was sufficient legal termination of the prosecution to support an action for malicious prosecution based thereon. *Abernethy v. Burns, ante,* 636; *Dickerson v. Refining Co., supra; Winkler v. Blowing Rock Lines,* 195 N. C., 673, 143 S. E., 213; *Stancill v. Underwood,* 188 N. C., 475, 124 S. E., 845; *Wilkinson v. Wilkinson,* 159 N. C., 265, 74 S. E., 740. The action of the committing magistrate in binding the defendant there, plaintiff here, over to the Superior Court for trial, was evidence of probable cause, sufficient to warrant the jury in finding its existence, but which neither compelled nor required such finding. *Stanford v. Grocery Co., supra; Jones v. R. R.,* 131 N. C., 133, 42 S. E., 559; *Griffin v. Sellers,* 19 N. C., 492; *Plummer v. Gheen,* 10 N. C., 66. The case is not like *Price v. Stanley,* 128 N. C., 38, 38 S. E., 33, where the justice of the peace had jurisdiction to determine the guilt or innocence of the accused. Perhaps the action of the grand jury in returning "not a true bill" neutralized that of the committing magistrate. *Miller v. Chicago, etc., R. Co.,* 41 Fed., 898; *Kelly v. Shoe Co.,* 190 N. C., 406, 130 S. E., 32. But, however this may be, the matter was for the twelve. The burden was on the plaintiff to show the concurrence of malice and want of probable cause. *Turnage v. Austin, supra; Overton v. Combs,* 182 N. C., 4, 108 S. E., 357; *Bowen v. Pollard,* 173 N. C., 129, 91 S. E., 711. In short, three things must be alleged and proved in an action for malicious prosecution: (1) Malice, (2) want of probable cause, and (3) termination of proceeding upon which the action is based. *Wingate v. Causey,* 196 N. C., 71, 144 S. E., 530; *Stancill v. Underwood, supra; Carpenter v. Hanes,* 167 N. C., 551, 83 S. E., 577; *R. R. v. Hardware Co.,* 138 N. C., 174, 50 S. E., 571.

For error in the charge as indicated, the defendant is entitled to a new trial. It is so ordered.

New trial.

B. G. LILLY v. BELK BROTHERS AND HARTFORD ACCIDENT AND INDEMNITY COMPANY.

(Filed 25 November, 1936.)

1. Master and Servant F c—Evidence held to support findings that claim was not filed in time and that employer was not estopped to assert defense.

The evidence before the Industrial Commission tended to show that claimant, injured in the course of his employment, failed to give the

employer notice thereof and did not file claim therefor until more than twelve months after the injury, that the employer did not file a report of the accident because it did not have knowledge thereof, and that the employer delivered claimant's wages to him after the disability resulting from the injury, but that the employer thought the disability was due to a prior injury, had no knowledge of the subsequent injury, and made no representations that the wages delivered to the claimant were in lieu of compensation. *Held:* The evidence supports the findings of the Industrial Commission that the claim was not filed within the time prescribed by N. C. Code, 8081 (dd), (ee), (ff), and that the employer was not estopped to set up the defense that the claim was filed too late.

2. Master and Servant F i—

The findings of fact made by the Industrial Commission in a hearing before it are conclusive on the courts when they are supported by competent evidence.

APPEAL by plaintiff from *Pless, J.*, at July Special Term, 1936, of MECKLENBURG. Affirmed.

Petition by plaintiff for an award under the North Carolina Workmen's Compensation Act on account of an injury by accident arising out of and in course of employment by defendant Belk Brothers.

An award was denied by the North Carolina Industrial Commission on the ground that plaintiff had not filed claim within the time prescribed by the statute. On appeal to the Superior Court, the ruling of the Industrial Commission was affirmed, and plaintiff appealed to this Court.

D. E. Henderson for plaintiff.

C. H. Gover, William T. Covington, Jr., and Hugh L. Lobdell for defendants.

DEVIN, J. The plaintiff, a salesman in the employ of defendant Belk Brothers, in Charlotte, North Carolina, in the course of his employment struck his leg against an obstacle in January, 1934, and later, as a result, was disabled from September, 1934, to February, 1935, and afterwards.

The North Carolina Industrial Commission found "that the claimant did not file a claim with the Industrial Commission within twelve months from date of the accident, as required by section 24" of the Workmen's Compensation Act, and "that the employer did not have knowledge of the accident within thirty days, and that the employer did not file with the Industrial Commission report of an accident occurring to the claimant in January, 1934." Award was denied for failure to comply with requirements of C. S., 8081 (dd), 8081 (ee), 8081 (ff). *Hardison v. Hampton,* 203 N. C., 187; *Hanks v. Utilities Co., ante,* 312.

There was evidence to sustain the findings of the Industrial Commission. It appeared from the testimony offered by the defendant employer

that it had no knowledge of the accident until the following September, and attributed the disability then to similar injury sustained by plaintiff in 1931, and that no notice of claim was given until July, 1935.

The findings of fact of the Industrial Commission are conclusive if supported by competent evidence. *West v. Fertilizer Co.,* 201 N. C., 556; *Reed v. Lavender,* 206 N. C., 898; *Morgan v. Cloth Mills,* 207 N. C., 317.

The plaintiff, however, contends that the defendants should be held to be equitably estopped to set up the defense that the claim was filed too late, by reason of the conduct of the employer calculated to induce him to think the claim had been duly filed. But the facts found by the Industrial Commission are not sufficient to render this principle applicable here. The findings on this point were as follows: "The evidence discloses that his wages were paid him (during fall of 1934) in the usual manner, except that they were delivered to him, as he was unable to go to the store; that nothing was said about these wages being paid in lieu of compensation provided by the Workmen's Compensation Law; . . . that claimant made no reference to being injured on the job, or that he was claiming compensation; . . . that the witness Barger, bookkeeper, to whom accidents were supposed to be reported, testified the first knowledge he had of an alleged injury on the job was in June, 1935. . . . The Commission is convinced that the defendant employer has done nothing in this case that would tend to lull the claimant into security that he was going to be taken care of under the provisions of the Compensation Law. There is evidence that the claimant sustained a prior injury to this same leg in 1931, at which time the medical bill was taken care of in the routine manner under the provisions of the Compensation Law."

The question here presented was discussed and decided adversely to the plaintiff by this Court in *Wilson v. Clement Co.,* 207 N. C., 541, *Brogden, J.,* writing the opinion and citing authorities in support.

Unfortunately for the plantiff, being debarred of his common law action, he has been denied compensation for his injury under the Workmen's Compensation Act, but on the record and findings of the Commission, we are unable to help him.

Judgment affirmed.

STATE v. HUBERT WELLS.

(Filed 25 November, 1936.)

1. Seduction A a—

The elements of the offense of seduction are the seduction of an innocent and virtuous woman under promise of marriage, and by provision of statute the unsupported testimony of prosecutrix is insufficient to sustain a conviction. C. S., 4339.

2. Seduction B d—Evidence held insufficient to show that seduction was induced by previous unconditional promise of marriage.

Testimony of the prosecutrix in this prosecution for seduction to the effect that she and defendant had sexual intercourse, that they planned to be married, that he asked her to have sexual intercourse with him and told her that if she would they would be married, and that they would be married right away if anything happened, *is held* insufficient to establish that the seduction was induced by a previous unconditional promise of marriage, it not appearing from the evidence when the first act of intercourse took place, and, the burden being upon the State to affirmatively show that the seduction was induced by a previous unconditional promise of marriage, defendant's motion to nonsuit should have been granted.

APPEAL by defendant from *Harding, J.*, at April Term, 1936, of GASTON. Reversed.

The defendant was charged with seduction under promise of marriage, in violation of C. S., 4339, and from the judgment pronounced on a verdict of guilty, he appealed.

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

Ernest R. Warren for defendant.

DEVIN, J. The essential elements of the offense of which the defendant was convicted are: (1) Seduction, (2) of an innocent and virtuous woman, (3) under promise of marriage. The statute contains the additional proviso that the unsupported testimony of the woman shall not be sufficient to convict. C. S., 4339. *S. v. Forbes, ante,* 567; *S. v. McDade,* 208 N. C., 197; *S. v. Crook,* 189 N. C., 545.

In order to convict, the burden of proof is upon the State to show beyond a reasonable doubt that the seduction was accomplished under and by means of the promise of marriage, and that the prosecutrix was at that time an innocent and virtuous woman. It must affirmatively appear that the inducing promise preceded the intercourse, and that the promise was absolute and not conditional. *S. v. Shatley,* 201 N. C., 83; *S. v. Lang,* 171 N. C., 778; 57 C. J., 50.

Here, the only evidence of the prosecutrix on this point was as follows: "That she knew the defendant Hubert Wells; that she had sexual intercourse with him and was pregnant; that in March, 1934, they had planned to be married. He asked her to have intercourse and told her if she would they would get married, and if anything happened they would marry right away." It does not appear when the first act of intercourse took place.

The evidence is insufficient to establish the controlling fact that the seduction was induced by a previous unconditional promise of marriage. *S. v. Shatley, supra;* 57 C. J., 50.

For the reasons stated, we think the motion for judgment of nonsuit should have been sustained.

Reversed.

T. E. CRAIG v. BEN F. PRICE.

(Filed 25 November, 1936.)

1. Mortgages H b—

An agreement to delay foreclosure of a deed of trust securing a note long past due is void for want of consideration.

2. Limitation of Actions A c—

A cause of action for breach of a contract to delay foreclosure of a deed of trust is barred after three years from the breach of the contract by foreclosure in violation of the agreement.

3. Limitation of Actions C c—

A promise to reconvey the land to the trustor will not estop the *cestui* from setting up the statute of limitations in the trustor's action to recover for breach of the *cestui's* alleged contract to delay foreclosure.

4. Mortgages H h—

Trustor cannot complain that no personal notice of foreclosure was given him when all the provisions of the instrument and the statute in respect to advertisement were fully complied with.

5. Frauds, Statute of, F b—

It is not necessary that the statute of frauds be pleaded in order to render incompetent parol evidence of a contract to convey land.

APPEAL by plaintiff from *Cowper, Special Judge,* at September Term, 1936, of MECKLENBURG. Affirmed.

Action for damages for alleged breach of contract to delay foreclosure of deed of trust on plaintiff's land. Summons issued 13 July, 1934.

Plaintiff alleged in his complaint that defendant, owner and holder of plaintiff's past-due note secured by deed of trust on plaintiff's land,

orally agreed, in summer of 1929, in order to give plaintiff opportunity to refinance the debt, that the land would not be sold until later in the fall; that in the late fall of that year plaintiff ascertained that the land had been sold by the trustee, without notice to plaintiff, and contrary to the agreement, and the land purchased by defendant; that "on account of defendant's breach of his contract not to sell the plaintiff's land, and on account of selling same not only in violation of the agreement, but without notifying plaintiff that it was to be sold in order to afford him opportunity to refinance the claim, the plaintiff has been greatly damaged."

Defendant answered denying that there was any agreement not to foreclose, alleging that the debt was long past due and unpaid after repeated demands; that the foreclosure sale was duly advertised by John C. Sikes, the trustee, and sale had on 14 October, 1929, at which sale defendant bid off the land for the amount of his debt.

Defendant further set up the three-year statute of limitations.

In reply, plaintiff alleged that his delay in bringing suit was due to the repeated promises of defendant to reconvey the land to plaintiff, and that defendant was thereby estopped to plead the statute of limitations.

The plaintiff testified substantially in accord with his allegations. At the close of plaintiff's evidence motion for nonsuit was sustained, and from judgment dismissing the action plaintiff appealed.

J. D. McCall and Carswell & Ervin for plaintiff, appellant.
W. B. Love and Stewart & Bobbitt for defendant, appellee.

DEVIN, J. Plaintiff bases his action upon the alleged breach of an agreement to delay the foreclosure of a deed of trust long in default.

There being no consideration for the promise to extend the time for foreclosure, it will not support a contract enforceable in law, or give ground for an action for damages for its breach. *Cromartie v. Lumber Co.*, 173 N. C., 712; *Jackson v. Bank*, 203 N. C., 357.

A promise is not binding in law if founded solely on a consideration which the law holds insufficient to create a legal obligation. *Hatchell v. Odom*, 19 N. C., 302; *Williams v. Chevrolet Co.*, 209 N. C., 29.

The breach of contract is alleged to have occurred in October, 1929, and, more than three years having elapsed before suit was instituted, it would seem plaintiff's cause of action was barred by the statute of limitations; nor is the evidence sufficient to show that defendant is estopped to plead the statute, under the rule laid down in *Oliver v. Fidelity Co.*, 176 N. C., 598; McIntosh Prac. & Proc., sec. 130; *Bryant v. Kellum*, 209 N. C., 112.

Plaintiff complains that he did not receive personal notification of the foreclosure sale, but there was no evidence that the provisions of the deed of trust or of the statute, with respect to advertisement, were not fully complied with.

Plaintiff does not base his action upon breach of parol contract to convey the land to him. But this would not avail him, for the alleged promise is denied, and it would not be necessary for the defendant to specifically plead the statute of frauds to render the evidence incompetent to prove the contract. *Winders v. Hill,* 144 N. C., 614; *Clegg v. Bishop,* 188 N. C., 564.

The motion for judgment of nonsuit was properly sustained, and the judgment is

Affirmed.

STATE v. BRADY LAURENCE.

(Filed 25 November, 1936.)

Criminal Law L b—

Where a defendant fails to make out and serve statement of case on appeal within the time allowed, he loses his right to prosecute the appeal, and the motion of the State to docket and dismiss must be allowed, but where the life of defendant is at stake this will be done only when no error appears on the face of the record proper.

MOTION by the State to docket and dismiss appeal by defendant from *Shaw, Emergency Judge,* at August Term, 1936, of IREDELL. Appeal dismissed.

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

No counsel for defendant.

DEVIN, J. At the August Term, 1936, of the Superior Court of Iredell County, said term beginning 3 August, Brady Laurence was tried upon indictment charging him with the murder of one E. Clyde Ervin. The jury returned a verdict of guilty of murder in the first degree, and thereupon sentence of death was pronounced by the court. The defendant gave notice of appeal to the Supreme Court and was allowed thirty days within which to serve statement of case on appeal. Nothing has been done towards perfecting the appeal. The time allowed for serving statement of case has long since expired. *S. v. Moore, ante,* 459.

The prisoner, having failed to make out and serve statement of case on appeal, has lost his right to prosecute his appeal, and the motion of the

State to docket and dismiss must be allowed. However, this being a case in which the life of the prisoner is involved, we have examined the record to see if any error appears on the face of the record. The examination reveals no error. *S. v. Williams,* 208 N. C., 352; *S. v. Kinyon, ante,* 294.

Appeal dismissed.

STATE v. ATLANTIC ICE & COAL COMPANY, TRADING AS CRYSTAL ICE & COAL COMPANY.

(Filed 25 November, 1936.)

1. Criminal Law I j—On motion to nonsuit, all incriminating evidence on whole record is to be considered in light most favorable to the State.

On a motion to nonsuit in a criminal prosecution, all the incriminating evidence on the whole record is to be taken in its most favorable light for the State, and only the incriminating evidence should be considered, and the State is entitled to every reasonable inference therefrom and every reasonable intendment thereon. C. S., 4643.

2. Criminal Law I i—

The competency, admissibility, and sufficiency of evidence is for the court to determine, the weight, effect, and credibility is for the jury.

3. Criminal Law L f—

Where a defendant is convicted on two counts of equal gravity and punishment, and no error is found in regard to the trial on one of the counts, exceptions not affecting such count, but relating solely to the other count need not be considered, since error, if any, in regard thereto would be immaterial.

4. Criminal Law I k—

Where a verdict of guilty specifically refers to some of the counts, but not to all, it amounts to an acquittal on the counts not referred to.

5. Monopolies A a: Statutes A d—C. S., 2563 (3), relating to monopolies, held constitutional and not void for indefiniteness.

C. S., 2563 (3), sufficiently defines the offense therein prohibited as the willful destruction or undertaking to destroy the business of any opponent or business rival in the State with the purpose or intention of attempting to fix the price of anything of value when competition is removed, and the statute is constitutional and clear and is not void for indefiniteness, the State having the power to regulate discriminatory sales unless the statute contravenes the Federal Constitution.

6. Monopolies C b—Evidence of defendant's violation of C. S., 2563 (3), held sufficient to be submitted to the jury.

Evidence that defendant, a foreign corporation, operated coal yards in several cities of this State, that in one of its yards it put down the price

of coal below the cost of handling, and that its manager, when advised by the secretary of the coal dealers' association of the city that its practices would be ruinous to other dealers in the city, replied that it had to sell the tonnage in that city and that there were too many coal dealers operating in the city anyway, that its prices in the city were lower than its prices in another city in the State, that by so cutting its price it doubled its volume of business in the city, and that it sold almost three times the tonnage of its largest competitor, with other direct and circumstantial evidence, *is held* sufficient to be submitted to the jury on the issue of defendant's violation of C. S., 2563 (3), the question of whether defendant willfully undertook to injure its competitors' businesses and intended to raise the price of coal after competition had been removed being for the jury to determine from all the facts and circumstances adduced at the trial, and defendant's motion to nonsuit was correctly denied. N. C. Constitution, Art. I, secs. 7, 31.

7. **Criminal Law G i—Coal dealer of long experience held competent to give opinion as to cost of handling coal.**

In this prosecution for violation of C. S., 2563 (3), relating to monopolies, the State was allowed to introduce the testimony of coal dealers in the same city as to the cost of handling coal, the opinion testimony being based upon complicated and detailed facts relating to costs of buying, shipping, trucking, handling, shrinkage, labor, repairs, etc., the witnesses having had years of experience in operating their respective businesses in the city. *Held:* The witnesses were experts and their opinion testimony was competent and was properly received in evidence.

8. **Same—**

Where expert testimony is admitted in evidence, it will be presumed that the court made a preliminary finding that the witnesses were experts. or that such finding was waived, and an exception to the testimony for that the record fails to show such preliminary finding cannot be sustained.

9. **Monopolies C c—Instruction in this prosecution for violation of C. S., 2563 (3), held without error.**

In a prosecution for violating C. S., 2563 (3), relating to monopolies, an instruction that a person violates this section if he lowers the price of the product in question for the purpose of injuring or destroying competitors, and then, after competition is removed, he sells at a higher price to the detriment of the public, *is held* without error.

10. **Same: Criminal Law A c—Instruction defining willfulness held without error.**

In this prosecution for violation of C. S., 2563 (3), relating to monopolies, the court's instruction defining the element of willfulness in injuring the business of competitors that willful means the wrongful doing of an act without justification or excuse, *is held* a correct definition of willfulness as used in criminal statutes, nor will the court's failure to explain the meaning of "justification" as used in the instruction be held for error in the absence of a request for special instructions, it appearing that elsewhere in the charge the court, in effect, explained the word by charging that defendant could not be found guilty unless defendant intended to injure its competitors and fix prices after competition was removed.

11. Criminal Law I g—

The failure of the court to elaborate on a subordinate feature of the charge will not be held for error in the absence of a request for special instructions.

12. Same—

The charge in this case *held* not to impinge on C. S., 564, it appearing that the court, in a clear and logical way, set forth the facts and gave the contentions of both parties in a fair manner, and charged the law applicable to the facts and clearly defined "reasonable doubt."

STACY, C. J., dissents.

APPEAL by defendant from *Clement, J.*, and a jury, at January Term, 1936, of FORSYTH. No error.

The defendant was indicted under the following bill of indictment: "The jurors for the State, upon their oath present, that the Atlantic Ice & Coal Company, a corporation organized and existing in the State of Georgia and doing business in the city of Winston-Salem, Forsyth County, on or about the 14th day of November, 1935, with force and arms, at and in the county aforesaid, unlawfully, willfully did undertake to destroy and injure the business of Consumers Coal Corp., George Agee, Barnes Coal Co., Carroll Coal Co., Dixie Coal Co., Drew & Tolley, Minnis Coal Co., Realty Bond Coal Co., Service Coal Co., and I. C. Yates Fuel Co., and others, the opponents and business rivals of the said Atlantic Ice & Coal Company, Inc., in the State of North Carolina, with the purpose and intention of attempting to fix the price of coal, a commodity of value, when the competition is removed in violation of section 2563, subsection 3, of the Consolidated Statutes, against the form of the statute in such case made and provided and against the peace and dignity of the State. And the jurors aforesaid, upon their oath, do further present, That the Atlantic Ice & Coal Company, a corporation organized and existing in the State of Georgia and doing business in the city of Winston-Salem, Forsyth County, on or about the 14th day of November, 1935, with force and arms, at and in the county aforesaid, unlawfully, willfully did buy and sell within the State, through its agent, E. W. Goodman, coal, a thing of value, which is sold and bought in the State of North Carolina, to injure and destroy the business of Consumers Coal Corp., George Agee, Barnes Coal Co., Carroll Coal Co., Dixie Coal Co., Drew & Tolley, Minnis Coal Co., Realty Bond Coal Co., Service Coal Co., and I. C. Yates Fuel Co., and others, the rivals and opponents of Atlantic Ice & Coal Company, by lowering the price of said coal sold, so low as to leave an unreasonable and inadequate profit for a time with the purpose of increasing the profit on the business when such rivals and opponents are driven out of business or the business of said opponents is injured in violation of section 2563, subsection 4, of Consolidated Stat-

utes, against the form of the statute in such case made and provided and against the peace and dignity of the State. And the jurors, aforesaid, upon their oath do further present, That the Atlantic Ice & Coal Company, a corporation organized and existing in the State of Georgia and doing business in the city of Winston-Salem, Forsyth County, on or about the 14th day of November, 1935, with force and arms, at and in the county aforesaid, who deals in coal, a thing of value, within the State of North Carolina, did unlawfully and willfully sell, at and in the city of Winston-Salem, a place where there is competition, said coal at a price lower than is charged by said Atlantic Ice & Coal Company for the same thing, to wit: the same or similar coal at another place, to wit: in the city of Charlotte, North Carolina, where there is not good and sufficient reason, on account of transportation or the expense of doing business, for charging less at the one place than the other, with the view of injuring the business of Consumers Coal Corp., George Agee, Barnes Coal Co., Carroll Coal Co., Dixie Coal Co., Drew & Tolley, Minnis Coal Co., Realty Bond Coal Co., Service Coal Co., and I. C. Yates Fuel Co., and others, rivals and opponents of Atlantic Ice & Coal Company, against the form of the statute in such case made and provided and against the peace and dignity of the State. GWYN, *Solicitor.*"

It is stipulated by the defendant that the Atlantic Ice & Coal Company is a corporation, organized and existing under the laws of the State of Georgia. It is further stipulated that the Atlantic Ice & Coal Company does business in the city of Winston-Salem, under the trade name of "Crystal Ice & Coal Company," and that the Crystal Ice & Coal Company is not a corporation.

A motion to quash was sustained as to the second count, on the ground that subsection 4 of C. S., 2563, was so indefinite that its enforcement would violate the due process clause of the Federal and State constitutions. Judgment as of nonsuit was rendered as to the defendant Goodman, manager of the Crystal Ice & Coal Company, and the corporate defendant was tried only upon the first and third counts. The defendant entered a plea of not guilty. The jury returned a verdict of guilty upon both of those counts, and the defendant company was fined $1,000 and costs.

The defendant made numerous exceptions and assignments of error, and appealed to the Supreme Court. The material ones and necessary facts will be set forth in the opinion.

Attorney-General Seawell and Assistant Attorneys-General McMullan and Bruton, and W. T. Wilson for the State.

W. M. Hendren and W. P. Sandridge, Jr., of Manly, Hendren & Womble for defendant.

CLARKSON, J. The defendant, at the close of the State's evidence and at the close of all the evidence moved to dismiss the action or for judgment of nonsuit. C. S., 4643. The court below denied the motions, and in this we can see no error. Was there sufficient evidence of defendant's guilt to be submitted to the jury? We think so.

"On motion to dismiss or judgment of nonsuit, the evidence is to be taken in the light most favorable to the State, and it is entitled to the benefit of every reasonable intendment upon the evidence and every reasonable inference to be drawn therefrom. 'An exception to a motion to dismiss in a criminal action taken after the close of the State's evidence, and renewed by defendant after the close of his own evidence, does not confine the appeal to the State's evidence alone, and a conviction will be sustained under the second exception if there is any evidence on the whole record of the defendant's guilt.' *S. v. Earp,* 196 N. C., at p. 166. See *S. v. Carlson,* 171 N. C., 818; *S. v. Sigmon,* 190 N. C., 684. The evidence favorable alone to the State is considered—defendant's evidence is discarded. *S. v. Utley,* 126 N. C., 997. The competency, admissibility, and sufficiency of evidence is for the court to determine, the weight, effect, and credibility is for the jury. *S. v. Utley, supra; S. v. Blackwelder,* 182 N. C., 899." *S. v. Lawrence,* 196 N. C., 562 (564).

N. C. Code, 1935 (Michie), sec. 2559, is as follows: "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce in the State of North Carolina is hereby declared to be illegal. Every person or corporation who shall make any such contract expressly, or shall knowingly be a party thereto by implication, or who shall engage in any such combination or conspiracy, shall be guilty of a misdemeanor, and upon conviction thereof such person shall be fined or imprisoned, or both, in the discretion of the court, whether such person entered into such contract individually or as an agent representing a corporation, and such corporation shall be fined in the discretion of the court not less than one thousand dollars."

Section 2563: "In addition to the matters and things hereinbefore declared to be illegal, the following acts are declared to be unlawful, that is, for any person, firm, corporation, or association, directly or indirectly, to do or to have any contract, express or knowingly implied, to do any of the acts or things specified in any of the subsections of this section. . . . (3) To willfully destroy or injure, or undertake to destroy or injure, the business of any opponent or business rival in the State of North Carolina with the purpose or intention of attempting to fix the price of anything of value when the competition is removed. (4) Who, directly or indirectly, buys or sells within the State, through himself or itself, or through any agent of any kind, or as agent or princi-

pal, or together with or through any allied, subsidiary, or dependent person, firm, corporation, or association, any article or thing of value which is sold or bought in the State to injure or destroy or undertake to injure or destroy the business of any rival or opponent, by lowering the price of any article or thing of value sold, so low, or by raising the price of any article or thing of value bought, so high as to leave an unreasonable or inadequate profit for a time, with the purpose of increasing the profit on the business when such rival or opponent is driven out of business, or his or its business is injured. (5) Who deals in any thing of value within the State of North Carolina, to give away or sell, at a place where there is competition, such thing of value at a price lower than is charged by such person, firm, corporation, or association for the same thing at another place, where there is not good and sufficient reason, on account of transportation or the expense of doing business, for charging less at the one place than at the other, with the view of injuring the business of another."

Section 2564: "Any corporation, either as agent or principal, violating any of the provisions of preceding section shall be guilty of a misdemeanor, and such corporation shall, upon conviction, be fined not less than one thousand dollars for each and every offense, and any person, whether acting for himself or as officer of any corporation or person violating any of the provisions of this chapter, shall be guilty of a misdemeanor, and, upon conviction, shall be fined or imprisoned, or both, in the discretion of the court."

Section 2566: "Where the things prohibited in this chapter are continuous, then, in such event, after the first violation of any of the provisions hereof, each week that the violation of such provision shall continue shall be a separate offense."

Constitution of North Carolina, Art. I, sec. 7, is as follows: "No man or set of men are entitled to exclusive or separate emoluments or privileges from the community but in consideration of public service."

Section 31: "Perpetuities and monopolies are contrary to the genius of a free state and ought not to be allowed."

One of the best definitions of "monopoly" which can be found is in Black's Law Dictionary (3d Ed.), p. 1202: "A monopoly consists in the ownership or control of so large a part of the market supply or output of a given commodity as to stifle competition, restrict the freedom of commerce, and give the monopolist control over prices," citing a long list of authorities.

The word "monopoly" is defined in *Commonwealth v. Dyer,* 243 Mass., 472: "In the modern and wider sense monopoly denotes a combination, organization, or entity so extensive and unified that its tendency is to suppress competition, to acquire a dominance in the market, and to

secure the power to control prices to the public harm with respect to any commodity which people are under a practical compulsion to buy."

Regulating discriminatory sales made within the State for the purpose of destroying competition is within the legislative power of the State, unless the statute conflicts with the Constitution of the United States. *Central Lumber Co. v. State of South Dakota,* 226 U. S., 157.

In Fletcher's Cyc. Corporations (Permanent Ed.), Vol. 10, ch. 56, part of sec. 5016, p. 850, it is said: "Ruinous competition by lowering prices has been recognized as an illegal medium of eliminating weaker competitors," citing many authorities. *Porto Rican Amer. Tobacco Co. v. Amer. Tobacco Co.,* 30 Fed. Reporter, 234 (236); *Standard Oil Co. v. U. S.,* 221 U. S., 1; *U. S. v. Amer. Tobacco Co.,* 221 U. S., 106.

Wharton's Criminal Law, Vol. 3, 12th Ed. (1932), sec. 2230, is as follows: "In the closing years of the 19th century and early part of the 20th, statutes were enacted in nearly all states and by Congress with a design to restrain the evils of complete monopoly. This class of laws has been sustained in principle as to both civil and criminal features. They were leveled at contracts, combinations, and conspiracies in restraint of trade that had been declared to be against public policy and void under the common law before the passage of such new statutes. The language of the statutes need be supplemented by allegations as to the facts. Conspiracy to combine as well as the actual coöperation to monopolize is forbidden. The exaction of excessive prices upon the sale of necessaries was forbidden in the United States as in various countries during the World War. The criminal part of the act failed for indefiniteness."

Chief Justice White, in *Standard Oil Co. v. United States,* 221 U. S., 1 (at p. 58), says for the Court: "Without going into detail, and but very briefly surveying the whole field, it may be with accuracy said that the dread of enhancement of prices and of other wrongs which it was thought would flow from the undue limitation on competitive conditions, caused by contracts or other acts of individuals or corporations, led, as a matter of public policy to the prohibition, or treating as illegal all contracts or acts which were unreasonably restrictive of competitive conditions, either from the nature or character of the contract or act, or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade, but, on the contrary, were of such character as to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce and tending to

bring about the evils, such as enhancement of prices, which were considered to be against public policy." *S. v. Craft,* 168 N. C., 208 (210-211).

The defendant was tried on the 1st and 3d counts in the bill of indictment and convicted on both.

In *S. v. Toole,* 106 N. C., 736 (738-9), it is said: "There having been a general verdict of guilty on two counts, for offenses punishable alike, it is immaterial to consider, as to the other count, whether there was error committed or not, unless it was such error as might or could effect the verdict of guilty on the second count. . . . If it is a general verdict of guilty upon an indictment containing several counts, charging offenses of the same grade, and punishable alike, the verdict upon any one, if valid, supports the judgment, and it is immaterial that the verdict as to the other counts is not good, either by reason of defective counts, or by the admission of incompetent evidence, or giving objectionable instructions as to such other counts, provided the errors complained of do not affect the valid verdict rendered on this count." *S. v. Newton,* 207 N. C., 323 (328).

Where a verdict refers to only one of several counts in an indictment, it amounts to an acquittal upon counts not referred to. *S. v. Hampton, ante,* 283 (284).

We will consider only the count on which defendant was convicted. C. S., 2563 (3), *supra.* The ingredients (1) to willfully destroy or injure, or undertake to destroy or injure; (2) the business of any opponent or business rival in the State of North Carolina; (3) with the purpose or intention of attempting to fix the price of anything of value; (4) when the competition is removed.

It is well settled in this jurisdiction that an act may be void for uncertainty, vagueness, or indefiniteness. *S. v. Morrison, ante,* 117 (120-1).

In *Nash v. United States,* 229 U. S., 373 (377), we find: "But, apart from the common law as to restraint of trade thus taken up by the statute, the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or short imprisonment," etc. At page 378, citing authorities: "As to the suggestion that the matters alleged to have been contemplated would not have constituted an offense if they had been done, it is enough to say that some of them conceivably might have been adequate to accomplish the result, and that the intent alleged would convert what on their face might be no more than ordinary acts of competition or the small dishonesties of trade into a conspiracy of wider scope, as has been explained more than once."

We think the act not uncertain, vague, or indefinite. The statute is clear and not ambiguous, and we think constitutional.

Let us now examine the evidence to see if it was sufficient to be submitted to the jury.

(1) The Atlantic Ice & Coal Company is (T/A) trading as the Crystal Ice & Coal Company in Winston-Salem, N. C. The Atlantic Ice & Coal Company has about fifty different branches scattered over seven Southern States. It is managed by an Atlanta board of directors, of which F. W. Beazley is president, and high officials in banks and service corporations. The company does business in Charlotte, Lexington, Salisbury, Albemarle, Statesville, Spencer, and other places in North Carolina. It does an ice and coal business in Winston-Salem and is the largest dealer in coal. There are some twenty-five coal dealers in Winston-Salem. E. W. Goodman was manager of the Winston-Salem branch of the Atlantic Ice & Coal Company.

(2) J. R. Tolley, a witness for the State, testified, in part: "I talked with Mr. Beazley over the telephone. I asked him if it was his instructions to sell coal at the prices Mr. Goodman had quoted me and he said that it was. I told him these prices were below cost and I did not see how anyone could sell at those prices. He said what he wanted to do was to get more tonnage here. I asked him if there was anything we could do to bring about an adjustment, whether there was anything the coal dealers had done to cause him to take such steps as that. He said it was not. I asked him if there was anything we could do to cause an adjustment so he could step his prices up to where we could compete. He said there wasn't. I told him we couldn't compete and stay in business. I told him there were a lot of small dealers who could not compete with these prices; and if we met his prices we would be put out of business, and if we didn't meet them he would get the majority of the business and that would decrease our business. He said what they wanted was tonnage, and there were too many coal dealers in Winston-Salem anyhow. This conversation was on the afternoon of the same day that Mr. Goodman told me he was going to cut the prices, that was 7 November, 1935, the day before the prices were cut. I am president of the Retail Coal Association. In the telephone conversation I told Mr. Beazley that we could not meet his prices and stay in business, and if we did not meet his prices it would decrease our business so we could not stay in business and that there were a lot of small coal dealers here. I also told him they depended on nothing but a living out of the coal business, and it just meant meat and bread to them, and if he couldn't think of the human side and adjust things so that we might operate and make a living. He stated he didn't think what he was doing was hurting anybody; that what he wanted was tonnage and that was what

he was going to have, and there were too many coal dealers in Winston-Salem, anyhow."

(3) T. W. Minnis testified, in part: "I am connected with the Minnis Coal Company, which has been in business in Winston-Salem since October, 1930. I have been in the coal business in Winston-Salem since 1914, with the exception of two years. . . . I had a conversation with Mr. Goodman, who is manager of the Winston-Salem plant in August, 1935. I talked to Mr. Goodman about general business conditions in the town. I told him I was losing some business on account of being undersold. He said, 'Something is liable to break loose here some day and when it is over with there won't be so many coal dealers in town as there are now.' "

(4) The cut by the Atlantic Ice & Coal Company went into effect on 8 November, 1935. At the time the advertisement of the cut published in the Winston-Salem papers cost $696.00. The defendant, after the price-cut in November, 1935, sold 4,195 tons of coal against 2,044 tons in November, 1934. In December, 1935, defendant sold 6,322 tons of coal against 2,936 tons in December, 1934.

(5) Although a member of the Retail Coal Association, which consists of practically all the coal dealers in Winston-Salem, Goodman did not discuss with the coal dealers the change of policy.

(6) Higher prices in Charlotte than in Winston-Salem.

(7) The defendant's volume amounts to some twenty thousand tons a year. The next largest dealer sells from seven thousand to eight thousand tons, the others selling from one thousand to fifteen hundred tons per year.

(8) J. R. Tolley stated that he had tried to persuade Mr. Goodman and Mr. Beazley, president of the company, not to make this cut. There was other evidence, direct and circumstantial.

J. R. Tolley testified: "I have been a coal dealer in Winston-Salem about nine and one-half years and am familiar with the coal business in this city. I know approximately what it costs me to handle coal. I am familiar with the equipment used in handling coal and the general expenses of handling coal in Winston-Salem. Q. State to his Honor and the jury whether or not in your opinion coal may be handled at a profit in Winston-Salem at the published prices of the Atlantic Ice & Coal Company, prices having been published since 8 November. Ans.: No, sir. Q. I understand by that, then, in your opinion, those prices are below the costs of handling? Ans.: Yes, sir. Q. How much below? Ans.: I would say they would have to get at least on some of those grades, selling, have to get from $1.00 to $1.50 more than what they are getting would be at cost." The defendant excepted and assigned error.

There was much evidence along this same line, to which the defendant excepted and assigned error—none of them can be sustained.

In *Britt v. R. R.,* 148 N. C., 37 (41), is the following: "5 Encyc. Ev., 654, summarizes the decisions thus: 'The exception to the general rule that witnesses cannot give opinions is not confined to the evidence of experts testifying on subjects requiring special knowledge, skill, or learning, but it includes the evidence of common observers testifying the results of their observations made at the time in regard to common appearances, facts, and conditions which cannot be reproduced and made palpable to the jury,' citing, among other cases, *S. v. Edwards,* 112 N. C., 901. This is a clear statement of well settled principle, and is a common-sense restriction which keeps the wise general rule as to 'opinion' and 'expert' evidence from degenerating into absurdity." *Kepley v. Kirk,* 191 N. C., 690 (694).

"Where an inference is so usual, natural, or instinctive as to accord with general experience, its statement is received as substantially one of fact—part of the common stock of knowledge." 22 C. J., p. 530, citing numerous North Carolina cases.

In the instant case, since the witnesses were coal dealers of long standing in Winston-Salem, and since they had had long experience in the coal business there, and were in close touch with conditions, and hence were acquainted with the detailed and complicated facts relating to costs of buying coal from the mines, shipping, trucking, handling, shrinkage, labor, repairs, etc., they were qualified as experts, and their opinions were properly received. *Belding v. Archer,* 131 N. C., 287; *Davenport v. Norfolk R. R.,* 148 N. C., 287; *May Co. v. Shoe Co.,* 186 N. C., 144. See 22 Corpus Juris, page 680; 3 Chamberlayne Evidence, page 2383. Nor will the admissions of the opinions of the coal dealers constitute error for the reason that the record does not show that the court below made a preliminary finding that they were experts. Where expert testimony is admitted in evidence, the presumption is that the preliminary finding was made, or that the point was waived. *S. v. Gray,* 180 N. C., 697; *S. v. Hightower,* 187 N. C., 307; *Shaw v. Handle Co.,* 188 N. C., 222.

The defendant, on its motions to nonsuit, stated in its brief: "Unless the evidence establishes beyond a reasonable doubt that the defendant had formed a purpose to monopolize the coal business in Winston-Salem and 'willfully' undertook to 'injure' its competitors, the verdict is without support in law and fact, and, therefore, must be set aside." We cannot so hold. We think there was sufficient evidence to be submitted to the jury that defendant came within the above clear statement of the controversy.

It goes without saying that reducing the price of coal to the consumer below what the defendant paid for same, with the other evidence above set forth, is sufficient evidence to be submitted to the jury that defendant formed a purpose to monopolize, and willfully undertook to injure its competitors. In fact, the sales for November and December, 1935, doubled its sales for the same months of the previous year. The defendant's president himself said: "In the spirit of fairness, I will have to admit that might possibly have the effect of reducing the number of coal dealers."

The court below charged the jury: "The defendant is indicted for violating certain sections of chapter 53 of the Public Laws of 1913, and the amendments thereto. The two sections involved are as follows: It prohibits the defendant from doing the following things: 'To willfully destroy or injure, or undertake to destroy or injure, the business of any opponent or business rival in the State of North Carolina with the purpose or intention of attempting to fix the price of anything of value when the competition is removed.' The State in that count in the bill charges this defendant with attempting to injure the business of opponents by reducing the price of coal and then raising the price after the competition has been destroyed. The statute says 'with the purpose or intention of attempting to fix the price of anything of value when the competition is removed.' That is one charge." Then the other section is set forth, but is not necessary to be considered, as the judgment will be sustained if correct on the above section.

The court then set forth the entire evidence in detail: "The State contends from this testimony you should be satisfied beyond a reasonable doubt that the defendant lowered his prices and that in doing so its purpose was to get rid of its competitors, and after putting its prices down and getting rid of them, it was its purpose or intention to increase the prices. . . . Now, gentlemen, a person may sell his coal for whatever he wants to unless he does it for the purpose prohibited by this statute. There are no two merchants in the town, probably, who sell two articles at the same price. A merchant may sell his merchandise for ten, twenty-five, fifty, or a hundred per cent profit. He may sell it for less than it costs. There is no law against that. (He does violate the law if he sells under this section, if he lowers the price of the product sold for the purpose of injuring or destroying his competitors, and after his competitors had been gotten out of the way, then he raises his price so that he sells his coal at a higher price to the detriment of the public. That would be a violation of the law.)" To the above portion of the charge in parentheses, defendant excepts and assigns error. Taking the charge as a whole, it clearly defines the offense. In fact, the language of the act is so simple that "He that runs may read" (Cowper).

If defendant desired the court to charge more in detail, or on a subordinate feature, it should have requested the court to do so under proper prayer for instructions. It is almost too well settled in this jurisdiction to cite authorities. *S. v. Johnson,* 193 N. C., 701 (703). The exception and assignment of error cannot be sustained.

The court below charged the jury: "The defendant contends he has not violated the law in any respect; that he lowered his prices because he felt that method of doing business would be more profitable than the one he was doing; that in lowering the prices he sold more than twice the amount of coal during a given period, and that he received a small profit per ton, but by the quantity sold, in the aggregate, he made more money during that period of time, and that he had no intention or no purpose of putting other coal dealers out of business, and, in raising the price, the defendant contends, gentlemen, there is no evidence offered or before you to warrant you in finding he is guilty of violating this section; that there is no evidence whatsoever, the defendant contends, that he has gotten rid of his competitors and no evidence he will ever get rid of them; that there is no evidence that he will raise the price of coal, and the defendant contends you should not be satisfied beyond a reasonable doubt from all this evidence that is the intention of the defendant, that he intends, as the statute says, to willfully destroy and injure his competitors. (Willfully means the doing of a thing without justification or excuse, the wrongful doing of an act without justification or excuse. That is what 'willful' is.)" To the portion of the above charge in parentheses, the defendant excepts and assigns error. This cannot be sustained. One of the ingredients of the crime is that it must be willful.

The defendant says that is an incorrect definition of "willful" as used in criminal statutes. He also says that the court should have defined to the jury the meaning of "justification" in the law of monopolies. Decisions upon the definition of "willful" in criminal statutes show the correctness of the charge of the court below. *S. v. Whitener,* 93 N. C., 590; *S. v. Taylor,* 175 N. C., 833; *S. v. Cook,* 207 N. C., 261; *Surety Co. v. Sullivan,* 7 Fed. (2d), 605.

In the *Cook case, supra,* the Court cites and adopts as the correct definition of "willful" when it appears in a criminal statute that definition which appears in the *Whitener case, supra.* The Court says that "willful" means the doing of something "intentionally, without just cause or legal excuse." The Court seemed to assume that such a definition was substantially the same as that given by *Justice Ashe* in the *Whitener case, supra:* "The word 'willful,' used in a statute creating a criminal offense, means something more than the intention to do a thing. It implies the doing the act purposely and deliberately, indicating a purpose to do it, without authority—careless, whether he has the right or

not—in violation of law, and it is this which makes the criminal intent, without which one cannot be brought within the meaning of a criminal statute."

Circuit Judge Hand, in the *Sullivan case, supra,* goes so far as to say: "The word 'willful,' even in a criminal statute, means no more than that the person charged with the duty knows what he is doing. It does not mean that, in addition, he must suppose that he is breaking the law."

The jury could not have been misled by the failure of the judge to explain the meaning of "justification" in the law of monopolies, since obviously it could only mean in the instant case that the defendant would be "justified" if he lowered his prices only to foster his own trade, and not to injure his competitors nor to monopolize the business. Hence, in effect, the court did define "justification" when it charged the jury it could not convict, unless it found defendant intended to injure his rivals and then fix prices after competition was removed. If the defendant wanted a fuller explanation, he should have requested it. *S. v. Ammons,* 204 N. C., 753; *S. v. Gore,* 207 N. C., 618; *S. v. Hendricks,* 207 N. C., 873.

The court did not impinge on C. S., 564, but in a clear and logical way it set forth the facts and gave the contentions fairly on both sides, and charged the law applicable to the facts. "Beyond a reasonable doubt" was charged and clearly defined.

"The defendant, gentlemen, is presumed to be innocent of the offense with which it is charged until evidence is offered that satisfies you beyond a reasonable doubt of its guilt. Being satisfied beyond a reasonable doubt does not mean beyond all doubt, imaginary doubt, captious doubt, or possible doubt, but it means a fair doubt, based upon reason and common sense, and growing out of the testimony in the case. It is such a doubt as leaves your mind, after you carefully consider all of the testimony, in such a condition that you cannot say you have an abiding conviction to a moral certainty in the guilt of the defendant. The defendant is charged here with a criminal offense. The law presumes it is innocent of the offense until the State has offered evidence or until evidence is offered in the trial of the case that satisfies you beyond a reasonable doubt of the defendant's guilt. The State contends from the evidence offered in this case you should be satisfied that the defendant is guilty as charged in those counts in the bill of indictment. The defendant contends that you should not."

The defendant denied the material allegations of the State and its evidence was to the effect that what it did was a legitimate business venture and in good faith. F. W. Beazley, president of the defendant company, testified: "I had no intention of injuring our business com-

petitors in Winston-Salem by lowering the prices of coal. Our intention was just the opposite. We felt that lowering the prices and reducing the margin of profit would cause an increase in the sales of coal and put us in a position where we could continue to sell at a lower margin of profit. We certainly had no intention of raising the prices of coal."

The evidence, on every aspect of the contentions, *pro* and *con,* was submitted to the jury. They were the triers of the facts and adopted the State's version and rendered a verdict that defendant, beyond a reasonable doubt, was guilty. In the record is a pathetic appeal to the president of this gigantic corporation, with 50 large branches in 7 states: "I also told him they depended on nothing but a living out of the coal business and it just meant meat and bread to them, and if he couldn't think of the human side and adjust things so that we might operate and make a living," and the answer was, "What he wanted was tonnage, and that was what he was going to get, and there were too many coal dealers in Winston-Salem, anyhow." It is the same old story. There came to Him a man with a withered hand on the Sabbath day to be healed, "And they asked Him, saying, Is it lawful to heal on the Sabbath day? that they might accuse Him. And He said unto them, What man shall there be among you, that shall have one sheep and if it fall into a pit on the Sabbath day, will he not lay hold on it, and lift it out? How much then is a man better than a sheep?" Is a man better than tonnage? The jury, on the charge in the indictment and evidence, found the defendant guilty. There being no error in law, we cannot disturb the verdict and judgment.

On the entire record, we see no prejudicial or reversible error. On a trial free from error the defendant has been convicted for violating the law of this State. We find

No error.

STACY, C. J., dissents.

THOMAS M. BATTON v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 25 November, 1936.)

Master and Servant C a—Employer may not be held liable for failure to give injured employee emergency medical attention when employer has no actual or constructive knowledge of the injury.

Plaintiff employee's first cause of action was predicated upon defendant employer's several acts of negligence resulting in plaintiff's injury in a fall from a platform while engaged in the performance of his duties as flagman on defendant's train late at night. For a second cause of action

plaintiff alleged that after his fall and injury he was left in such helpless condition during the balance of the night until he was discovered by an employee of another railroad the next morning, that his absence from his train should have been discovered by other employees on the train before the train moved from the station, in that the train should not have moved without plaintiff's signal, and that his absence should have been discovered in like manner at every subsequent stop of the train, and that it was defendant's duty to have searched for him and given him medical attention, and that defendant suffered mental anguish and great physical injury by reason of his long exposure to the inclement weather and his failure to receive immediate emergency medical treatment after his injury. *Held:* Defendant's demurrer to the second cause of action was properly sustained, since the complaint does not charge the defendant with knowledge, actual or constructive, that plaintiff had been injured and was in a helpless condition, the allegations that his absence should have been discovered raising no presumption that his absence was due to injury, there being no facts alleged imposing the duty upon defendant or its employees to presume that plaintiff's failure to return to the train was other than voluntary.

APPEAL by plaintiff from *Harris, J.*, at August Term, 1936, of HALIFAX. Affirmed.

This is an action to recover damages (1) for personal injuries which the plaintiff suffered when he fell from a platform in the town of Weldon, N. C., while he was engaged in the performance of his duties as an employee of the defendant; and (2) for personal injuries which the plaintiff suffered after he had fallen from said platform.

The plaintiff is a resident of the city of Richmond, in the State of Virginia.

The defendant is a corporation, duly organized and doing business in the State of North Carolina, as a common carrier. It owns and operates railway lines which extend from the city of Richmond, in the State of Virginia, in a southerly direction to and through the town of Weldon, in the State of North Carolina.

The plaintiff is now and has been almost continuously for 26 years an employee of the defendant. His services have been satisfactory to the defendant. On 18 April, 1934, the plaintiff was sound in mind and in body and was able to perform and did perform his duties as an employee of the defendant to its satisfaction.

Two causes of action are alleged by the plaintiff in his complaint in this action.

The facts alleged as constituting his first cause of action are as follows:

"4. On 18 April, 1934, the plaintiff, being then engaged in the employment of the defendant as a flagman on its passenger train from Richmond, Virginia, to Florence, South Carolina, was duly performing his duties as such flagman when said train, on its southbound trip from

Richmond to Florence, being engaged in interstate commerce, arrived at the town of Weldon, in the State of North Carolina, at about 2:15 a.m. When the said train arrived at Weldon, the plaintiff's duty required him to leave the train and go to the rear thereof to protect said train, to see about the condition of said train at the rear thereof, the condition of the marker and lights, and to perform certain necessary duties with respect to the steam valves.

"It had always been the custom of defendant's engineer to stop the train entirely on the platform with sufficient clearance at the rear thereof that passengers and crew could alight safely from all cars to the platform, and that members of the train crew could safely walk on said platform to and around the rear of said train in connection with their duties.

"On said date and trip above referred to, when the said train arrived at Weldon, N. C., and the station was announced and the train stopped for the discharge of its passengers and crew, defendant's engineer negligently failed to pull his engine far enough south so as to make the rear of the train stop on the platform at the north end, but instead negligently stopped said train at such point that the rear car of said train projected northward beyond the platform and over a high trestle upon which said train had come, which said trestle was about 60 feet in height above the ground beneath, the projection of said train to the north of said platform extending about 12 or 15 feet. There was no guard, barrier, or protection of any kind provided by the defendant at the north end of said platform to prevent either passengers or train crew from falling or walking off the said north end of the platform, and there was no light or warning marker of any kind provided by the defendant to indicate to one walking northward along the platform that the end of the platform was near, notwithstanding the duty owed by the defendant so to provide, the only guard and barrier on said platform being a wall at the east side of the platform about 6 feet high to prevent persons falling or walking from said platform off the east side, the said east side of the platform being about 6 feet from the side of the train; but, as aforesaid, there was no guard or barrier at the north end, which was near the rear of said train, except one upright one-foot board at the end of said platform next to the last wall thereof, leaving an open space between said board and the train at the north end of said platform of about 5 feet, and constituting a menace to passengers alighting from defendant's trains and to the crew alike.

"At the time the said train arrived at Weldon, N. C., it was dark and rainy, and the north end of the platform was negligently permitted to be unlighted, and while there were small lights along said platform a very short distance from the station northwardly, said lighting did not extend at the time complained of far enough northwardly to give any light to

the north end of said platform, and was insufficient to disclose to passengers or train crew the proximity of the dangerous opening at the north end of said platform. On the occasion complained of, the curtains of the rear car in said train, which was a private car, had been pulled down so that there was no light available from said car.

"When the said train stopped on said platform, the plaintiff, in pursuance of his duties, got off the train at the third car from the rear, and, assuming that the train had stopped at its customary and regular place upon the platform, he walked slowly down the east side of the train towards the rear end of the train, at the north end, examining the train as best he could with the light from the small lantern which he had, but which was inadequate to light the surrounding space. Plaintiff had no idea and no reason to suspect that the train projected beyond the platform, and, relying upon the custom of the engineer to stop the train at a safe point, he continued slowly to the rear of the train, with his attention engrossed upon the performance of his duties as a flagman on defendant's train.

"Suddenly, before he reached the rear of the train, and without any fault on his part, and while relying upon the duty of the defendant as his employer to furnish him a safe place to perform his regular duties, and safe and adequate equipment upon the premises for his protection, and relying upon the duty of the engineer to avoid any act of negligence, and upon his accustomed course in handling the train in such manner or at such place as would not be calculated to endanger him while performing his duties as a flagman on the train, the plaintiff stepped off the north end of the said platform into the open space at the end thereof, and fell about 60 feet before he struck the ground, his fall being so violent that when he struck the ground he made a deep hole in it, and as a result of said fall, caused by the negligent acts and omissions of duty by the defendant, the plaintiff was injured in the manner and to the extent hereinafter set out in detail.

"Before going towards the rear of the train, on the outside thereof and on the platform, the plaintiff had tried to go through the rear car, but notwithstanding the fact that he was entitled to have free access to get through said car, the same was closed to him and he had to go to the rear by way of the platform. If said rear car had not been closed to him in such way as prevented free access to and through said rear car, it would have been possible for the plaintiff to cut out the steam from the rear platform of said car without alighting upon the platform on which the train was standing, but in such event he would not have had adequate opportunity to perform his other duties with respect to the protection of the rear of the train, and with respect to the inspection of the cars making up said train.

"5. (On motion of the defendant, this paragraph was stricken from the complaint.)

"6. The defendant was grossly negligent and careless in the following particulars, inclusive of and in addition to the acts of negligence and omissions of duty above set out, which separately caused and concurred in producing the injuries to the plaintiff herein complained of, and were the proximate cause thereof, to wit:

"(a) The defendant negligently failed to stop its train at the customary and regular place of stoppage for the discharge of its passengers and crew;

"(b) The defendant negligently and carelessly stopped its train for the discharge of its passengers and crew at a point on said platform with the rear end of the train projecting beyond the north end of said platform, thus constituting an extreme hazard and condition dangerous to the safety of its passengers and crew;

"(c) The defendant negligently failed to have guards or barricades at the north end of said platform for the protection of its passengers and train crew;

"(d) The defendant negligently failed to have and keep the north end of said platform adequately lighted;

"(e) The defendant negligently failed to have markers or lights at the northern end of said platform, or warning signals of any kind to indicate the proximity of the dangerous opening to passengers or train crew, or to indicate to the engineer where the end of the said platform was, and thereby enable him to stop his train upon said platform with safety to and protection of its passengers and train crew;

"(f) The defendant negligently failed to provide free access to and through the rear car of said train to enable the plaintiff and other members of the train crew to go through said train and to perform some of their necessary duties at the stopping place with less hazard;

"(g) The defendant failed to furnish the plaintiff and the crew of said train a safe place in which to perform their necessary duties at the town of Weldon upon the stoppage of its train, in that: The north end of the platform was open, unguarded, and dangerous to the train crew; was unlighted, was improperly constructed at a dangerous height for use as a platform for discharge of passengers and crew, was not equipped with markers, lights, or other warning signals or devices as set out in section (e) hereof, and free access through its train was not provided for the performance of their necessary duties by its employees, who were members of its train crew;

"(h) The defendant failed to furnish safe and adequate appliances and equipment for the protection of its passengers and train crew, includ-

ing the plaintiff, from the dangerous conditions then and there existing, as set out in subsections (c), (d), and (e) hereof.

"(i) The defendant negligently failed to remedy the dangerous conditions existing at the north end of said platform, constituting a menace to passengers and train crew, including the plaintiff, after and notwithstanding various complaints which had been made to its officers prior to the injuries complained of;

"(j) The defendant negligently constructed its station and approach thereto and the platform over and at the end of a dangerously high trestle running across the Roanoke River at said point, in such manner as to constitute an unfit place for its employees, including the plaintiff, to adequately perform their duties, and in such manner as to constitute a continuing danger and hazard to its passengers and train crew, including the plaintiff."

In paragraph 7, plaintiff alleges that "as a result of the negligent acts and omissions of duty of the defendant, hereinbefore set out, which concurred in producing and produced the fall of plaintiff from said platform and his consequent injuries," he sustained damages in the sum of $150,000.

On the facts alleged as his first cause of action the plaintiff demands judgment that he recover of the defendant the sum of $150,000.

The facts alleged in the complaint as constituting plaintiff's second cause of action, in addition to those alleged as constituting his first cause of action, are as follows:

"1. After the plaintiff fell about 60 feet and struck the ground, as hereinbefore alleged, he crawled up beside the pillars about 12 feet away to get out of the rain, expecting that his absence would be immediately discovered and that he would be found quickly, as he could and should have been by the exercise of reasonable care and diligence on the part of the defendant. His white lantern was broken but he lighted his red lantern, notwithstanding the broken and crushed condition he was in, and tried to attract attention. He remained in his helpless condition, suffering all night excruciating and agonizing pain and being conscious throughout until he was discovered the next morning about 7:45 o'clock by the Seaboard Air Line section master.

"2. The defendant was careless and negligent in failing to have discovered his absence and to have located him and removed him promptly, and to have rendered him necessary medical assistance and aid in procuring prompt medical treatment, and thereby to have prevented his protracted suffering and exposure, in that:

"(a) Defendant's engineer, agent, and employee, and plaintiff's fellow servant, negligently, and in violation of instructions and custom, moved out from Weldon without getting plaintiff's signal as flagman so to do,

which had not been given, and could not have been given, and upon failure to get such signal from which failure he should have known that plaintiff was missing, negligently failed to take or cause steps to be taken for his discovery, protection, and the procurement of first aid and medical assistance.

"(b) The other members of the train crew, agents and employees of the defendant, and fellow servants of the plaintiff, including the conductor, baggage master, and porter, should have discovered plaintiff's absence. It was their duty and custom to pass his signals along to the engineer, but they negligently failed in their duties in these respects and negligently failed to take prompt steps to have discovered plaintiff and relieve him from his pain, suffering, and exposure. Even after the train left Weldon his absence should have been discovered by the engineer and other members of the train crew, as they were required and it was their custom and instructions to get his signals at each stop, and in the absence of getting such signals they should have known, in the exercise of reasonable care, that he was missing, and have taken necessary and prompt steps to discover his whereabouts and condition, and if such steps had been taken promptly, plaintiff could have been discovered in time to have saved him from a large portion of his suffering throughout the night, and exposure, all of which they negligently failed to do as agents and employees of the defendant and fellow servants of the plaintiff.

"(c) Plaintiff is informed and believes and upon such information and belief alleges that when the train arrived at Rocky Mount, about an hour thereafter, his absence from the train was discovered by a car inspector at Rocky Mount, who, as agent and employee of the defendant and fellow servant of the plaintiff, owed the plaintiff a duty to have reported that he was missing and to have caused necessary and prompt steps to be taken to discover his whereabouts and condition, and give him immediate first aid and relief from his suffering and exposure, and that upon such report that he was missing, if such report had been made, the defendant owed the duty to the plaintiff to take prompt and necessary steps for his protection, all of which the defendant failed to do, and the negligence of said inspector was the negligence of the defendant.

"(d) Plaintiff is informed and believes and upon such information and belief alleges that when the train got to Weldon tower, only about one-fourth of a mile south of where the plaintiff fell, defendant's telegraph operator, employed at that point, should have gotten his signal before permitting the train to go forward, and that he did negligently indicate that said signal had been received and permit said train to go forward, notwithstanding that plaintiff gave no such signal and could not have given one, and that this omission of duty and negligent conduct

prevented an earlier search for and discovery of plaintiff's condition, which negligence was the negligence of the defendant.

"3. By reason of the negligent acts and omissions of duty of defendant's agents, servants, and employees hereinbefore set out, whose negligence is imputed to the defendant, the plaintiff's absence from the train was not discovered until the train got to Selma, North Carolina, and no search was made by the defendant at Weldon, but if defendant had fully performed its duties, through its employees as above set out, the plaintiff's whereabouts and condition could have and would have been discovered promptly and he could have and would have been relieved promptly from the continuous agonizing pain and suffering and exposure he experienced prior to his discovery at about 7:45 o'clock in the morning by the employee of another railroad company.

"4. As a result of the negligent acts and omissions of duty by the defendant's agents and employees, constituting negligence of the defendant, the plaintiff was permitted to suffer all the remainder of the night excruciating agony and menacing exposure to the cold and inclement weather, and thereby the injuries which he had received in falling from the platform were greatly aggravated, and better recovery therefrom prevented, all to his great damage in the sum of $20,000."

On the facts alleged in the complaint as constituting his second cause of action against the defendant, the plaintiff demands judgment that he recover of the defendant the sum of $20,000.

In its answer to the complaint, the defendant denies all the material allegations therein, which constitute his first cause of action, and pleads in bar of plaintiff's recovery on said cause of action his assumption of the risk incident to his employment by the defendant as a flagman on defendant's train, and his contributory negligence as a proximate cause of his alleged injuries, thus raising issues of fact to be tried by a jury.

The defendant demurs to so much of the complaint as alleges a second cause of action against the defendant, on the ground that the facts stated therein are not sufficient to constitute a cause of action, for that it is not alleged in the complaint that defendant had actual knowledge that plaintiff had fallen from the platform at Weldon, N. C., and thereby suffered injuries as alleged in the complaint, and on the further ground that in his complaint the plaintiff has attempted improperly to split a single cause of action into two causes of action, and thereby recover damages on both causes of action, whereas, if he is entitled to recover at all, he is entitled to recover on the single cause of action alleged in the complaint.

The action was heard on defendant's demurrer to the second cause of action.

The court, being of opinion that the facts stated in the complaint as constituting the second cause of action are not sufficient to constitute a

cause of action against the defendant, sustained the demurrer and dismissed the action as to said second cause of action.

The plaintiff excepted and appealed to the Supreme Court, assigning as error the judgment dismissing the action as to the second cause of action alleged in the complaint.

A. W. Oakes, Jr., E. L. Travis, and Langston, Allen & Taylor for plaintiff.

Spruill & Spruill, Geo. C. Green, and Thos. W. Davis for defendant.

CONNOR, J. "In the absence of a statutory or contractual obligation, there is, as a general rule, no duty resting upon the employer to provide surgical or medical attendance or medicine for an employee who is injured or becomes ill while in his employment, except, perhaps, in a case in which the employee gives service without compensation.

"However, there is a tendency upon the part of the courts to hold that where in the course of his employment a servant suffers serious injury or is suddenly stricken down in a manner indicating immediate and emergent need of aid to save him from death or serious harm, the master, if present, is bound to take such reasonable measure or make such reasonable effort as may be practicable to relieve him, even though the master is not chargeable with fault in bringing about the emergency, and in some jurisdictions it is said to be the duty of the employer to provide medical or surgical assistance in the case of an emergency where it is imperatively demanded to save life or prevent serious bodily injury.

"Hence, it has been held that a railroad company, in the absence of any contract obligation or a statute regulating the subject, is under a legal duty to use reasonable care in furnishing medical aid and suitable attention to its employees who are injured in the course of their employment, although the injury may not have been caused by the negligence of the company, and there is authority in behalf of extending this rule to all employees engaged in hazardous employment." 39 C. J., 240.

"If an employee of a railroad company is injured as a result of hazards to which his employment exposes him, and if his injuries are of such a nature as to render him incapable of caring for himself, it becomes the duty of the company to take such steps as are reasonably necessary and proper, under the circumstances, to prevent an aggravation of the injury through exposure or for the want of medical or surgical assistance." *Tippecanoe L. & T. Co. v. Cleveland, etc., R. Co.,* 57 Ind. A., 644, 104 N. E., 866.

"The courts have also found much difficulty in settling on a ground on which to rest the liability of the master in cases like this when there is no contract or statute imposing the duty of taking care of an injured

servant. We think, however, it may well be put upon the ground that as it would be a cruel and inhumane act to leave a helpless servant who was injured in the course of his employment to suffer or die from want of care and attention, there is an obligation growing out of the relation of master and servant that puts upon the master the duty of taking such reasonable care of the servant as the existing circumstances will permit." *Troutman v. Louisville, etc., R. Co.,* 119 Ky., 145, 200 S. W., 488.

"When an employee is engaged in any dangerous business for the master, and while in the performance of his duties, as such, he is so badly injured that he is thereby rendered physically or mentally incapable of procuring medical assistance for himself, then that duty as a matter of law is devolved upon the master and he must perform that duty with reasonable diligence and in a reasonable manner, through the agency of such of his employees as may be present at the time." *Hunicke v. Meramic Quarry Co.,* 262 Mo., 560, 172 S. W., 43, L. R. A., 1915-C, 789, Ann. Cas., 1915-D, 493.

In the instant case it is not alleged in the complaint that any of the employees of the defendant was present at the time the plaintiff fell from the platform at Weldon, or that the defendant had actual knowledge of the condition of the plaintiff as the result of his fall. Nor are facts alleged in the complaint from which it can be held that the defendant had constructive knowledge of such condition. At most, the defendant knew when and after its train left Weldon that the plaintiff, while engaged in the performance of his duties as a flagman on said train, had disappeared from the platform and had not returned to the train. This knowledge did not impose upon the defendant or any of its employees the duty to make an investigation to discover the cause of plaintiff's disappearance from the platform or failure to return to the train. The plaintiff may have disappeared from the platform and failed to return to the train, while it was standing at the station at Weldon, voluntarily. No facts are alleged in the complaint which imposed upon the defendant or its employees the duty to presume to the contrary.

Conceding that if the defendant had known that the plaintiff had fallen from the platform at Weldon, and had thereby suffered injuries which required immediate attention, medical or otherwise, the law would have imposed upon the defendant the duty to exercise reasonable diligence to provide such attention, we cannot hold that in the absence of such knowledge such duty was imposed upon the defendant. We therefore find no error in the judgment dismissing the second cause of action alleged in the complaint. The judgment is

Affirmed.

BUNCOMBE COUNTY, IN ITS OWN BEHALF AND IN BEHALF OF ALL OTHER GOVERNMENTAL UNITS, PERSONS, FIRMS, OR CORPORATIONS IN SIMILAR SITUATION, WHO MAY COME IN AND MAKE THEMSELVES PARTIES TO THIS ACTION, v. EDITH C. CAIN, EXECUTRIX OF J. B. CAIN, DECEASED, UNITED STATES FIDELITY AND GUARANTY COMPANY, FIDELITY AND CASUALTY COMPANY, COMMERCIAL CASUALTY COMPANY, AND THE CENTURY INDEMNITY COMPANY.

(Filed 25 November, 1936.)

1. **Appeal and Error J c—Findings of fact of receiver authorized to hear claims against the estate are conclusive on appeal.**

Where a receiver of the estate of a deceased clerk of court is authorized and directed by the court to hear claims against the estate of the clerk and the sureties on his official bond, the findings of fact made by the receiver in regard to a claim embraced in the order are conclusive on appeal to the Supreme Court when the findings are supported by competent evidence and are approved by the court.

2. **Guardian and Ward B e—Appointment of guardian cannot be shown by parol.**

Claimant contended that the person purporting to act as guardian for a minor in selling the minor's lands had never been appointed and had not qualified as guardian. Defendants offered testimony that certified letters of guardianship had been attached to the petition to sell the lands, and had been subsequently detached therefrom. *Held:* The evidence offered by defendants was properly excluded, since the appointment of a guardian can be shown only by the records in the office of the clerk of the Superior Court by whom the appointment was made, or by letters of appointment issued by the clerk as required by statute, C. S., 2157, and the parol evidence tending to show appointment is incompetent.

3. **Appeal and Error F b—**

Where a ruling of the court upon one of the conclusions of law is not assigned as error upon appeal to the Supreme Court, the judgment in accordance with the ruling will be affirmed without consideration.

4. **Guardian and Ward D a—Petition for sale of ward's land filed by person who has not qualified as guardian confers no jurisdiction on clerk.**

A clerk of the Superior Court has jurisdiction to order the sale of a ward's lands only upon petition verified by the duly appointed and qualified guardian of the ward, and where such petition is filed and signed by a person purporting to act as guardian, but who had not been appointed guardian and had not qualified by filing bond, the petition confers no jurisdiction on the clerk, and the sale of the lands upon the clerk's order approved by the court conveys no title and does not adversely affect the interest of the ward in the lands. C. S., 2180.

5. **Principal and Surety B c—Where party suffers no loss by reason of default of clerk in the performance of his official duties, such party may not recover against the clerk's official bond.**

The clerk of the Superior Court approved petitions filed by a person purporting to act as guardian for a minor for the sale of the minor's

lands, and ordered that the lands be sold in accordance with the petition, when the person purporting to act as guardian had never been appointed and had not qualified by filing bond. The funds received from the sale of the lands were embezzled by the person purporting to act as guardian, and this proceeding was instituted against the executrix of the deceased clerk and the sureties on his official bonds to recover the loss. *Held:* The sales of the lands upon the petitions of one who had never been appointed guardian and had not qualified by giving bond, were void, the clerk acquiring no jurisdiction by reason of such petitions, and the minor's interest in the lands being unaffected by the purported sales and the minor having suffered no loss by reason thereof, the minor is not entitled to recover against the official bonds of the clerk making the order.

APPEAL by Flossie Sprinkle, a minor, appearing by her next friend, E. L. Wheeler, from *McElroy, J.*, at April Term, 1936, of BUNCOMBE. Affirmed.

On 3 February, 1934, an action was begun in the Superior Court of Madison County by Flossie Sprinkle, a minor, appearing by her next friend, E. L. Wheeler, against J. B. Cain, clerk of the Superior Court of Buncombe County, and the sureties on his official bond.

On the facts alleged in her complaint, the plaintiff demanded judgment that she recover of the defendants the sum of $3,378.56, as damages which she alleged she had sustained by reason of certain defaults by the defendant J. B. Cain, as clerk of the Superior Court of Buncombe County.

After pleadings were filed, on motion of the defendants the action was removed from the Superior Court of Madison County to the Superior Court of Buncombe County for trial.

While the action was pending in the Superior Court of Buncombe County, to wit: On 14 July, 1934, the defendant J. B. Cain died. Edith C. Cain was duly appointed and duly qualified as executrix of the said J. B. Cain, deceased. Thereafter this action was begun in the Superior Court of Buncombe County against Edith C. Cain, executrix of J. B. Cain, deceased, and the sureties on his successive official bonds as clerk of the Superior Court of said county. The complaint in the action is in the nature of a creditor's bill.

On 5 October, 1934, the action, which had been removed from the Superior Court of Madison County to the Superior Court of Buncombe County, and which was then pending in the latter court for trial, was consolidated with this action. J. E. Swain had theretofore been appointed as receiver in this action, and had been ordered and directed by the court to hear claims against the estate of J. B. Cain, deceased, and the sureties on his official bonds as clerk of the Superior Court of Buncombe County, and to report to the court his findings of fact and conclusions of law with respect to such claims.

The claim of Flossie Sprinkle, a minor, appearing by her next friend, E. L. Wheeler, based on the facts alleged in her complaint in the action which was begun in the Superior Court of Madison County, and which was thereafter removed from said court to the Superior Court of Buncombe County and consolidated with this action, was duly heard by J. E. Swain, receiver, who thereafter filed his report on said claim, setting out in said report his findings of fact and conclusions of law, which are substantially as follows:

FINDINGS OF FACT.

1. Johnny R. Sprinkle died domiciled in Buncombe County, North Carolina, on or about 1 January, 1923. He left a last will and testament, which was duly probated and recorded in the office of the clerk of the Superior Court of Buncombe County. By said last will and testament he devised and bequeathed all his property, real and personal, to his wife and to his four children, three of whom were born of his first marriage. The youngest of said children, Flossie Sprinkle, was born of his second marriage and was about three years of age at the death of her father. After his death, and some time prior to 1926, the widow of Johnny R. Sprinkle, and the mother of Flossie Sprinkle, intermarried with H. K. Wheeler, a resident of Madison County, North Carolina, and after said marriage removed with the said Flossie Sprinkle to Madison County, where she and the said Flossie Sprinkle have since resided with the said H. K. Wheeler.

2. After the last will and testament of Johnny R. Sprinkle, deceased, had been probated and recorded in the office of the clerk of the Superior Court of Buncombe County, Guy Weaver, a resident of Buncombe County, was duly appointed by the clerk of the Superior Court of said county as administrator *c. t. a.* of Johnny R. Sprinkle, deceased. The said Guy Weaver filed his bond as required by statute, and entered upon the administration of the estate of Johnny R. Sprinkle, deceased. On or about 10 June, 1926, the said Guy Weaver filed his final account as administrator *c. t. a.* of Johnny R. Sprinkle. It appeared from said account that the said Guy Weaver, administrator *c. t. a.,* had paid to H. E. Walter, as guardian of Flossie Sprinkle, a minor, the sum of $174.77, the amount due her as a child and legatee of her father, Johnny R. Sprinkle, deceased. The said final account was approved by J. B. Cain as clerk of the Superior Court of Buncombe County, and was duly recorded in his office. The said J. B. Cain, as clerk of the Superior Court of Buncombe County, signed an order by which the said Guy Weaver, and the sureties on his bond as administrator *c. t. a.* of Johnny R. Sprinkle were discharged from further liability on said bond.

3. H. E. Walter, who held himself out to Guy Weaver, administrator *c. t. a.* of Johnny R. Sprinkle as guardian of Flossie Sprinkle, a minor, and acted as such guardian, has never been appointed as guardian of Flossie Sprinkle. He has never applied for such appointment, has never filed a bond as required by statute, and has never qualified as guardian of Flossie Sprinkle. No letters of guardianship have ever been issued to him by the clerk of the Superior Court of Buncombe County. He is not related by blood or marriage to Flossie Sprinkle, and had no knowledge of her interest in the estate of Johnny R. Sprinkle, deceased, except such as was required by him while auditing the accounts of Guy Weaver, administrator *c. t. a.* of Johnny R. Sprinkle, deceased.

4. At his death Johnny R. Sprinkle was seized in fee and in possession of an undivided one-half interest in certain lands situate in Buncombe County, the remaining undivided one-half interest in said lands being owned by his son-in-law, N. L. Crisp. By virtue of his last will and testament, Flossie Sprinkle, his minor child, became and was the owner of an undivided one-tenth interest in said lands, as a tenant in common with the owners of the remaining interests in said lands.

5. On or about 12 January, 1926, a petition addressed to J. B. Cain, clerk of the Superior Court of Buncombe County, and signed by H. E. Walter as guardian of Flossie Sprinkle, a minor, was filed in the office of the clerk of the Superior Court of Buncombe County. It was alleged in said petition that Flossie Sprinkle, a minor, was the owner in fee of an undivided one-tenth interest in the lands described in said petition, and situate in Buncombe County; that N. L. Crisp, the owner of the remaining interest in said lands, had offered to the petitioner the sum of $1,030 for the undivided one-tenth interest of Flossie Sprinkle, his ward; that said sum is a full, fair, and adequate price for said undivided interest; and that it would be to the best interest of the said Flossie Sprinkle to sell her interest in said lands for said sum. The petition was verified by H. E. Walter as guardian of Flossie Sprinkle, a minor.

Upon hearing said petition, and affidavits filed therewith, J. B. Cain, clerk of the Superior Court of Buncombe County, found that the facts as alleged in said petition were true, and thereupon signed an order authorizing and empowering H. E. Walter, as guardian of Flossie Sprinkle, a minor, to execute and deliver to N. L. Crisp a deed conveying to him in fee the undivided one-tenth interest of Flossie Sprinkle in the lands described in the petition, upon the payment to him, the said H. E. Walter, as guardian of Flossie Sprinkle, a minor, of the sum of $1,030 in cash. This order is dated 13 January, 1926, and was approved on the same day by the judge of the Superior Court presiding in the Superior Court of Buncombe County. Thereafter, on the same day, H. E. Walter, as guardian of Flossie Sprinkle, a minor, reported to

J. B. Cain, clerk of the Superior Court of Buncombe County, that pursuant to his order he had executed and delivered the deed to N. L. Crisp, and had collected from him the sum of $1,030. This report was accepted by the said J. B. Cain and approved by his order dated 13 January, 1926. This order of the clerk was approved in writing by the judge on the same day.

At the date of the filing of said petition, the petitioner, H. E. Walter, was not the guardian of Flossie Sprinkle. He had never been appointed by any court of competent jurisdiction as her guardian. He has never filed a bond as guardian of Flossie Sprinkle, or otherwise qualified to act as her guardian.

6. After the death of her father, Flossie Sprinkle became and was the owner in fee of an undivided one-half interest in certain lands situate in Madison County, the remaining one-half interest being owned by her mother, Mrs. Dissie Pearl Wheeler, and her step-father, H. K. Wheeler, with whom she resided in Madison County after the death of her father.

7. On or about 28 November, 1927, a petition addressed to the clerk of the Superior Court of Madison County and signed by Weaver & Patla, attorneys for H. E. Walter, guardian of Flossie Sprinkle, a minor, was filed in the office of the clerk of the Superior Court of Madison County. This petition was verified by H. E. Walter, as guardian of Flossie Sprinkle, a minor. It was alleged in the petition that Flossie Sprinkle, a minor, of the age of eight years, was the owner in fee of an undivided one-half interest in certain lands situate in Madison County, and described in the petition; that the petitioner, H. E. Walter, was the guardian of the said Flossie Sprinkle, a minor, having been duly appointed as her guardian by the Superior Court of Buncombe County; that the said Flossie Sprinkle then resided with and was in the custody of her mother, Mrs. Dissie Pearl Wheeler, and her step-father, H. K. Wheeler; that the said H. K. Wheeler had offered the petitioner the sum of $1,500 for her undivided one-half interest in the lands described in the petition; that said sum is a full, fair, and adequate price for the interest of Flossie Sprinkle in said lands; and that it would be to her best interest to sell her interest in said lands to the said H. K. Wheeler for said sum, on the terms set out in the petition.

Upon hearing said petition, and affidavits filed therewith, J. Hubert Davis, clerk of the Superior Court of Madison County, found the facts to be as alleged in the petition, and thereupon signed the order authorizing and empowering H. E. Walter, as guardian of Flossie Sprinkle, a minor, to execute and deliver to H. K. Wheeler a deed conveying to him the undivided one-half interest of Flossie Sprinkle in the lands described in the petition, upon the payment to him by the said H. K. Wheeler of the sum of $1,500. This order is dated 12 December, 1927,

and was approved by the judge of the Superior Court presiding in the courts of Madison County on 22 December, 1927. Thereafter, on 22 December, 1927, H. E. Walter, as guardian of Flossie Sprinkle, a minor, reported to the clerk of the Superior Court of Madison County, in writing, that pursuant to his order he had executed and delivered to H. K. Wheeler a deed conveying to him the undivided one-half interest of Flossie Sprinkle in the lands described in the petition, and had collected from the said H. K. Wheeler the purchase price for said lands. The report was approved by the clerk of the Superior Court of Madison County, by the order dated 22 December, 1927. This order was approved by the judge of the Superior Court presiding in the Superior Court of Madison County.

At the date of the filing of said petition, the petitioner, H. E. Walter, was not the guardian of Flossie Sprinkle. He had never been appointed by or qualified before the clerk of the Superior Court of either Buncombe or Madison County as such guardian.

8. After the death of Johnny R. Sprinkle, his children, Charlie Sprinkle and Flossie Sprinkle, both minors, became and were the owners in fee of undivided interests in certain lands situate in Madison County and described in the petition, the said Charlie Sprinkle being the owner of an undivided two-fifths, and the said Flossie Sprinkle being the owner of an undivided one-fifth interest in said lands.

9. On or about 6 April, 1927, a petition addressed to the clerk of the Superior Court of Madison County and signed by Weaver & Patla, as attorneys for H. E. Walter, guardian of Charlie Sprinkle and Flossie Sprinkle, was filed in the office of the clerk of the Superior Court of Madison County. The petition was verified by H. E. Walter as guardian of Charlie Sprinkle and Flossie Sprinkle, minors. It was alleged in the petition that both Charlie Sprinkle and Flossie Sprinkle were minors and that the petitioner, H. E. Walter, was their duly appointed and duly qualified guardian; that the said Charlie Sprinkle owned an undivided two-fifths and that Flossie Sprinkle owned an undivided one-fifth interest in certain lands situate in Madison County, and described in the petition; that C. V. Reece and W. G. McDarris had offered the petitioner the sum of $800.00 for the undivided interests in said lands owned by the wards of the petitioner; that said sum is a full, fair, and adequate price for said interests; and that it would be to the best interest of said minors to sell their interests in said land at said price.

Upon hearing said petition and affidavits filed therewith, the clerk of the Superior Court of Madison County found the facts to be as alleged in the petition, and signed an order authorizing and empowering H. E. Walter, as guardian of said minors, to execute and deliver to C. V. Reece and W. G. McDarris a deed conveying to them in fee the undivided

interests of Charlie Sprinkle and Flossie Sprinkle in the lands described in the petition, upon the payment to him by the said C. V. Reece and W. G. McDarris of the said sum of $800.00. This order was dated 9 April, 1927, and was approved by the judge of the Superior Court presiding in the Superior Court of Madison County. Thereafter, on 14 April, 1927, H. E. Walter, as guardian of Charlie Sprinkle and Flossie Sprinkle, minors, reported to the clerk of the Superior Court of Madison County that pursuant to his order he had executed and delivered to C. V. Reece and W. G. McDarris a deed conveying to them in fee the interests of his wards in the lands described in the petition, and had collected from them the purchase price for said land, to wit: The sum of $800.00. This report was approved by the said clerk by an order dated 14 April, 1927. This order was approved by the judge of the Superior Court presiding in the Superior Court of Madison County.

At the date of the filing of said petition, the petitioner, H. E. Walter, was not the guardian of Flossie Sprinkle. He has never been appointed by or qualified before any court of competent jurisdiction as her guardian.

10. H. E. Walter has never accounted to the clerk of the Superior Court of either Buncombe or Madison County, or to any other person, for the money which he received as guardian of Flossie Sprinkle, a minor. He has never filed a bond conditioned for such accounting. Upon his indictment at the October Term, 1933, of the Superior Court of Buncombe County for the embezzlement of said money, he entered a plea of guilty, and has served a sentence in the State's Prison under a judgment on said plea. He has expended on behalf of Flossie Sprinkle out of the money which he received as her guardian under orders of the clerk of the Superior Court of Buncombe County the sum of $121.95.

On the foregoing facts the receiver reported the following as his

CONCLUSIONS OF LAW.

1. That J. B. Cain, deceased, clerk of the Superior Court of Buncombe County, was negligent in permitting Guy Weaver, administrator *c. t. a.* of Johnny R. Sprinkle, deceased, to pay to H. E. Walter, as guardian of Flossie Sprinkle, a minor, the sum of $174.77, without first having ascertained that, as her duly appointed guardian, the said H. E. Walter had filed the bond required by statute.

2. That neither the clerk of the Superior Court of Buncombe County nor the clerk of the Superior Court of Madison County had jurisdiction of the proceedings instituted by petitions filed with said clerks, respectively, for the sale of the undivided interests of Flossie Sprinkle, a minor, in the lands described in said petitions, for the reason that the

petitioner, H. E. Walter, was not the duly appointed and duly qualified guardian of the said Flossie Sprinkle.

3. That Flossie Sprinkle, a minor, was not represented in either of said proceedings by a duly appointed and duly qualified guardian, and that for that reason all the orders made in said proceedings were and are void.

4. That the grantees in the deeds executed by H. E. Walter, as guardian of Flossie Sprinkle, a minor, knew or were charged with knowledge that the orders on said proceedings were void, and are therefore not innocent purchasers without notice.

5. That the defendant Edith C. Cain, executrix of J. B. Cain, deceased, and the defendant Fidelity & Casualty Company, surety on his bond as clerk of the Superior Court of Buncombe County, which was in force and effect on 10 June, 1926, are indebted to the claimant, Flossie Sprinkle, in the sum of $174.77, less the sum of $121.95.

6. That neither Edith C. Cain, executrix of J. B. Cain, deceased, nor any of her codefendants, who are sureties on the successive bonds of J. B. Cain as clerk of the Superior Court of Buncombe County, are indebted to the claimant, Flossie Sprinkle, on account of money received by H. E. Walter as her guardian from sales of her land, for the reason that the deeds under which the grantees claim said lands do not convey her interests in said land, and she has therefore sustained no damage by reason of the orders made in said proceedings.

The report of the receiver, with claimant's exceptions to his findings of fact and to his conclusions of law, was heard by the judge presiding at the April Term, 1936, of the Superior Court of Buncombe County. The exceptions were not sustained. The findings of fact and conclusions of law were approved and confirmed.

From judgment that the plaintiff Flossie Sprinkle, appearing by her next friend, E. L. Wheeler, recover of the defendant Edith C. Cain, executrix of J. B. Cain, deceased, and the defendant Fidelity & Casualty Company, the sum of $174.77, with interest from 10 June, 1926, less the sum of $121.95, with interest from 14 May, 1928, to wit: The sum of $101.62, the plaintiff appealed to the Supreme Court, assigning as errors the rulings of the court on her exceptions to the report of the receiver and the judgment.

W. K. McLean for plaintiff.

Johnson, Rollins & Uzzell for defendant Fidelity & Casualty Company.

J. G. Merrimon and C. K. Hughes for defendants other than Fidelity & Casualty Company.

CONNOR, J. Appellant's exceptions to findings of fact made by the receiver at the hearing of her claim were properly overruled by the judge.

All the findings of fact set out in the report of the receiver were supported by evidence at the hearing before him, and, upon their approval by the trial judge, are conclusive in this Court.

In *Kenney v. Hotel Co.*, 194 N. C., 44, 138 S. E., 349, it is said: "It is settled by all the decisions on the subject, with none to the contrary, that the findings of fact made by a referee and approved by the trial judge, are not subject to review on appeal if they are supported by any competent evidence."

This principle is applicable in this appeal where the receiver was authorized and directed by the court to hear claims against the estate of J. B. Cain, deceased, and the sureties on his official bonds as clerk of the Superior Court of Buncombe County and to report his findings of fact and conclusions of law with respect to such claims to the court.

There was no evidence at the hearing by the receiver which tended to show that H. E. Walter was the duly appointed and duly qualified guardian of Flossie Sprinkle, minor, at the time he filed the petitions in the office of the clerk of the Superior Court of Buncombe County and in the office of the clerk of the Superior Court of Madison County for orders authorizing him to sell her interests in the lands described in the said petitions. Testimony offered at the hearing tending to show that certified copies of letters of guardianship issued to H. E. Walter, as guardian of Flossie Sprinkle, a minor, by J. B. Cain, clerk of the Superior Court of Buncombe County, were attached to the petitions filed in the office of the clerk of the Superior Court of Madison County, and had been subsequently detached from said petitions, was properly excluded by the receiver as evidence tending to show the appointment by J. B. Cain, clerk of the Superior Court of Buncombe County, of H. E. Walter, the petitioner, as guardian of Flossie Sprinkle. An appointment as guardian can be shown only by the records in the office of the clerk of the Superior Court by whom the appointment was made, or by letters of appointment issued by the clerk to the guardian as required by statute. C. S., 2157. An appointment of a guardian cannot be shown by parol evidence.

The ruling of the trial judge approving the conclusion of law made by the receiver that on the facts found by him the defendant Edith C. Cain, executrix of J. B. Cain, deceased, and the defendant Fidelity & Casualty Company, as surety on the official bond of J. B. Cain as clerk of the Superior Court of Buncombe County, are indebted to the claimant in the sum of $101.62, is not assigned as error on this appeal. This

ruling was in accord with the contention of the appellant. The judgment in accordance with this ruling is affirmed, without consideration by this Court of the ruling.

The appellant assigns as error the rulings of the trial judge confirming the conclusions of law made by the receiver on the facts found by him, in accordance with which it was adjudged in effect that neither Edith C. Cain, executrix of J. C. Cain, deceased, nor any of her codefendants who are sureties on the official bonds of J. B. Cain as clerk of the Superior Court of Buncombe County, are indebted to the claimant on account of money received by H. E. Walter, as her guardian, from the sales of her lands made by him, for the reason that the deeds under which the grantees claim do not convey her interest in the lands described therein, and she has therefore sustained no damage by reason of the orders made by J. B. Cain as clerk of the Superior Court of Buncombe County on petitions filed by H. E. Walter. These assignments of error cannot be sustained.

A clerk of the Superior Court in this State has no jurisdiction with respect to infants or with respect to property, real or personal, of infants, except such as is conferred by statute. He has power to authorize the sale of property, real or personal, owned by an infant, only upon the application of his duly appointed and duly qualified guardian by petition duly verified by such guardian. C. S., 2180. An order made by a clerk of the Superior Court for the sale of the infant's property, real or personal, on the petition of one who is not his duly appointed and duly qualified guardian is void. All proceedings under color of such order are void, and no rights to the property of the infant can be acquired under such order. A purchaser of an infant's property at a sale made under an order which is void because the clerk who made the order had no jurisdiction of the proceeding in which the order was made, acquires no right, title, interest, or estate in said property, adverse to the infant. For this reason an infant whose property has been sold and conveyed to a purchaser under a void order has sustained no damages by reason of the sale and conveyance, and therefore cannot recover on the official bond of the clerk of the Superior Court who made the order under which the sale and conveyance was made.

The judgment in this action is

Affirmed.

J. L. MARTIN v. L. B. CRESS.

(Filed 25 November, 1936.)

Husband and Wife F a—

Testimony of the husband as to conversations between himself and his wife tending to show the relations between her and the defendant in a suit for alienating her affections is properly excluded as hearsay.

APPEAL by plaintiff from *Harding, J.*, at May Term, 1936, of MECKLENBURG. No error.

This is an action for the alienation by the defendant of the affections of plaintiff's wife.

Issues raised by the pleadings and submitted to the jury were answered adversely to the contentions of the plaintiff.

From judgment that he recover nothing by his action, the plaintiff appealed to the Supreme Court, assigning as error the exclusion by the trial court of testimony offered by the plaintiff as evidence.

Carswell & Ervin and William Winter for plaintiff.
Kirkpatrick & Kirkpatrick for defendant.

PER CURIAM. On his appeal to this Court, the plaintiff contends that there was error in the trial of this action in the exclusion by the trial court of testimony by the plaintiff as to conversations between him and his wife, with respect to conversations between her and the defendant, tending to show her relations with him. In support of this contention, the plaintiff cites and relies upon *Cottle v. Johnson,* 179 N. C., 426, 102 S. E., 769. In that case it was held that testimony by the plaintiff as to conversations between him and his wife were competent as evidence tending to show their relations to each other, both before and after their separation. In the instant case the testimony of the plaintiff was properly excluded as hearsay. The court was mindful of the caution contained in the opinion in the cited case. The distinction between the instant case and the cited case is obvious.

The contention of the plaintiff cannot be sustained. There was no error in the trial. The judgment is affirmed.

No error.

MISS EVELYN RUCKER v. SNIDER BROTHERS, INC., J. W. KLUTTZ, AND MANER MOTOR TRANSIT COMPANY.

(Filed 25 November, 1936.)

1. Removal of Causes C b—Complaint held to state joint cause against defendants, and nonresident's motion for removal was properly denied.

A complaint alleging that plaintiff's injuries were the result of a collision between a truck owned by a resident defendant and a truck owned by the nonresident defendant, and that the collision was caused by the joint and concurrent negligence of the resident drivers of the trucks, states a joint cause against the defendants, and the nonresident defendant's motion to remove for separable controversy and diversity of citizenship is properly denied.

2. Same—

Upon a petition for removal of a cause from the State to the Federal Court on the ground of diversity of citizenship and separable controversy, the allegations of the complaint determine whether the cause alleged is joint or separable.

APPEAL by defendant Maner Motor Transit Company from *Shaw, Emergency Judge,* at June Term, 1936, of MECKLENBURG. Affirmed.

Petition for removal to United States District Court on the ground of diversity of citizenship and separable controversy. The ruling of the clerk denying the petition was affirmed by the judge of the Superior Court, and petitioner appealed to this Court.

Carswell & Ervin for plaintiff, appellee.

C. H. Gover, William T. Covington, Jr., and Hugh L. Lobdell for defendant, appellant.

PER CURIAM. The plaintiff alleged a personal injury caused by the joint negligence of each of the defendants in the operation of motor vehicles on the highway, setting out the facts and claiming damages in the sum of ten thousand dollars. The plaintiff and the defendants Snider Brothers, Inc., and J. W. Kluttz, are residents of North Carolina, and the appellant is a Georgia corporation.

The complaint alleges that the truck of defendant Snider Brothers, Inc., and that of appellant collided, due to negligence of both, and that as proximate result of joint and concurring negligence of both, plaintiff was struck and injured.

Upon a petition for removal to the Federal Court on the ground of separable controversy, the plaintiff is entitled to have her cause of action considered as stated in her complaint, and the motion must be determined by the facts therein set forth. *Moses v. Morganton,* 192 N. C.,

102; *Crisp v. Fibre Co.*, 193 N. C., 77; *Brown v. R. R.*, 204 N. C., 25; *Trust Co. v. R. R.*, 209 N. C., 304; *R. R. v. Dixon*, 179 U. S., 131.

The facts alleged in the instant case are distinguishable from those on which the decision in *Brown v. R. R.*, *supra*, was based.

It is obvious that plaintiff has here alleged a cause of action based upon the joint and concurring negligence of both resident and nonresident tort-feasors, at the same time and place, and that the complaint does not show a separable controversy.

The petition for removal was properly denied.

Affirmed.

MRS. A. P. RUCKER v. SNIDER BROTHERS, INC., J. W. KLUTTZ, AND MANER MOTOR TRANSIT COMPANY.

(Filed 25 November, 1936.)

APPEAL by defendant Maner Motor Transit Company from *Shaw, Emergency Judge*, at June Term, 1936, of MECKLENBURG. Affirmed.

Petition for removal to United States District Court on the ground of diversity of citizenship and separable controversy. The ruling of the clerk denying the petition was affirmed by the judge of the Superior Court, and petitioner appealed to this Court.

Carswell & Ervin for plaintiff, appellee.

C. H. Gover, William T. Covington, Jr., and Hugh L. Lobdell for defendant, appellant.

PER CURIAM. This is a companion case to that of *Miss Evelyn Rucker v. Snider Brothers et al., ante*, 777, involving the same facts, and for the reasons therein stated the judgment of the court below is

Affirmed.

STATE v. CLARENCE McALLISTER.

(Filed 25 November, 1936.)

Larceny B d—

The evidence in this prosecution for larceny *is held* sufficient to take the case to the jury.

APPEAL by the defendant from *Small, J.*, at September Term, 1936, of WAKE. No error.

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

A. Burton Breece for defendant, appellant.

PER CURIAM. The defendant was convicted upon a bill of indictment charging him with the larceny of a shotgun of the value of $50.00, the property of E. O. Marshburn. All of the exceptive assignments of error present the same question, namely, was there sufficient evidence upon which to submit the case to the jury?

The evidence was to the effect that E. O. Marshburn had a shotgun, for which he paid $68.00, in a room in the basement of his house known as the den; that on or about 5 June, 1936, the gun was taken from the den and never recovered; that the defendant, who slept on the premises of Marshburn, had a key to the den; that on said date the defendant took the gun out of the den and offered to sell it for $6.00 to a plumber who was working at the Marshburn house, stating that Mr. Marshburn had given him the gun; that when the defendant exhibited the gun to the plumber he brought it out of the den wrapped in a spread; and that Mr. Marshburn never gave the defendant the gun.

This evidence raises more than a suspicion of the guilt of the defendant, and was, therefore, sufficient to be submitted to the jury.

No error.

LOEE PICKELSIMER, NEXT FRIEND OF PEGGIE JEW CRITCHER, A MINOR. v. WILLIAM S. CRITCHER.

(Filed 25 November, 1936.)

Parent and Child B a—

A child who has been abandoned by its father may maintain a suit by a next friend against the father to force the father to contribute to its support.

APPEAL by plaintiff from *Barnhill, J.*, at February Term, 1936, of FRANKLIN. Reversed.

It is alleged in the complaint in this action that the plaintiff Peggie Jew Critcher is a minor, and that she appears in this action by her duly appointed next friend, Loee Pickelsimer; that the defendant William S. Critcher is the father of the plaintiff; that he has not paid any sum whatsoever for the support and maintenance of the plaintiff since her birth, and has abandoned her; and that the defendant is amply able financially to provide for the support and maintenance of the plaintiff.

On these allegations the plaintiff prays judgment that the defendant pay to the plaintiff the sum of $50.00 per month for her support and maintenance during her minority.

The action was heard on defendant's demurrer *ore tenus* to the complaint on the ground that the facts stated therein are not sufficient to constitute a cause of action. The demurrer was sustained.

From judgment dismissing the action, the plaintiff appealed to the Supreme Court, assigning error in the judgment.

J. P. & J. H. Zollicoffer and Yarborough & Yarborough for plaintiff.
No counsel for defendant.

PER CURIAM. There is error in the judgment dismissing this action. The judgment must be reversed on the authority of *Green v. Green, ante.* 147, 185 S. E., 651. In that case it is held that an infant appearing by its next friend can maintain an action against its father for support and maintenance, notwithstanding the bonds of matrimony between its father and mother have been dissolved by a judgment of divorce, and notwithstanding the infant is the illegitimate child of the father. It is said that there can be no controversy that the father is under a legal as well as a moral duty to support his infant child, and if he has the ability to do so, whether the child has property or not. There is a natural obligation to support even an illegitimate child which the law not only recognizes, but enforces.

This action was heard in the Superior Court before the opinion in *Green v. Green, supra,* was filed. The decision in that case is fully supported by the authorities cited in the opinion by *Devin, J.*, and is determinative of the question presented by this appeal.

Reversed.

MRS. MAIE DENNIS v. ANTHONY REDMOND, SUCCESSOR TRUSTEE, AND THOMAS H. LEATH, ATTORNEY.

(Filed 16 December, 1936.)

1. Appeal and Error F b—

A sole exception to the judgment rendered presents the single question of whether the judgment is supported by the findings of fact, and the judgment will be affirmed when it is regular upon its face and is supported by the findings.

2. Injunctions D b—

Where the undisputed facts are sufficient to support a decree dissolving the temporary restraining order entered in the cause, an exception on the

ground that the order should have been continued for a jury trial upon the disputed facts is untenable.

3. Mortgages H b—Admitted facts held sufficient to support finding that debt was in default, and dissolution of restraining order was proper.

In this suit to restrain foreclosure instituted by the grantee in a deed assuming the payment of the debt secured by a deed of trust on the lands, it appeared that the debt was in default and that no payment had been made thereon for about three years, even giving plaintiff credit for amounts paid by her plus an amount received by the *cestui* from the proceeds of a fire insurance policy on the property, and that the *cestui* had paid taxes and insurance and had properly credited plaintiff with the credits claimed by her. *Held:* It was not error for the court to find that the debt was in default and to dissolve the temporary restraining order entered in the cause, there being no facts in dispute sufficient to warrant the continuation of the restraining order for a jury trial.

4. Same—

An allegation that several concerns had made demand on plaintiff for payments on the indebtedness secured by a deed of trust assumed by plaintiff is insufficient to restrain foreclosure of the deed of trust when it appears that each of the various concerns represented the holder of the notes.

5. Same—Plaintiff held not entitled to restrain foreclosure for an accounting under the facts of this case.

Where it appears that plaintiff seeking to restrain the foreclosure of a deed of trust had not paid anything on the indebtedness for about three years, that she could have easily ascertained the amount of insurance collected by the *cestui* on the policy of fire insurance on the property which the *cestui* had allowed as a credit on the debt, and could have ascertained the amount of insurance and taxes paid by the *cestui* and added to the debt, plaintiff is not entitled to restrain the foreclosure for an accounting to ascertain the exact amount of the indebtedness in the absence of a tender of some amount to the *cestui*.

6. Same—

The holder of notes secured by a deed of trust may foreclose the property in the hands of a purchaser from the trustor assuming the payment of the debt without first filing claim with the personal representative of the deceased maker of the notes.

APPEAL by plaintiff from *Rousseau, J.*, at Chambers in Wadesboro, on 14 September, 1936. From RICHMOND. Affirmed.

This is a proceeding brought by plaintiff against defendants to restrain them from selling certain real property under power contained in a deed of trust. A temporary restraining order was duly issued and the cause came on to be heard on motion of plaintiff to continue the restraining order to the hearing.

The judgment of the court below is as follows: "This cause coming on to be heard, and being heard on 14 September, 1936, by his Honor,

J. A. Rousseau, Judge presiding over the courts of the Thirteenth Judicial District, in Chambers at Wadesboro, N. C., the motion of the plaintiff for a restraining order to be continued to the hearing having been continued, by consent of all the parties, to this date and place: And it appearing to the court and the court finding facts as follows:

"(1) That on 18 January, 1930, Mrs. Maie Dennis executed and delivered to J. R. Henderson a deed conveying the lands set out and described in the complaint filed herein and used as an affidavit, which deed was recorded on 20 March, 1930, in Book 207, page 123, Richmond County registry; that J. R. Henderson and wife, on 15 February, 1930, executed and delivered to the Commercial National Bank of High Point, N. C., their deed of trust to secure the payment of a note in the amount of $3,150, said note being made payable to bearer at the office of the Charleston National Bank, Charleston, West Virginia; that said deed of trust was recorded on 6 March, 1930.

"(2) That on 6 March, 1930, J. R. Henderson and wife reconveyed the land described in the complaint to the plaintiff herein by deed recorded in Book 207, page 237, Richmond County registry.

"(3) That thereafter J. R. Henderson died, to wit: On 26 May, 1930, and E. N. Rhodes was duly appointed collector of the estate of the said J. R. Henderson, and thereafter filed his final report showing assets in hand of only $59.11, no executor or administrator having ever qualified, the report of said E. N. Rhodes, collector, being duly filed in Record of Settlements No. 4, page 348, office of the clerk of the Superior Court of Richmond County, File No. 898-A, a copy thereof being hereto attached.

"(4) That from 2 April, 1930, through 21 June, 1933, the plaintiff made payments aggregating $660.00.

"(5) That on 21 November, 1933, the Commercial National Bank of High Point, N. C., trustee, and John Biggs, receiver, advertised the land described in the complaint, and described also in the aforesaid deed of trust for sale on 23 December, 1933, and that on 14 December, 1933, Hon. A. M. Stack, one of the judges of the Superior Court, issued a temporary restraining order restraining the sale; that as a basis for said restraining order the plaintiff herein filed an affidavit and complaint wherein she alleged the execution and delivery of the deed of trust hereinabove referred to, to secure the payment of the note payable to bearer, and further alleged, 'The notes being made payable to bearer, but in fact were made payable to the Commercial National Bank of Charleston, West Virginia, whose place of business was at Charleston, West Virginia; that thereafter, on or about 6 March, 1930, the said J. R. Henderson and wife, Jennette Henderson, conveyed by deed to Maie Dennis the property described in the deed of trust; the said Maie Dennis assuming the indebt-

edness thereon'; that the said Maie Dennis made payments as provided in the deed of trust in excess of $600.00 on the original indebtedness of $3,150.

"(6) That, in addition to the payments made by the plaintiff above referred to, the sum of $1,235.84 was collected by the defendant as proceeds of fire loss on 27 December, 1934, as found by Judge Clayton Moore in an order dated 28 May, 1935, a copy being hereto attached as 'Exhibit A.'

"(7) That the plaintiff has paid no taxes on the property described in the complaint and in the deed of trust to the town of Hamlet or the county of Richmond for the years 1931 to 1935, inclusive.

"(8) That in May, 1936, the defendant Anthony Redmond, successor trustee, duly advertised the lands described in the deed of trust for sale under the power contained therein on 1 June, 1936, and that after said sale was held, that the plaintiff Mrs. Maie Dennis, on the 10th day thereafter, raised the bid to $1,575 on said property as by statute provided, and that thereafter the lands were readvertised and reoffered for sale on 3 July, 1936, and temporary restraining order was secured as hereinabove referred to on 13 July, 1936.

"(9) That the plaintiff in the complaint filed herein alleges the due execution and delivery of the deed of trust from J. R. Henderson and wife to secure the payment of the note described therein and secured thereby, and further alleges certain payments, including the collection of $1,235.84 from an insurance company on account of damage to the mortgaged property by fire.

"(10) That while the plaintiff admits certain payments on said note, and that there is a balance due and unpaid thereon, she has not made any tender or offer to pay any amount whatsoever.

"(11) That the plaintiff has not offered to do equity and is not entitled to receive equity or any equitable relief on the showing made at this hearing.

"It is now, on motion of Thomas H. Leath, *in propria persona,* and of Varser, McIntyre & Henry, attorneys for defendants, considered, ordered, and adjudged that the motion of the plaintiff to continue the restraining order until the hearing be and the same is hereby denied, and that the temporary restraining order heretofore issued in this cause be and the same is hereby in all respects dissolved.

J. A. ROUSSEAU, *Judge Presiding.*"

To the foregoing judgment the plaintiff excepted, assigned error, and appealed to the Supreme Court.

A. A. Reaves and J. C. Sedberry for plaintiff.
Thomas H. Leath and Varser, McIntyre & Henry for defendants.

CLARKSON, J. The only exception and assignment of error made by plaintiff is "to the foregoing judgment." A case where the facts are similar in all respects to the present one is that of *Ingram v. Mortgage Co.,* 208 N. C., 329. At page 330, it is said: "The first exception is to the judgment itself. This judgment is regular upon its face, and the facts found by the trial judge are sufficient to support the decree. Consequently, the first exception must fail. *Warren v. Bottling Co.,* 207 N. C., 313; *Moreland v. Wamboldt, ante,* 35. The second exception is 'to the finding and signing of the order of the finding of facts.' It is to be observed that the plaintiff requested no findings of facts and there is no specific exception to any particular finding of fact. Obviously, some of the findings of fact are necessary and beyond question. The Court is not endowed with the gift of prophecy, and, therefore, is unable to determine which particular finding of fact is objectionable to the plaintiff. Hence, the second exception must likewise fail."

In the record the facts are practically undenied, and those found by the court below are supported by the evidence. On the above authority the judgment of the court below must be affirmed.

As the merits of the cause are urgently argued by the plaintiff, we will consider same. The plaintiff contends: (1) "Did his Honor have a right to pass upon and determine the disputed facts without the intervention of a jury?" On the whole record, we do not think that there were sufficient facts disputed to continue the restraining order to the hearing for a jury to determine.

Hoke, J., in *Grantham v. Nunn,* 188 N. C., 239 (242), speaking to the subject, says: "In *Sutton v. Sutton, supra* (183 N. C., 128), wherein the lower court dissolved the restraining order and entered judgment for defendant, the governing principle is stated as follows: 'Upon the hearing by the judge upon the question of continuing a restraining order to the hearing, the judge, upon proper findings (and it may be added on the evidence presented and without findings), may dissolve the temporary order, but in doing so it is error for him also to determine an issue of fact material to the rights of the parties and which should be reserved for the jury to pass upon at the trial.' " *Tomlinson v. Cranor,* 209 N. C., 688. Of course, the litigants may consent that the court try the cause. *Hershey Corp. v. R. R.,* 207 N. C., 122 (125).

The undisputed facts: (1) On 18 January, 1930, plaintiff made and executed a deed to her brother, J. R. Henderson, for the land in controversy, which was duly recorded on 20 March, 1930. (2) J. R. Henderson and wife, on 15 February, 1930, executed and delivered to the Commercial National Bank of High Point, N. C., a deed of trust to secure the payment of a note in the amount of $3,150. Said deed of trust was duly recorded on 6 March, 1930. (3) On 6 March, 1930, J. R. Hender-

son and wife reconveyed the land to plaintiff, which deed was duly recorded. (4) The land was advertised for sale under the deed of trust and plaintiff, on 14 December, 1933, obtained a restraining order. In her complaint and affidavit she states: "That thereafter, on or about 6 March, 1930, the said J. R. Henderson and wife, Jennette Henderson, conveyed by deed to Maie Dennis the property described in the deed of trust; *the said Maie Dennis assuming the indebtedness thereon;* that the said Maie Dennis made payments as provided in the deed of trust in excess of $600.00 on the original indebtedness of $3,150."

In Wiltsie on Mortgage Foreclosure (4th Ed.), Vol. 1, sec. 237, is the following: "An agreement by the grantee of mortgaged premises to assume or pay the mortgaged indebtedness, may be embodied in the deed, may appear in separate instruments, or may rest in parol. Or the agreement may be implied from all the facts and circumstances existing in connection with the transfer of the property, and may appear without any formal promise. . . . Where the contract of sale provided that the purchaser should pay the mortgage, he is liable though deed to him merely excepted the mortgage from the covenant of warranty. An oral agreement by a purchaser to assume or pay a mortgaged indebtedness upon the premises is valid and enforceable though the conveyance contains no such agreement. (Citing *Parlier v. Miller,* 186 N. C., 501.) And an oral agreement by a purchaser to assume a mortgaged indebtedness is not within the statute of frauds where it has the original transfer to support it as a consideration."

The plaintiff assumed the indebtedness in the deed of trust, $3,150, and the taxes and insurance which were tacked on in the deed of trust and made a part of same. In the proceeding of 1933 for injunctive relief by plaintiff, she alleges that she paid on the $3,150 in excess of $600.00.

The principal of the debt was $3,150, there were credits of $660.00 paid in 17 different payments, the last 6/21/33. Fire loss draft 12/27/34, $1,235.84, insurance $105.13, taxes $604.60 paid at different times, and interest on advances left a total due 8/15/36 of $3,077.32. The land was duly advertised to pay the indebtedness on 1 June, 1936, and bid in by the Metropolitan Realty Company for $1,500. Plaintiff raised the bid and the property was resold on 3 July, 1936, and bid in by the same company for $2,000. The plaintiff did not raise the bid, but, within 10 days, on 11 July, 1936, instituted this proceeding and the temporary restraining order was secured on 13 July, 1936. From the record it appears beyond question that the above amount is due on the note and deed of trust, with taxes and insurance, which plaintiff assumed.

The plaintiff alleges that various concerns have made demand on her for this indebtedness; be that so, she owes the indebtedness and there is

no evidence on her part that the defendants did not represent the owner of the indebtedness, and, in fact, defendant Redmond so stated in his affidavit, "is owned and held by the Charleston National Bank of Charleston, West Virginia, as trustee," etc., and he was duly appointed substitute trustee in said deed of trust. In the proceeding of 1933 for restraining order, plaintiff contended she had paid in excess of $600.00. She was given credit for $660.00. In her complaint she alleges that a house on the lot was burned and $1,235.84 was collected as insurance. She has been credited with same on her indebtedness.

(2) Is the plaintiff entitled to an accounting in order to find out the balance due on a deed of trust, to which her ownership of the land is subject, without making an actual tender of some sum of money? We think not under the facts and circumstances of this case. She has paid nothing on this indebtedness since 1933, up to that time she had paid $660.00. The insurance amount collected was easily obtainable; in fact, in her complaint she alleges the exact amount due on fire loss, $1,235.34. In the exercise of due care she could have ascertained the exact amount due, including taxes and insurance, which were tacked on to the deed of trust, and tendered same. She was given several years in which to pay this indebtedness, but has not done so. It is said in *Wilson v. Trust Co.*, 200 N. C., 788 (791): "Until this amount, which is in controversy between plaintiff and the answering defendants, has been ascertained and definitely determined, plaintiff is entitled to have the sale of the land described in the complaint, under the power of sale contained in the deed of trust, enjoined and restrained. *Parker Co. v. Bank, ante,* 441, 157 S. E., 419." *Porter v. Ins. Co.,* 207 N. C., 646 (647). On the entire record plaintiff knew or in the exercise of due care could have known the exact amount due on the indebtedness, and tendered same.

(3) Is the plaintiff entitled to require the holders of the note, secured by said deed of trust, to file their claim with the personal representative of the maker of said note and the grantors in said deed of trust and proceed in an effort to collect said indebtedness thereby before proceeding to foreclose the deed of trust on the land of which the plaintiff is the equitable owner? We think not.

J. R. Henderson died on 26 May, 1930. The collector of the estate of J. R. Henderson, after the receipts and disbursements were accounted for, had left on hand $59.11. We do not think this material, as the owner of the note and deed of trust could resort for payment of the debt foreclosing under the power of sale contained in the deed of trust.

In *Leak v. Armfield,* 187 N. C., 625 (628), speaking to the subject, this Court said: "It nowhere appears in the record that Chase Boren consented to the procedure in which she was made a party or waived any right. This being so, from the facts found by the court below as a matter

of law, we think that the restraining order ought not to have been granted. If subsequent judgment creditors or litigants over the equity of redemption could 'tie up' a first mortgage and effect its terms, it would seriously impair a legal contract. It may be 'hard measure' to sell, but this is universally so. The mortgagee has a right to have her contract enforced under the plain terms of the mortgage. To hold otherwise would practically nullify the present system of mortgages and deeds of trust on land, so generally used to secure indebtedness and seriously hamper business. Those interested in the equity of redemption have the right of paying off the first lien when due. We can see no equitable ingredient in the facts of this case. The mortgage is not a 'scrap of paper.' It is a legal contract that the parties are bound by. The courts under their equitable jurisdiction, when the amount is due and ascertained—no fraud or mistake, etc., alleged—have no power to impair the solemn instrument directly or indirectly by nullifying the plain provisions by restraining the sale to be made under the terms of the mortgage."

The case of *Moseley v. Moseley,* 192 N. C., 243, cited by plaintiff, is in no sense applicable. That case construed N. C. Code, 1935 (Michie), sec. 74. No mortgagee or trustee was endeavoring to foreclose, nor were they made parties to the proceeding. In the present case the power of sale was being carried out under the terms of the instrument. The *Moseley case, supra,* is so different from the present case that "He that runs may read." *Bank v. Purvis,* 201 N. C., 753; *Teeter v. Teeter,* 205 N. C., 438; *Kenny Co. v. Hotel Co.,* 206 N. C., 591; *Miller v. Shore,* 206 N. C., 732.

It is held in this jurisdiction, and the weight of authority by text writers and decisions all over the nation are to the effect that it was not necessary for the mortgagee to file his claim for allowance with the personal representative of the deceased mortgagor before proceeding to foreclose on the mortgaged property, and that the failure to file the claim for payment out of the general funds of the estate did not affect the right of the mortgagee to foreclose under power of sale in the mortgage. *Miller v. Shore, supra.*

We have examined the record and the elaborate and carefully prepared briefs of the litigants with care. The brief of the defendants filed in the cause by Thomas H. Leath and his associates was most helpful in writing this opinion. The brief was not only persuasive, but convincing.

For the reasons given, the judgment of the court below is

Affirmed.

A. D. BURROWES v. LOUISE W. BURROWES.

(Filed 16 December, 1936.)

1. **Divorce F a—Order for custody of minor child is improperly entered in divorce proceedings when adverse party is given no notice.**

It appeared that a copy of the complaint in this divorce proceeding was mailed to the *feme* defendant together with a nonsuit taken by plaintiff in a prior action for divorce in which plaintiff prayed for the custody of a child of the marriage, and that thereafter summons in the divorce proceedings was served on the nonresident *feme* defendant by publication. The complaint gave no notice that the plaintiff would seek the custody of the minor child. Judgment for absolute divorce entered in the action provided that plaintiff should have the custody and control of the minor child. *Held:* The order awarding the custody of the minor child to plaintiff is irregular and not in accordance with the practice of the courts of this State, and should have been stricken out on motion of the *feme* defendant for the reason that the *feme* defendant had no notice from the complaint or otherwise that the custody of the minor child was involved in the action.

2. **Same—Proviso of C. S., 1664, dispensing with notice, does not apply in cases where movant has custody and control of child.**

The provision of C. S., 1664, that no notice of a motion for the custody of a minor child of the marriage need be given in the divorce proceedings when the adverse party has removed or is about to remove the child from the jurisdiction of the court, applies only when the motion or application is made by the parent not having custody of the child, and where the motion is made by the parent having the custody of the child the five days notice required by the statute must be given.

3. **Same—**

The court entering a decree of absolute divorce may not award, *ex mero motu*, the custody of a minor child of the marriage to plaintiff without giving notice to defendant and without finding that the best interest of the child would be promoted by so awarding its custody.

4. **Same—Court has no jurisdiction to ratify improvident order for custody of minor child when the child is not within the jurisdiction of the court.**

In this proceeding for divorce the decree awarded the custody of a minor child of the marriage to plaintiff without any notice to defendant that the custody of the child was involved in the action. Upon motion of defendant to strike out the improvident order awarding the custody of the child, plaintiff filed a counter motion that the prior improvident order be ratified. The court granted plaintiff's counter motion although the child was in another state, the court stipulating that the presence of the child in court was waived by the court. *Held:* The presence of the child within the State was necessary to confer jurisdiction on the court to award its custody, and such jurisdictional requirement could not be waived by the court, and the court's order ratifying the prior improvident order for the custody of the child is void.

APPEAL by defendant from *Barnhill, J.*, at Second March Term, 1936, of WAKE. Reversed.

This action was begun in the Superior Court of Wake County on 28 November, 1934. The defendant was at said date and is now a nonresident of this State. The summons was duly served on her by publication as provided by statute. C. S., 484 (5).

On the facts alleged in the complaint as constituting his cause of action, C. S., 1659 (4), the plaintiff prays judgment that the bonds of matrimony existing between him and the defendant be dissolved, and that he be granted an absolute divorce from the defendant.

It is alleged in the complaint "that one son of the marriage, Thomas Henry Burrowes, was born on 6 May, 1924." The plaintiff does not allege that he is entitled to the custody of the said Thomas Henry Burrowes, nor does he pray in his complaint for an order that the said Thomas Henry Burrowes be committed to his custody.

The action was tried at the Second March Term, 1935, of the Superior Court of Wake County, when judgment was rendered as follows:

"This cause coming on to be heard before the undersigned and a jury, and being heard, and the jury having answered the issues submitted to them as follows:

"1. Is the plaintiff, A. D. Burrowes, a resident of Wake County, State of North Carolina, and has he been a resident of said State and county for a period of more than two years prior to 28 November, 1934? Answer: 'Yes.'

"2. Were the plaintiff and the defendant married, as alleged in the complaint? Answer: 'Yes.'

"3. Were the plaintiff and the defendant separated in June, 1932, and have they lived separate and apart since said date? Answer: 'Yes.'

"4. Did the defendant abandon the plaintiff in June, 1932, without cause on the part of the plaintiff? Answer: 'Yes.'

"And upon said issues, as answered by the jury, the plaintiff being entitled to an absolute divorce from the defendant Louise W. Burrowes.

"It is now therefore ordered, adjudged, and decreed that A. D. Burrowes be and he is hereby granted an absolute divorce from the defendant Louise W. Burrowes.

"It appearing to the court that one son, Thomas Henry Burrowes, was born to said plaintiff and defendant, on 6 May, 1924, and that said son by virtue of orders heretofore entered in this court in the case of 'A. D. Burrowes *v.* Louise W. Burrowes,' instituted on 26 October, 1933, has been committed to the care, custody, and control of the plaintiff in this action, and that under and by virtue of orders of the juvenile court of Wake County, city of Raleigh, the care, custody, and control of the said Thomas Henry Burrowes has been committed also to the plaintiff in this

action, A. D. Burrowes, and that the said Thomas Henry Burrowes, the said son, is now in the custody and control of the said A. D. Burrowes, the plaintiff in this action;

"It is now, therefore, further ordered and decreed that without in any manner affecting the orders which have been heretofore issued by the juvenile court of the county of Wake, city of Raleigh, the care, custody, and control of the said Thomas Henry Burrowes is hereby committed to A. D. Burrowes, the plaintiff in this action, under the terms and conditions of the order of his Honor, J. Paul Frizzelle, on 21 December, 1934, at the December Term of the Wake Superior Court.

F. A. DANIELS, *Judge Presiding.*"

Thereafter, on or about 17 January, 1936, the defendant filed a motion, in writing, in this action, which is as follows:

"In the above entitled cause, now comes the defendant Louise W. Burrowes, by and through her counsel, Ruark & Ruark, whose address is Rooms 602, 603, 604, and 605 Lawyers' Building, Raleigh, North Carolina, and makes this her motion to the court, that any and all of the provisions of the judgment heretofore entered in this cause at the Second March Term, 1935, of this court, which relate to and/or in any manner undertake to determine or in any manner affect the rights of this defendant or to provide for the custody and control of the person of Thomas Henry Burrowes, minor son of the plaintiff and this defendant, be stricken out, so that said judgment shall remain and continue in force only as a divorce of the plaintiff from this defendant from the bonds of matrimony.

"This motion is made upon the grounds:

"(a) That the portion of said judgment hereby moved to be stricken was entered and signed by the judge presiding at the Second March Term, 1935, of this court, through inadvertence and mistake.

"(b) That the failure of this defendant to appear in said cause and oppose the entry of that portion of the judgment hereby moved to be stricken resulted by and through mistake, inadvertence, and excusable neglect.

"(c) That the court, at the time of the rendition of said judgment, was without authority and/or jurisdiction in law to enter that portion of same hereby moved to be stricken.

"(d) That the portion of the judgment hereby moved to be stricken was entered without any notice to this defendant, as required by law.

"In support of this motion, defendant Louise W. Burrowes appends hereto her affidavit.

"All of which is respectfully submitted, and the defendant Louise W. Burrowes prays the court that notice of this motion, together with a copy

of the affidavit hereto appended, be given to and served upon the plaintiff A. D. Burrowes, as provided by law, and that she, the said Louise W. Burrowes, may have such relief in the premises as she may be entitled to.

LOUISE W. BURROWES.

"RUARK & RUARK, *Attorneys for Defendant.*"

The said motion, together with a copy of the affidavit of Louise W. Burrowes appended thereto, was duly served on the plaintiff A. D. Burrowes, who duly filed his reply to said motion, in which he prayed that the motion be denied.

Thereafter, on or about 10 March, 1936, the plaintiff A. D. Burrowes filed a motion in writing in the action, which is as follows:

"Now comes the plaintiff A. D. Burrowes, through his attorney, I. M. Bailey, and moves the court that it ratify that portion of the judgment entered in this cause at the Second March Term, 1935, Superior Court of Wake County, to which the defendant Louise W. Burrowes directs her motion that the same be stricken out, and in support of said motion respectfully showeth to the court:

"1. That said portion of said judgment was entered pursuant to the authority and jurisdiction of the court.

"2. That the defendant Louise W. Burrowes contends that she was not notified and was not present at the time said portion of said judgment was entered, while the plaintiff contends that it was not necessary that she be present, or that she be notified, to confer jurisdiction on the court to enter said portion of said judgment.

"3. That summons in this action was served by publication, and that said service was properly made according to law, and that since said judgment, to wit: On 18 January, 1936, Louise W. Burrowes has, by general appearance in this action, entered her motion therein.

"4. That if there is any defect in said portion of said judgment, which the plaintiff denies, then, since the defendant has made motion herein after entering her appearance in this cause, the plaintiff is entitled to have said portion of said judgment ratified and affirmed.

"Wherefore, the plaintiff A. D. Burrowes prays an order of the court herein ratifying and affirming that portion of the judgment to which the defendant, after entering special appearance herein, directed her motion.

I. M. BAILEY,
Attorney for A. D. Burrowes, Plaintiff."

The action was heard at Second March Term, 1936, of the Superior Court of Wake County, by Barnhill, J., on the motion of the defendant, and also on the motion of the plaintiff.

On the facts found at said hearing, the court was of opinion and held that "so much of the judgment rendered at the Second March Term,

1935, of the Superior Court of Wake County as relates to and undertakes to fix or determine the rights of the plaintiff and the defendant with respect to the custody of their minor child, Thomas Henry Burrowes, was and is irregular and not in accordance with the practice of the court, for the reason that the portion of the judgment referred to was rendered without notice to the defendant, and the court is of the opinion that the five days notice required by C. S., 1664, relates to motions of either party for the custody of an infant child of the parties to a divorce action in term as well as out of term.

"The court is therefore of the opinion that the defendant would be entitled to have said portion of said judgment stricken therefrom except for the motion of the plaintiff now pending that this court now ratify and affirm said portion of said judgment.

"The court is of the opinion that under the provisions of C. S., 1664, this court now has the discretionary power, after due notice to the defendant, which has been given, to ratify and affirm that portion of the judgment of Judge Daniels awarding custody of said infant to the plaintiff."

It was accordingly ordered and adjudged by the court that "the provisions of the judgment of Daniels, Judge, hereinbefore recited, awarding the custody of said infant Thomas Henry Burrowes to the plaintiff be and the same is hereby in all respects ratified and affirmed, except so much of said judgment as limits the right of the defendant to move the court for a rehearing upon the custody of said infant, and there is reserved to the defendant her statutory right to move the court upon notice for a rescission or modification of the judgments awarding the custody of said infant.

"Prior to the hearing upon plaintiff's motion hereinbefore mentioned, counsel for the plaintiff offered, if requested or required by the court so to do, to bring the minor son of the plaintiff and defendant into the State of North Carolina, and produce him before the court at said hearing. The actual presence of said infant was waived by the court.

"This judgment is entered without prejudice to the rights of the defendant Louise W. Burrowes to move in this court at any time for change, modification, or revocation of this judgment, as she may be advised."

The defendant excepted to the judgment and appealed therefrom to the Supreme Court. She assigns as error the refusal of the court to allow her motion that the order in the judgment in this action at Second March Term, 1935, with respect to the custody of her son, Thomas Henry Burrowes, be stricken from said judgment, and also the judgment ratifying and affirming said order at the Second March Term, 1936.

I. M. Bailey for plaintiff.
Ruark & Ruark for defendant.

CONNOR, J. The facts pertinent to the motion of the defendant in this action that the order in the judgment at the Second March Term, 1935, of the Superior Court of Wake County, with respect to the custody of Thomas Henry Burrowes, infant son of the plaintiff and defendant, be stricken from said judgment, as found by the judge at the hearing of said motion, are as follows:

This action was begun in the Superior Court of Wake County, North Carolina, on 28 November, 1934. At that date the defendant was and she is now a nonresident of this State. She is a resident of the city of Washington, in the District of Columbia, where she and the plaintiff were married to each other on 12 September, 1923, and where they resided as husband and wife until some time during 1929, when the plaintiff became a resident of this State.

At the date of the commencement of this action, the attorney for plaintiff, by letter addressed to her at the place of her residence in Washington, D. C., advised the defendant of the commencement of the action against her by the plaintiff. He enclosed with his letter a copy of the complaint in the action, and advised her that the original complaint had been duly filed in the Superior Court of Wake County. The only reference in the complaint to Thomas Henry Burrowes, the infant son of the plaintiff and defendant, is the allegation that he was born on 6 May, 1924. No notice was given to the defendant in the complaint that the custody of her son was involved in the action. The prayer in the complaint was for judgment dissolving the bonds of matrimony existing between the plaintiff and defendant, and granting the plaintiff an absolute divorce from the defendant.

There was also enclosed with the letter a copy of a judgment of nonsuit, which the plaintiff had caused to be entered in an action for divorce instituted by the plaintiff against the defendant in the Superior Court of Wake County, on 26 October, 1933. In the complant in that action, the plaintiff had prayed for an order awarding him the custody of Thomas Henry Burrowes, and orders had been entered in the action, from time to time, with respect to the temporary custody of the said Thomas Henry Burrowes.

The defendant was advised in said letter that summons in the action instituted against her by the plaintiff on 28 November, 1934, would be served by publication, as provided by statute, unless she accepted service of the summons. The summons in the action was subsequently served on the defendant by publication.

The defendant did not file an answer to the complaint nor did she enter an appearance in this action prior to Second March Term, 1935, of the Superior Court of Wake County, when the action was tried and judgment rendered granting the plaintiff an absolute divorce from the defendant, and containing an order awarding the custody of Thomas Henry Burrowes to the plaintiff.

We concur with the opinion of Judge Barnhill that on these facts the order with respect to the custody of Thomas Henry Burrowes, infant son of the plaintiff and defendant, contained in the judgment rendered in this action at Second March Term, 1935, of the Superior Court of Wake County, was irregular and not in accordance with the practice of the courts of this State. We are further of the opinion that the order was improvidently made and included in the judgment, and should have been stricken from said judgment on the motion of the defendant, for the reason that the defendant had no notice from the complaint or otherwise that the custody of her infant son was involved in the action.

It does not appear on the record or in the order that same was made upon the application or motion of the plaintiff. If such were the case, as may be reasonably inferred, the order was improvidently made, because no notice of five days, as required by the statute, C. S., 1664, was given to the defendant. It is manifest that the provision in the statute dispensing with the notice of five days, when it appears that the parent having possession or control of the infant child of the parties to the action has removed or is about to remove such child from the jurisdiction of the court, is not applicable to the instant case. This provision is applicable only where the application or motion is made by the parent who does not have possession or control of the child, and is for the protection of the rights of such parent, and not of the parent who has possession or control of the child at the time the application or motion is made. In such case, no notice to the adverse party is required.

If the order was made by the court, not on the application or motion of the plaintiff, but *ex mero motu,* still the order was improvidently made, for, in such case, conceding without deciding that the court had the power to make the order in this action with respect to the custody of the infant child of the plaintiff and defendant, after their divorce, for its protection, there is no finding by the court that the best interests of the said child would be promoted by committing its custody to its father rather than to its mother. Even in such case, notice should have been given to the defendant before an order was made in this action, affecting her rights with respect to the custody of her infant child. There is nothing in the record in this action which shows or tends to show that the defendant is not a proper person to have the custody of her child, or that she has by her conduct forfeited her rights as its

mother. Indeed, there is no contention on this appeal to that effect. Nor does it appear from the record that the order was made for the protection of the child, or to promote its best interests.

There was error in the refusal of the court to allow defendant's motion in the action, notwithstanding the motion of the plaintiff that the order improvidently made by the court at Second March Term, 1935, be ratified and affirmed by the court at Second March Term, 1936, of the court.

As pertinent to the motion of the plaintiff, it was found by the court that at the time of the hearing of said motion, Thomas Henry Burrowes, infant son of the plaintiff and defendant, whose custody was involved in the said motion, was a student in a school in the State of Pennsylvania, where he had been placed by his father, the plaintiff. It thus appears that the said infant was not within the jurisdiction of the court at the time the order was made ratifying and affirming the order improvidently made by the court at its Second March Term, 1935, committing the custody of the said infant to the plaintiff. The effect of the order made at the Second March Term, 1936, was to commit the said infant to the custody of the plaintiff, as of the date of the order. As the child was not then within its jurisdiction, the court was without power to make the order, and for that reason there is error in the judgment in accordance with the order. 31 C. J., 988. See *Finlay v. Finlay,* 240 N. Y., 429, 40 A. L. R., 937, and *In re Alderman,* 157 N. C., 507, 73 S. E., 126. In the last cited case it was held that an order made by a court in the State of Florida with respect to the custody of an infant child who had become a resident of this State, had no force or effect in this State. It is said in the opinion that when the child became a citizen and resident of this State, and duly domiciled here, it was no longer under the control of the Florida courts. In the instant case, it appears that neither the plaintiff nor the defendant, nor their child, Thomas Henry Burrowes, was a resident of or domiciled in this State at the time the order was made ratifying and affirming the order made in this action at Second March Term, 1935, committing the said Thomas Henry Burrowes to the custody of the plaintiff. The waiver by the court of the actual presence of the child at the hearing of plaintiff's motion did not dispense with such presence for the purpose of acquiring jurisdiction of said child. Nor did the offer of counsel for the plaintiff to produce the child at the hearing supply the want of his presence within the jurisdiction of the court.

For the reasons stated in this opinion, the judgment is reversed and the action remanded to the Superior Court of Wake County, that judgment may be entered in accordance with the decision of this Court.

Reversed.

STATE v. CHARLES R. PERRY.

(Filed 16 December, 1936.)

1. **Constitutional Law F a—Witness may not disclose part of facts and withhold other facts on ground of self-incrimination.**

An accomplice may not testify on direct examination to facts tending to incriminate defendant and at the same time refuse to answer questions on cross-examination relating to matters embraced in his examination-in-chief, and where he refuses to answer relevant questions on cross-examination on the ground that his answers might tend to incriminate him, it is error for the court to refuse defendant's motion that his testimony-in-chief be stricken from the record, the refusal to answer the questions on cross-examination rendering the testimony-in-chief incompetent. N. C. Constitution, Art. I, sec. 11.

2. **Constitutional Law F c: Criminal Law G r—Right to confront accusers includes right to cross-examination.**

The constitutional right of a defendant to confront his accusers includes the right to cross-examine them on any subject touched on in their examination-in-chief, N. C. Constitution, Art. I, sec. 11, and a witness testifying to facts incriminating defendant on his examination-in-chief may not deprive defendant of his right to cross-examine him on the ground that answers to questions asked on cross-examination might tend to incriminate the witness.

CLARKSON, J., dissenting.

APPEAL by the defendant from *Cranmer, J.*, at April Term, 1936, of HERTFORD. New trial.

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

J. H. Matthews and C. W. Jones for defendant, appellant.

SCHENCK, J. The defendant Charles Perry was convicted of murder in the first degree and sentenced to death by asphyxiation.

The witness Joseph Terry stood indicted upon another bill of indictment for the same homicide for which the defendant was being tried. The witness was not on trial. There was no eye-witness to the homicide. All of the evidence tended to show that the defendant Perry and the witness Terry were together on the night of the homicide, that they separated, and then rejoined each other.

The contention of the defendant, as shown by his own testimony, was that the defendant went with the witness Terry to a point close by Terry's house, that defendant Perry waited outside while the witness Terry went inside the house, that Perry heard a gun fire in the house and in a few minutes Terry came out and said that he had killed the deceased.

Joseph Terry was introduced as a witness by the State, over objection both by the defendant and by the witness himself, and, after being told by the court that he would not be required to answer any question which tended to incriminate him, testified in effect that he and the defendant Perry separated for about an hour and a half, and when the defendant Perry rejoined him (Terry) the defendant Perry told him that he (Perry) had killed the deceased at the house of the witness Terry.

The defendant Perry, on cross-examination, asked the witness Terry if he owned a gun and where he kept it, and where he was during the separation of an hour and a half from the defendant Perry. The witness declined to answer upon the ground that to do so would incriminate him. The defendant objected and moved to strike the testimony of the witness from the record, which motion was denied, and the defendant excepted.

It is apparent that the State contended that the defendant Perry fired the fatal shot, and that the defendant Perry contended that the witness Terry fired the fatal shot. The questions propounded bore directly upon these conflicting contentions, and if the State was to have the benefit of the testimony of the witness tending to substantiate its contention, the defendant was entitled to impeach this testimony, and to substantiate his contention, if he could, by cross-examination of the witness giving the testimony relied upon by the State.

His Honor's ruling practically denied the defendant the right to cross-examine the State's witness, and under these circumstances it was reversible error not to allow the motion of the defendant to strike the testimony of the witness from the record. The right of cross-examination is a common law right and is guaranteed by the Constitution of North Carolina: "In all criminal prosecutions every man has the right . . . to confront the accusers and witnesses with other testimony." Art. I, sec. 11. This Court has repeatedly held that the right to confront is an affirmance of the rule of the common law that in criminal trials by jury the witness must not only be present, but must be subject to cross-examination under oath. *S. v. Thomas,* 64 N. C., 74; *S. v. Behrman,* 114 N. C., 797; *S. v. Dowdy,* 145 N. C., 432; *S. v. Dixon,* 185 N. C., 727; *S. v. Hightower,* 187 N. C., 300; *S. v. Breece,* 206 N. C., 92; N. C. Handbook of Evidence (Lockhart), par. 275, pp. 326-7.

While it has been held that on trial for crime any defendant is competent and compellable to testify for or against a codefendant, provided he is not compellable to give evidence that may tend to convict him, either of the crime charged or other offense against the criminal law, *S. v. Medley,* 178 N. C., 710; *S. v. Smith,* 86 N. C., 705, it is part of the express or implied understanding that an accomplice admitted to testify

for the prosecution shall tell all he knows, *S. v. Lyon,* 81 N. C., 600, and he cannot refuse to answer a relevant question on cross-examination under the rule that he shall not incriminate himself, even though he is required to disclose confidential communications made to his attorney, as he has waived his privilege, *S. v. Condry,* 50 N. C., 418. In other words, an accomplice will not be permitted to disclose part of the facts and withhold the rest. He must tell the whole. The cross-examination of a witness is a right and not a mere privilege, *S. v. Nelson,* 200 N. C., 69, and any subject touched on in the examination-in-chief is open to cross-examination. *Milling Co. v. Highway Commission,* 190 N. C., 692.

If the further provision of Article I, sec. 11, of the North Carolina Constitution to the effect that "every man has the right not to be compelled to give evidence against himself" worked an irreconcilable conflict with the right of the defendant to cross-examine the witness, the court should have stricken the testimony of the witness from the record upon the motion properly lodged by the defendant, since the testimony was rendered incompetent by reason of the denial to the defendant of the right to cross-examine the witness. The power of the court to withdraw incompetent evidence improvidently admitted and to instruct the jury not to consider it has long been recognized in this jurisdiction. *S. v. Stewart,* 189 N. C., 340.

For the error assigned the defendant is entitled to a new trial, and it is so ordered.

New trial.

CLARKSON, J., dissenting: The defendant, at the October Term, 1935, of Hertford Superior Court, was convicted of murder in the first degree and appealed to the Supreme Court. The defendant was granted a new trial on the ground that there was evidence to warrant a verdict of murder in the second degree, and the question should have been submitted to the jury on this aspect. *S. v. Perry,* 209 N. C., 604.

The facts are fully set forth in my dissenting opinion in the former appeal.

The defendant was again tried and convicted of murder in the first degree. In the main opinion a new trial is again granted him.

I think, under the Constitution and the statute law of this State applicable, that the witness Joseph Terry was a competent witness against defendant, and was compelled to testify against him subject to his right to refuse to answer any question tending to criminate himself. In cases where defendants are indicted for affrays in the same bill of indictment, this practice has been approved since "Time whereof the memory of man runneth not to the contrary." The solicitors of the

State have universally put defendants on the stand and compelled them to testify, subject to their right to refuse to answer any questions tending to criminate themselves. Joseph Terry was subpœnaed as a witness for the State, his attorney made a motion not to put him on the stand as a witness. The objection was overruled. The court below duly informed Joseph Terry of his rights under the Constitution: "You may refuse to answer any question that in your judgment might tend to criminate you. You understand what I mean. When the solicitor asks you a question and in your judgment you think it would tend to criminate you, you need not answer it."

Const. of N. C., Art. I, sec. 11, is as follows: "In all criminal prosecutions every man has the right to be informed of the accusation against him and to confront the accusers and witnesses with other testimony, and to have counsel for his defense, and not be compelled to give evidence against himself, or to pay costs, jail fees, or necessary witness fees of the defense, unless found guilty."

N. C. Code, 1935 (Michie), sec. 1799, is as follows: "In the trial of all indictments, complaints, or other proceedings against persons charged with the commission of crimes, offenses, or misdemeanors, the person so charged is, at his own request, but not otherwise, a competent witness, and his failure to make such request shall not create any presumption against him. But every such person examined as a witness shall be subject to cross-examination as other witnesses. Except as above provided, nothing in this section shall render any person who, in any criminal proceeding, is charged with the commission of a criminal offense, competent or compellable to give evidence against himself, nor render any person compellable to answer any question tending to criminate himself."

Under section 1792, a witness, with the exception of attesting witnesses to wills, is not excluded by interest or crime. Section 1793 makes parties competent and compellable to give evidence with exception of actions in consequence of adultery and criminal conversation. A defendant in a criminal case is competent and compellable to testify for or against a codefendant, provided his testimony does not criminate himself. *S. v. Smith,* 86 N. C., 705; *S. v. Medley,* 178 N. C., 710. In an indictment for an affray, it is not error for the presiding judge to caution the witness (a defendant), before the counsel for the other defendant cross-examines him, that he need not tell anything to criminate himself. *S. v. Ludwick,* 61 N. C., 401; *S. v. Rose,* 61 N. C., 406; *S. v. Smith,* 86 N. C., 705; *S. v. Weaver,* 93 N. C., 595 (600). N. C. Code, 1935 (Michie), secs. 1794, 1795, 1801, and 1802.

N. C. Code, *supra,* sec. 978: "Any person guilty of any of the following acts may be punished for contempt: (6) The contumacious and

unlawful refusal of any person to be sworn as a witness, or, when so sworn, the like refusal to answer any legal and proper interrogation."

In *S. v. Simpson,* 9 N. C., 580 (581), speaking to the subject, it is said: "It is clearly established that a witness cannot be compelled to answer any question tending to render him the subject of a criminal accusation; nor to answer interrogations having a direct tendency to subject him to penalties; or having such a connection with them as to form a step towards it."

In *LaFontaine v. Southern Underwriters,* 83 N. C., 132 (139), is the following: "In the trial of Burr, *Chief Justice Marshall* lays down the rule, which most of the text writers adopt, as the correct, practical rule, in these words: 'It is the province of the court to judge whether any direct answer to the question that may be proposed will furnish evidence against the witness. If such answer may disclose a fact, which forms a necessary and essential link in the chain of testimony which would be sufficient to convict him of any crime, he is not bound to answer it, so as to furnish matter for that conviction. In such case the witness must himself judge what his answer will be, and if he says on his oath he cannot answer without accusing himself, he cannot be compelled to answer.' Whether it (the answer) may tend to criminate or expose the witness is a point which the court will determine under all the circumstances of the case. 1 Greenl. Ev., sec. 451. And the same view is taken in Ros. Cr. Ev. and in other authorities." *S. v. Hollingsworth,* 191 N. C., 595.

On cross-examination, the witness Joseph Terry refused to answer as to the ownership of the gun and where he kept it, and whether he had one and where he had been at a certain time. The defendant cites no authority in his brief to sustain his position, but says: "These exceptions cover the proposition that the witness was permitted to testify to the facts favorable to the State, but the defendant was denied the right to cross-examine him to bring out evidence to impeach him, to contradict him, and to produce from him evidence favorable to the defendant. Surely this is reversible error."

I hardly see how the refusal of Terry to answer the question is prejudicial, if error. The refusal to answer would no doubt make a favorable impression in behalf of defendant. But, be that as it may, Terry was subpœnaed and bound to attend and give evidence. N. C. Code, 1935 (Michie), sec. 1807, is as follows: "Every witness, being summoned to appear in any of the said courts, in manner before directed, shall appear accordingly, and continue to attend from term to term until discharged. . . . Or, when summoned in a criminal prosecution, until discharged by the court, the prosecuting officer, or the party

at whose instance he was summoned; . . . or, if summoned in a criminal prosecution, shall forfeit and pay eighty dollars for the use of the State, or the party *summoning* him," etc.

In *S. v. Smith,* 86 N. C., 705, the indictment was jointly against one Green and defendant for an affray. *Ashe, J.,* at p. 707, has this to say: "It does not repeal or affect in any manner the provisions of that section by which a defendant in a criminal action is made competent and compellable to testify for or against a codefendant, provided his testimony does not criminate himself. The defendant Green, then, was a competent witness against his codefendant Smith, and Smith against Green."

In *S. v. Medley,* 178 N. C., 710, at p. 712, *Hoke, J.,* says: "Under section 1634, in all indictments, complaints, or other proceedings against persons charged with crimes, etc., the person so charged shall, at his own request and not otherwise, be a competent witness, etc. And in section 1635 it is provided that nothing in the preceding section (1634) shall render any person charged with a criminal offense competent or compellative to give evidence against himself, nor shall render any person compellative to answer any question tending to criminate himself, etc., etc. Construing these and other sections appertaining to the subject, *it has been held that on trial for crime any defendant is competent and compellable to testify for or against a codefendant, provided he is not compellable to give evidence that may tend to convict him, either of the crime charged or other offense against the criminal law. S. v. Smith,* 86 N. C., 705." (Italics mine.)

In the present case, the jury has convicted defendant of murder in the first degree of a most atrocious crime. He had taken the dead man's wife and had been indicted, convicted, and imprisoned for fornication and adultery with her. He made threats, time and time again, against the life of the deceased, who was shot from behind. A piece of his skull was found in the other room, blood was spattered upon the wall, bits of hair, flesh, and blood were on the ceiling. Defendant was found on the day after the night of the killing, lying on the bed in his home in his bloody clothes, bits of flesh and pieces of hair were on the apron of his overalls. His paramour, the deceased's wife, was with him on the bed.

On the whole record, I see no prejudicial or reversible error, and respectfully dissent from the main opinion.

T. W. KEITH v. S. ALEX GREGG, JR.; S. A. GREGG, SR., W. M. GREGG, AND J. M. GREGG, PARTNERS TRADING AND DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF GREGG BROS.

(Filed 16 December, 1936.)

1. **Appeal and Error B b—An appeal will be determined in accordance with the theory of trial in the lower court.**

Where defendant does not move for nonsuit in the court below, but the case is tried upon the theory of defendant's violation of implied warranty, defendant's contention on appeal that in no event could plaintiff recover will not be considered, but the appeal will be determined on the theory of trial in the lower court as to whether defendant is liable for breach of implied warranty.

2. **Evidence K d—Expert held competent to testify from examination of gun as to the cause of its bursting.**

Plaintiff instituted this action to recover for injuries sustained when a shell sold by defendant bursted plaintiff's gun. Defendant's expert witness was allowed to testify from his examination of the gun that an obstruction in the barrel caused the bursting of the gun, and that an overloaded shell could not have caused the damage. *Held:* The testimony was competent as expert testimony on the facts, the probative force of the testimony being for the jury, and objection thereto on the ground that the witness' testimony should have been based on hypothetical questions and that he could not testify directly as to the cause of the bursting of the gun, cannot be sustained.

3. **Appeal and Error J e—**

Plaintiff's objection to the testimony of defendant's witness cannot be sustained when plaintiff elicits the same evidence from the witness on cross-examination.

4. **Sales F b—**

The charge of the court that the seller of merchandise impliedly warrants the goods to be reasonably fit and proper for the purpose for which sold, and that the buyer could recover damages resulting from breach of such implied warranty, the burden of proof on the issue being on the buyer, *is held* without error.

STACY, C. J., concurs.

APPEAL by plaintiff from *Parker, J.,* and a jury, at March Term, 1936, of NEW HANOVER. No error.

This is a civil action brought by the plaintiff to recover of the defendants damages for an alleged breach of an implied warranty in the contract of sale of certain loaded gun shells—12-gauge scatter load shells, manufactured by the Remington Arms Company.

The issues submitted to the jury and their answers thereto are as follows:

"1. Was the plaintiff injured by a breach of an implied warranty that the gun shells sold by the defendants to the plaintiff on 24 December, 1934, were reasonably fit for the purpose for which the gun shells were sold and purchased, as alleged in the complaint? Answer: 'No.'

"2. What damages, if any, is the plaintiff entitled to recover? Answer: ...."

On the verdict the court below rendered judgment. The plaintiff made numerous exceptions and assignments of error and appealed to the Supreme Court. The material ones will be considered in the opinion.

E. K. Bryan and Rountree & Rountree for plaintiff.
Isaac C. Wright for defendants.

CLARKSON, J. This action was tried in the court below on the theory alleged in the complaint that the damage to plaintiff was caused by the breach of an implied warranty in the sale of certain 12-gauge scatter load gun shells, sold by defendants to plaintiffs. The defendants made no motion in the court below for judgment as in case of nonsuit. C. S., 567. *Jones v. Ins. Co., ante,* 559. This theory was recognized in the charge of the court below: "If you find from the evidence in the case, and by its greater weight, the burden of proof being upon the plaintiff Thomas W. Keith to so satisfy you, that the gun shells sold by the defendants to the plaintiff on 24 December, 1934, were not reasonably fit and proper for the purpose for which the gun shells were sold and purchased, and that by reason of any such unfitness or defect a gun shell purchased by the plaintiff from the defendants exploded in the left barrel of plaintiff's gun on Christmas day, 1934, when the plaintiff was hunting quail, blowing out part of the left barrel of plaintiff's gun, was the direct proximate cause of plaintiff's injuries, it will be your duty to answer the first issue in this case 'Yes'; if you fail to so find, it will be your duty to answer the first issue in this case 'No.'"

In *Thomason v. Ballard & Ballard Co.,* 208 N. C., 1 (4), *Connor, J.,* for the Court, says: "There are decisions in this jurisdiction to the effect that as between a vendor and his vendee there is an implied warranty that the personal property sold by the vendor and purchased by his vendee was fit for the use for which it was sold and purchased, and that the vendor is liable to his vendee for a breach of this warranty. *Swift v. Aydlett,* 192 N. C., 330, 135 S. E., 141; *Poovey v. Sugar Co.,* 191 N. C., 722, 133 S. E., 12; *Swift v. Etheridge,* 190 N. C., 162, 129 S. E., 453." *Tomlinson v. Morgan,* 166 N. C., 557; *Ward v. Sea Food Co.,* 171 N. C., 33; *Corum v. Tob. Co.,* 205 N. C., 213. "An appeal *ex necessitate* follows the theory of the trial." *In re Parker,* 209 N. C., 693

(697). The trial theory of the case is controlling on appeal. *Mercer v. Williams, ante,* 456 (458).

The matter of implied warranty is treated in the briefs of the litigants, and the case was tried on this theory in the court below. The defendants' contentions will not now be considered on this record—that in no event could plaintiff recover.

The plaintiff alleged that the damage to him was caused by a breach of an implied warranty in the sale of certain 12-gauge scatter load gun shells; that one, when shot by him, bursted the gun and caused serious injury to his left hand and thumb. The defendants in answer say: "It is admitted that the plaintiff's gun exploded, and that his left thumb and hand were hurt, and that he suffered pain and some expense for medical attention, etc. It is particularly denied that this occurred from any negligence on the part of the defendants, or any breach of warranty, and in connection therewith the defendants allege that they are informed, believe, and allege that either the plaintiff's gun was defective or that the plaintiff was negligent in getting some obstruction in said gun, and in shooting the same with an obstruction in it."

The facts: The plaintiff bought the shells on 24 December, 1934, from defendants, and on the next day (Christmas) he and his friend, W. P. Emerson, went hunting. He testified: "When we got up to where we were going to park (Currie) and Mr. Emerson took my gun out of this case here while I got my shells out and got my coat on, and I broke the gun open and put two of these shells in my gun. . . . We walked on behind the dogs, I should say 300 yards from where we got out of the car, and the dog pointed. . . . Mr. Emerson was to my left, and I was on the right. I shot the right barrel and it made a terrific explosion, it was unusually heavy, and I shot the left barrel and it blew this piece of shell through my hand and blew my arm away from the gun. . . . I cleaned it and the barrel was as bright as a new silver dollar. I examined it to see its condition and found no defects whatever. . . . Mr. Emerson was shooting a Remington automatic gun, 20-gauge, I think it is. I had seen his gun, and he told me he was shooting those Nitro Club scatter load shells, loaded with No. 8, manufactured and put up by the Remington Arms Company. . . . I was opening my box of shells and getting on my hunting coat and putting some shells in my hunting coat while Mr. Emerson was getting my gun out of the case." On recall, he testified: "Mr. Emerson got the gun out of the case while I was putting some shells in my pockets. After Mr. Emerson handed me the gun and before I put the shell in it, I opened, or unbreached it, held it up to the light and looked through it through force of habit to see that there was nothing in the barrel, and there was nothing in the barrel."

W. P. Emerson testified in corroboration of plaintiff, as to his going hunting with him and as to the explosion, and on cross-examination testified: "When we got up there he was putting this box of shells out and opening it and he broke the seal, and was putting the shells in his hunting coat pocket. I took his gun out of the case and was looking at it. I am under the impression that I broke it, but I cannot say definitely. . . . I don't remember when I loaded my gun. I did not drive up there with it loaded. After we stopped, while he was getting his coat on and putting shells in it, I was getting out the gun. I loaded mine some time about that time as we started off. I was shooting 20-gauge Remington Nitro scatter load shells."

The defendants offered in evidence W. T. Ashcroft, superintendent of the loading department of the Remington Arms Company, who testified, in detail, the precautions that are taken in loading these shells, that it was impossible to overload one, that if an overcharge of powder should get in a shell the machine would stop, etc.

W. A. King testified for defendants: "I am employed by the Parker Gun Company, in the manufacture of Parker guns. I have been with the Parker Gun Company over 46 years. I am supervisor of quality, responsible for the proper manufacture and quality of the guns manufactured. I first learned the mechanical trade, was tool maker, and took up die sinking, and was placed in charge of forging of all parts; then I was placed in charge of the machining of all parts; in 1912 I was made assistant superintendent, and in 1914 superintendent, and a few years after that works manager, in charge of the entire plant. In my work I have made guns and the different parts, and have tested them. I have made all parts that go into a gun, or had them made under my immediate supervision." The court below held King was an expert on shotguns. "At the request of Gregg Brothers, I came down here previous to this and made an inspection of this gun of Mr. Keith's, in the presence of Mr. Keith, and of me and of Judge Williams and Judge Bryan, in Mr. Wright's office. This is the same gun that I then inspected. Q. From your experience, state what you see there from your observation of that burst that indicates anything about the cause of the burst. Ans.: A distinct swell, or ring, running around the barrel (which the witness points out to the jury). There is evidence of foreign material. I have got a glass, and in looking at it I see it is brass. It is right here on the break; that is a difference in color; it is yellow. (Witness points it out to the jury.) Q. From the evidence of that you see there, and have just shown there on that gun, what, in your opinion, was the cause of the gun bursting? (Judge Bryan: Objection to the form of the question. Court: Sustained, but if you will ask what, in his opinion, caused it, I will permit it.) Q. Please state, in your opinion, what caused that gun

barrel to burst. A. The presence of a twenty-gauge loaded shell in the barrel, and a twelve-gauge loaded shell placed in back of it and fired and the twenty-gauge shell exploding at the same moment the twelve-gauge shell exploded. The brass burned in there is from the side wall of the twenty-gauge shell. Court: Mr. King, are you expressing your opinion from your examination of that, or from what you heard and also from your examination of that barrel? A. I am expressing my opinion from the examination of that barrel, and many tests I have made with barrels, and produced exactly similar bursts. I have a barrel of a twelve-gauge gun that I have tested in that manner, at the hotel. I didn't bring it to the court with me. I have made tests as to the overloaded shells with extra large quantities of powder or explosives. In my opinion an extra heavy loaded shell would not have caused a gun to burst at that point. It would burst in the breach, in the chamber. Right here, where the load would be chambered; it would tear the chamber up. It might extend forward and will not be confined to that point. It might tear the barrel so badly as to extend further forward than the exact length of the chamber. The result on the empty shell of such an explosion, made with high pressure shells, would tear the shell apart. Q. Please state if, in your opinion, an extra heavily loaded gun shell would cause a burst like that. A. No, sir. (Court: He has already testified to that.) A. The bulge I spoke of is always caused by an obstruction. When there is an obstruction in the gun barrel, the load being driven up to the obstruction is momentarily held up, which causes extra high pressure, and causes a ring, or bulge. The length of the chamber in that gun, for the explosion of the shell, is slightly over two and five-eighths inches long, and these Nitro Club scatter load shells are a fraction longer than this chamber, as they are two and three-quarters. The effect of using that kind of shell in a gun of a short chamber is that it tends toward raising the breach pressure somewhat." To the material portions of the testimony of the expert, King, above set forth, plaintiff excepted and assigned error. We think the testimony was competent. On cross-examination he testified, in part: "I say there is brass there, a very small particle, big as a pin head. I would not say how much larger. Q. You are sure that is not rust? A. I am sure it is brass. . . . Q. If the jury found this shell came out of there, you would say, in your expert opinion, this shell didn't blow this gun open, would you? A. If I knew that shell did come out of that chamber, and I knew that shell had been fired? Q. Yes? A. No, but I would say the twenty-gauge ahead of that shell did it. Q. You mean the difference in the calibre? A. A loaded twenty-gauge shell was in that barrel, and assuming that was the shell that was fired, when these shells were fired and exploded, the twenty-gauge caused the damage. Q. You mean there

were two shells in there? A. Yes, sir. Q. You base your expert opinion on *that*? A. Yes, sir." The same testimony appears in the record elicited by plaintiff. *Albritton v. Albritton, ante,* 111 (114). The testimony of the expert, King, was admissible in evidence, the probative force was for the jury to determine.

Shaw v. Handle Co., 188 N. C., 222, was tried by *Devin, J.,* when he was on the Superior Court bench, and he permitted a physician, an expert, to testify on personal knowledge, observation, etc., as to the cause of the death of two men found dead in a closed gasoline boat—that it was carbon monoxide gas. At p. 232, this Court said: "Dr. Garriss saw the boat, the condition of the two men, how they were lying, the windows down, and, by personal observation, had knowledge of the entire situation. With this personal knowledge and observation of all the facts, and Dr. Garriss' training and experience as a physician, we think this evidence competent. Its probative force was for the jury," citing *Flaherty v. Scranton Gas and Water Co.,* 30 Pa. Superior Court Rep., 446. "In that case (*Flaherty case, supra*), nor in the case at bar, was there an autopsy. The examination in each case was external and all the surrounding facts known to the physicians. They knew the facts, and on the known facts gave their opinion. Their education and training were for the purpose of enabling them to deal with and express their opinion as to what ills and the causes that constantly threaten and affect humanity. In *Davenport v. R. R.,* 148 N. C., 294, *Hoke, J.,* says: 'Even if it should be regarded as more strictly "opinion evidence," when it comes from a source of this kind, from one who has had personal observation of the facts, and from practical training and experience is qualified to give an opinion which is likely to aid the jury to a correct conclusion, such evidence is coming to be more and more received in trials before the jury. McKelvey speaks of it with approval as "expert testimony on the facts." McKelvey, p. 230.' *S. v. Morgan,* 95 N. C., 641; *Jones v. Warehouse Co.,* 137 N. C., 337; *Jones v. Warehouse Co.,* 138 N. C., 546; *Lynch v. Mfg. Co.,* 167 N. C., 98; *Ferebee v. R. R.,* 167 N. C., 290. . . . The evidence in *Summerlin v. R. R.,* 133 N. C., p. 551, was excluded in the lower court, and sustained, 'upon the ground that the witness was called upon to state a fact of which he had no personal or competent knowledge, and not merely the opinion of an expert. The opinion of the witness should be based upon facts admitted or found, or upon his personal knowledge, and not upon the assumption of the fact. The question should therefore be hypothetical, or rather supposititious, in form, following the precedents as settled in our decisions.' *Mule Co. v. R. R.,* 160 N. C., 252; *Hill v. R. R.,* 186 N. C., 475." *S. v. Hightower,* 187 N. C., 300 (307); *S. v. Fox,* 197 N. C., 478 (486); *Dempster v. Fite,* 203 N. C., 697 (706-7); *Green v. Casualty Co.,* 203 N. C., 767

(772); *S. v. Atlantic Ice & Coal Co., ante,* 742. From the view we take of this case, we see no error in the charge of the court below.

The facts and circumstances on which the expert based his opinion were practically uncontroverted. Perhaps Emerson's testimony indirectly corroborated the expert's opinion. The plaintiff testified there was nothing in the barrel when he put the shell in, yet his companion, Emerson, who was shooting a 20-gauge and plaintiff a 12-gauge shell, testified that he took plaintiff's gun out of the case and was looking at it and was under the impression that he broke it, but could not say definitely. He never said that he did not put the 20-gauge shell in the plaintiff's gun. It may be that he unthoughtedly put the 20-gauge shell in it. This was a legitimate circumstance for the jury to consider. This was a fact within the witness' knowledge.

For the reasons given, we find

No error.

STACY, C. J., concurs.

ESTELLE KIRBY v. JULES CHAIN STORES CORPORATION ET AL.

(Filed 16 December, 1936.)

1. **Trespass A e—Fright caused by wrongful act is actionable when it results in physical injury, although act does not amount to forcible trespass.**

   The evidence favorable to plaintiff tended to show that defendant's bill collector, in attempting to collect a past-due account from plaintiff, sat in his car at the curb opposite plaintiff's home and shouted abusive language at plaintiff, and threatened to get the sheriff to arrest plaintiff; that plaintiff was far advanced in pregnancy, which fact was known to defendant's agent, and that the fright caused by the collector's language and threats resulted in the premature stillbirth of plaintiff's child. *Held:* Although fright alone is not actionable, when fright directly causes physical injury and arises out of a wrongful act of defendant, it is sufficient to constitute a cause of action for trespass to the person, which lies for physical injury to the person either negligently or willfully inflicted, and defendant's demurrer to the complaint alleging facts supported by plaintiff's evidence was properly overruled.

2. **Appeal and Error J a—**

   The verdict of the jury upon conflicting evidence is conclusive on appeal.

APPEAL by defendants from *Shaw, Emergency Judge,* at March Special Term, 1936, of MECKLENBURG.

Civil action for willful trespass to the person.

Plaintiff purchased a dress and a hat from the corporate defendant in the summer of 1933, to be paid for on the installment plan. The account originally amounted to $13.98 or $14.98, but had been reduced by some payments.

On 5 July, 1934, S. M. Russell, collecting agent of the corporate defendant, went to the home of the plaintiff, who was living with her parents at the time, and asked if she had anything to pay on her account. Plaintiff replied that she did not, as she was then not able to work, being in her seventh month of pregnancy, but that she would pay as soon as she could. Russell, without getting out of his automobile, which was about fifteen feet from the plaintiff, is alleged to have retorted: "By G——, you are like all the rest of the damn deadbeats. You wouldn't pay when you could. . . . If you are so damn low you won't pay, I guess when I get the sheriff and bring him down here you will pay then."

Plaintiff testifies: "He said he was going right then and send the sheriff after me, and scared me to death. He said, By G——, he was going to bring the sheriff down there and arrest me, said guess I'd pay then. . . . He called me a deadbeat. . . . He repeated it three or four times, and, as he drove off, that is what he said. . . . He didn't get out of the car, he just hollered at me."

About two weeks prior to this, plaintiff's father had ordered the defendant Russell, who was then trying to collect on the account, to leave the premises because of plaintiff's condition, and Russell's profanity and apparent anger. On the occasion in question, the plaintiff, her mother, and sister were the only persons in the house. "There were no men folks at home."

Continuing, plaintiff says: "Then I took sick in about two hours after he left, real sick. . . . I had been feeling good up to that time. . . . From that time on, I was in pain, and on the following Wednesday night my child was prematurely born. It was dead."

Dr. G. W. Black testifies that in his opinion the fright occasioned by the conduct of the defendant Russell could have produced the premature birth of plaintiff's child.

There was denial of the plaintiff's testimony by the defendant Russell; and Dr. Nance, who attended the plaintiff at the birth of her child on 12 July, 1934, testifies: "I have an opinion satisfactory to myself. . . . The baby appeared to be fully developed. . . . Birth apparently not premature. . . . It was a breach presentation. . . . Death due to contraction of cervix around baby's neck. . . . Nothing to indicate a miscarriage."

The jury answered the issue of liability in favor of the plaintiff, and assessed her damages at $1,000. From judgment thereon, the defendants appeal, assigning errors.

Carswell & Ervin for plaintiff, appellee.
Tillett, Tillett & Kennedy and John A. Kleemeier, Jr., for defendants, appellants.

STACY, C. J., after stating the case: At the outstart of the argument in this Court, the defendants interposed a demurrer to the complaint on the ground that it does not state facts sufficient to constitute a cause of action. This must be overruled. The case is controlled by the principles announced in *Freeman v. Acceptance Corporation*, 205 N. C., 257, 171 N. C., 63; *Beasley v. Byrum*, 163 N. C., 3, 79 S. E., 270; *May v. Tel. Co.*, 157 N. C., 416, 72 S. E., 1057; *Arthur v. Henry*, *ibid.*, 438, 73 S. E., 211; *Kimberly v. Howland*, 143 N. C., 398, 55 S. E., 778; *Watkins v. Mfg. Co.*, 131 N. C., 536, 42 S. E., 983, rather than by the decision in *Anthony v. Protective Union*, 206 N. C., 7, 173 S. E., 6, or the holding in *Kaylor v. Sain*, 207 N. C., 312, 176 S. E., 560.

The gravamen of plaintiff's cause of action is trespass to the person. *Duncan v. Stalcup*, 18 N. C., 440; 63 C. J., 891. This may result from an injury either willfully or negligently inflicted. *May v. Tel. Co.*, *supra.*

The leading case on the subject is *Hill v. Kimball*, 76 Tex., 210, 13 S. W., 59, 7 L. R. A., 619, where the petition was held to be good as against a demurrer, which contained averments to the effect that plaintiffs were husband and wife, in possession of a dwelling house as tenants of defendant, that the *feme* plaintiff was well advanced in pregnancy, which fact was known to the defendant, who also knew the probable effects upon *feme* plaintiff of any undue excitement, that defendant came to the premises and in the immediate presence of *feme* plaintiff assaulted two Negroes in a boisterous and violent manner, which assault was accompanied with profane language and resulted in drawing blood, and that, as a consequence, *feme* plaintiff was greatly frightened, which brought on pains of labor, and eventually produced a miscarriage, and otherwise seriously impaired her health.

In holding that the plaintiffs could recover, the Court said: "That a physical personal injury may be produced through a strong emotion of the mind there can be no doubt. The fact that it is more difficult to produce such an injury through the operation of the mind than by direct physical means affords no sufficient ground for refusing compensation, in an action at law, when the injury is intentionally or negligently inflicted. It may be more difficult to prove the connection between the alleged cause and the injury, but if it be proved, and the injury be the proximate result of the cause, we cannot say that a recovery should not be had. Probably an action will not lie when there is no injury except the suffering of the fright itself, but such is not the present case. Here,

according to the allegations in the petition, the defendant has produced a bodily injury by means of that emotion, and it is for that injury that the recovery is sought."

Likewise, in *Engle v. Simmons,* 148 Ala., 92, 41 So., 1023, which was an action "for an injury to the plaintiff," it was held (as stated in the second headnote): "A man entered the dwelling house occupied by a married woman, far advanced in pregnancy, and after being informed that the husband was absent, and after being requested to leave the house, he refused to do so, took an inventory of the household effects, and made threats in reference as to what he would do in reference to a collection of a debt against the husband. The woman was thrown in a nervous excitement, and labor pains, resulting in the premature birth of a child, were brought on. Held, the person entering the house was liable for the bodily pain the woman suffered, though he inflicted no physical violence."

In commenting on the fact that physical violence to the person was not necessary to make out the case, the Court said: "The plaintiff here was in her home, and had a right to the peaceful and undisturbed enjoyment of the same, and any unlawful entry or invasion thereof, which produced physical injury to her, whether by direct personal violence or through nervous excitement the proximate result of the wrongful acts of the defendant, was a wrong for which she is entitled to recover."

Again, in *Purcell v. R. R.,* 48 Minn., 134, 16 L. R. A., 203, the plaintiff, a pregnant woman, was frightened by the negligent conduct of the defendant in running its cars, miscarried, and suffered permanent injury: Held, that a cause of action would lie. Compare *Nelson v. Crawford,* 122 Mich., 466, 81 N. W., 335, 80 Am. St. Rep., 577.

The doctrine of *Hill v. Kimball, supra,* has not been universally followed. *Nelson v. Crawford, supra;* 17 C. J., 834. The rationale of the North Carolina decisions, however, places this State in line with it. In addition to the cases cited above, see *Blow v. Joyner,* 156 N. C., 140, 72 S. E., 319; *Brame v. Clark,* 148 N. C., 364, 62 S. E., 418; *Stewart v. Lbr. Co.,* 146 N. C., 47, 59 S. E., 545; *Hatchell v. Kimbrough,* 49 N. C., 163; *McClees v. Sikes,* 46 N. C., 310; *Loubz v. Hafner,* 12 N. C., 185; *S. v. Hinson,* 83 N. C., 640; *S. v. Tolever,* 27 N. C., 452. The authorities are assembled and digested in annotations, 11 A. L. R., 1119, and 32 A. L. R., 921.

Animadverting on the situation and distinguishing the cases in *Bouillon v. Gas Light Co.,* 148 Mo. App., 462, 129 S. W., 401, *Nortoni, J.,* delivering the opinion of the Court, said: "There are cases which go to the effect that before plaintiff may recover as for a miscarriage caused by fright it must appear the defendant was aware of her condition and notwithstanding such knowledge occasioned the fright by entering into

an altercation in her presence. These authorities proceed as though no obligation rests upon defendant to respond except it appear he breached the obligation to exercise ordinary care. That is to say, they proceed as though no damages may be recovered unless it appear that defendant was in a position to anticipate the particular result as a probable sequence of the fright. See *Phillips v. Dickerson,* 85 Ill., 11; *Reed v. Ford* (Ky.), 112 S. W., 600; *Brownback v. Frailey,* 78 Ill. App., 262; 1 Cooley on Torts (3 Ed.), 94, 95, 96, 97, 98. This doctrine is no doubt correct enough with respect to those cases where the injury is inflicted under circumstances apart from a trespass or other legal wrong against the person or possessions of the plaintiff. But it seems the rule of ordinary care should find no application to a case where it appears the fright is occasioned as a result of a trespass against the person of the plaintiff, such as an assault on her, as in *Barbee v. Reese,* 60 Miss., 906; *Mann Boudoir Car Co. v. Dupre,* 54 Fed., 646, 21 L. R. A., 289; *Hickey v. Welch,* 91 Mo. App., 4; nor where the fright is the result of a trespass against the home or possession of the plaintiff and engaging in an encounter with a third party therein, as in *Watson v. Dilts,* 116 Ia., 249; *Lesch v. Great Northern Ry. Co.,* 93 Minn., 435; *Mann Boudoir Car Co. v. Dupre,* 54 Fed., 646, 21 L. R. A., 289. Indeed, it is said in some cases where it appears there is a legal wrong against the right of the plaintiff, such as negligence, a recovery may be had for physical injuries resulting from fright even though the sick or enfeebled condition of plaintiff was wholly unknown to the wrongdoer. (*Purcell v. St. Paul City Ry. Co.,* 48 Minn., 134; *Sanderson v. Northern Pac. Ry. Co.,* 88 Minn., 162; 1 Cooley on Torts [3 Ed.], 97.)"

It is true, the basis of the action in most of the cases has been forcible trespass, and it is contended that in the case at bar no forcible trespass has been shown, hence no liability exists. Without conceding the correctness of the syllogism as applied to the instant case, it is observed that much of the confusion on the subject seems to have come from worshipping at the shrine of words and formulas, rather than applying correct principles to the facts in hand. *Gulf, etc., Ry. Co. v. Hayter,* 93 Texas, 239, 77 Am. St. Rep., 856, and note. It is no doubt correct to say that fright alone is not actionable, *Arthur v. Henry, supra,* but it is faulty pathology to assume that nervous disorders of serious proportions may not flow from fear or fright. *Hickey v. Welch,* 91 Mo. App., 4; 17 C. J., 838. Fear long continued wears away one's reserve.

"As a general rule, damages for mere fright are not recoverable; but they may be recovered where there is some physical injury attending the cause of the fright, or, in the absence of physical injury, where the fright is of such character as to produce some physical or mental impair-

ment directly and naturally resulting from the wrongful act"—*Sutton, J.*, in *Candler v. Smith,* 50 Ga. App., 667, 179 S. E., 395.

If it be actionable willfully or negligently to frighten a team by blowing a whistle, *Stewart v. Lumber Co., supra,* or by beating a drum, *Loubz v. Hafner, supra,* thereby causing a run-away and consequent damage, it is not perceived upon what logical basis of distinction the present action can be dismissed as in case of nonsuit. *Arthur v. Henry, supra.*

While it would seem the jury might well have answered the issues in favor of the defendant, especially in view of Dr. Nance's testimony, still there is evidence to the contrary, and the matter was for the twelve.

No reversible error having been made to appear, the verdict and judgment will be upheld.

No error.

A. J. BELL v. DENNY ROLL & PANEL COMPANY AND CITY OF HIGH POINT.

(Filed 16 December, 1936.)

Jury A d: Trial C a—Court may allow counsel, in selecting jury, to ask jurors if any of them are connected with an insurance company.

While evidence that defendant carries indemnity insurance is incompetent, the trial court has the discretionary power to allow plaintiff, in selecting the jury, to ask the jurors, in good faith, if any of them are agents of any insurance company or bonding company, it being the duty of the trial court to prevent prejudice to either party.

APPEAL by defendant Denny Roll & Panel Company from *Rousseau, J.*, at May Term, 1936, of GUILFORD. No error.

Plaintiff instituted his action for damages for personal injury, alleged to have resulted from striking his foot against a nail in some crating which had been thrown out on the street in front of the place of business of the defendant Denny Roll & Panel Company in the city of High Point.

Plaintiff testified that defendant had obstructed the sidewalk by piles of crating accumulating from unpacking veneering, and that these piles extended into the street; that in order to pass he had to step out in the street, and in doing so stepped on a nail protruding from a board; that the nail was obscured by snow.

Nonsuit was entered as to the city of High Point. From judgment on the verdict in favor of plaintiff, defendant Denny Roll & Panel Company appealed.

Walser & Wright for plaintiff, appellee.
Dalton, Turner & Dickson for defendant, appellant.

PER CURIAM. The motion for judgment of nonsuit was properly denied. Appellant complains that the following question propounded by plaintiff's counsel while selecting the jury was prejudicial: "Is any member of the jury an agent of any insurance company doing a bonding business?" The court found that the question was asked in good faith. The record states: "To this finding the defendant excepted for that there was no basis in fact for the finding." There was no motion for a mistrial at the time. The counsel's question to the jury was less pointed than that in *Starr v. Oil Co.,* 165 N. C., 587. While evidence that a defendant carried indemnity insurance is incompetent (*Luttrell v. Hardin,* 193 N. C., 266), the propriety of a question propounded in good faith, whether any of the prospective jurors is engaged in the insurance business, ordinarily, must be left to the sound discretion of the trial judge to prevent prejudice to either party. *Goss v. Williams,* 196 N. C., 213; *Fulcher v. Lumber Co.,* 191 N. C., 408; *Scott v. Bryan, ante,* 478.

An examination of the other exceptions which appellant noted and brought forward in its appeal fails to show any error warranting us in disturbing the result.

No error.

MARGARET RUSHING BERWER, AND MARGARET RUSHING BERWER, GUARDIAN OF WALTER F. RUSHING AND WILLIAM A. RUSHING, MINORS, v. THE UNION CENTRAL LIFE INSURANCE COMPANY.

(Filed 16 December, 1936.)

Appeal and Error C e—Defect in affidavit for appeal in forma pauperis may not be cured by supplemental affidavit filed after five-day period.

Where the jurisdictional affidavit for leave to appeal *in forma pauperis* fails to aver that appellant is advised by counsel learned in the law that there is error of law in the judgment, C. S., 649, the affidavit is fatally defective and the appeal must be dismissed, and the defect may not be cured by an additional affidavit filed after the expiration of the five days prescribed by the statute, or one filed after the date for docketing the appeal.

APPEAL by the plaintiffs from *Barnhill, J.,* at September Term, 1936, of COLUMBUS.

Civil action to correct boundary in deed and to recover for rents lost by reason of error therein.

Robert W. Davis and S. J. Bennett for plaintiffs, appellants.
D. L. Carlton and Powell & Lewis for defendant, appellee.

PER CURIAM. The affidavit filed in the appeal *in forma pauperis* is defective, in that it does not contain the averment required by C. S., 649, that appellants are "advised by counsel learned in the law that there is error in matter of law in the decision of the Superior Court in said action." This is a jurisdictional requirement and for that reason the appeal must be dismissed. *Hanna v. Timberlake,* 203 N. C., 556. See, also, an applicable discussion of this subject in *Powell v. Moore,* 204 N. C., 654.

On 16 November, 1936, the appellants made an additional affidavit containing the averment omitted from the original affidavit and on the day following obtained an additional order from the trial judge allowing them to appeal *in forma pauperis.* This did not cure the omission, however, for the reason that the additional affidavit was not made within the five days prescribed by C. S., 649, and for the further reason that said affidavit and order based thereon were not filed in this Court until after the date for docketing the appeal here, 10 November, 1936.

Appeal dismissed.

BERTHA SMITH, ADMINISTRATRIX OF CLARENCE SMITH, DECEASED, v. J. CARL SINK AND WINSTON-SALEM SOUTHBOUND RAILWAY COMPANY.

(Filed 16 December, 1936.)

1. **Negligence B d: Railroads D d—Complaint held to allege joint negligence of driver and railroad company for injury on railroad overpass.**

   The complaint alleged that a piece of timber from a bridge over the corporate defendant's tracks struck and killed intestate when the car in which he was riding as a guest was driven into the side of the bridge, that the driver of the car was intoxicated and was driving at an excessive speed, and that the bridge was allowed to remain with broken guard rails projecting in a manner hazardous to the traveling public, and that the corporate defendant had prior knowledge of its condition, and that intestate's death was proximately caused by the concurrent negligence of the driver and the railroad company. *Held:* The complaint states a cause of action against defendants as joint tort-feasors, entitling plaintiff to maintain an action against either or both, and the corporate defendant's demurrer on the ground that it appeared from the facts alleged that the negligence of the driver of the car was the sole proximate cause of the injury was properly overruled.

2. **Pleadings D e—**

   Upon demurrer, the complaint must be construed in the light most favorable to the plaintiff.

APPEAL by the defendant Winston-Salem Southbound Railway Company from *Rousseau, J.*, at June Term, 1936, of DAVIDSON. Affirmed.

T. S. Wall, Jr., and P. V. Critcher for plaintiff, appellee.
Craige & Craige and Phillips & Bower for defendant, appellant.

PER CURIAM. This is an appeal by the corporate defendant from judgment overruling its demurrer grounded upon the contention that the complaint does not state facts sufficient to constitute a cause of action against it, since it appears from the complaint that the negligence of the defendant Sink was the sole proximate cause of the death of the plaintiff's intestate.

The complaint alleges that on 12 January, 1936, the plaintiff's intestate met his death while riding as a guest in an automobile owned and driven by the defendant Sink; that the automobile was driven in a negligent manner in that it was driven at an excessive rate of speed, and without keeping a proper lookout, and while the driver was intoxicated, and that as a direct and proximate result of such negligence the automobile was driven into the side rail at the entrance of a bridge over the corporate defendant's tracks, causing a piece of timber from the bridge to enter the moving automobile and strike the intestate with great force, resulting in his death.

The complaint, after alleging the duty of the corporate defendant to properly construct and maintain the bridge on which the intestate received his mortal wound, further alleges that the corporate defendant was negligent, *inter alia:*

"(i) In that the defendant Winston-Salem Southbound Railway Company, carelessly and negligently, through its agents and employees, failed in its duty to properly repair the north side of the south end of the railroad bridge across said right of way and cut after that part of the bridge had been destroyed or broken off.

"(j) In that the defendant Winston-Salem Southbound Railway Company, through its agents and employees, left the broken guard rails of said bridge projecting or protruding so that the same was dangerous and hazardous and a menace to the public traveling across said bridge.

"(k) In that the defendant Winston-Salem Southbound Railway Company, through its agents and employees, used defective material in the repair of the north side of the south end of said bridge across said cut and allowed them to remain in that condition to its knowledge prior to the time of the injuries hereinbefore set out."

The plaintiff further alleges that the death of her intestate was proximately caused by the joint and concurrent negligence of the defendants.

Where an injury to a third person is proximately caused by the negligence of two persons, to whatever degree each may have contributed to the result, the negligence of the one may not exonerate the other, each being a joint tort-feasor, and the person so injured may maintain his action for damages against either one or both. *White v. Realty Co.*, 182 N. C., 536.

Construing the allegations of the complaint in the light most favorable to the plaintiff, as we must do on demurrer, we are of the opinion that his Honor was correct in overruling the demurrer, and that the judgment below should be affirmed, and it is so ordered.

Affirmed.

HENRY F. AUSTIN AND WIFE, EMMA AUSTIN, v. JAMES McCOLLUM, HOYLE McCOLLUM, HOWARD McCOLLUM, FRANK McCOLLUM, AND DANIEL McCOLLUM, EXECUTORS OF JOHN A. McCOLLUM, AND AS RESIDUARY DEVISEES OF JOHN A. McCOLLUM.

(Filed 16 December, 1936.)

Frauds, Statute of, E b—Deed duly executed and found among valuable papers of grantor held sufficient memorandum of contract to convey.

A deed duly executed and acknowledged and found among the valuable papers of the grantor after his death is a sufficient writing within the meaning of the statute of frauds of a contract of grantor to convey the lands to the grantees in consideration of grantees' taking care of grantor for the remainder of his life. C. S., 988.

APPEAL by the defendants from *Rousseau, J.*, at August Term, 1936, of UNION. Affirmed.

This is an action for the specific performance of an alleged contract to convey land. The plaintiffs allege that John A. McCollum, prior to his death, contracted to convey to them a certain tract of land known as the Fincher Place, if they would come and live with him and do his housekeeping and keep up his farm and take care of him until his death, and that they performed their part of the contract; and that John A. McCollum died on 30 October, 1934, and that while a conveyance of the land has not been delivered to them, such conveyance was prepared and signed by John A. McCollum during his lifetime and was found among his valuable papers after his death.

From judgment on verdict in favor of the plaintiffs the defendants appealed, assigning errors.

W. B. Love and A. M. Stack for plaintiffs, appellees.
Vann & Milliken for defendants, appellants.

PER CURIAM. The only exceptive assignments of error discussed in the appellants' brief are those that question the sufficiency of the evidence as to a written contract to convey on the part of the defendants' testator within the effect and meaning of the statute of frauds. C. S., 988. The pertinent facts in evidence tended to show that on 23 November, 1931, John A. McCollum had prepared by a justice of the peace a deed to the plaintiffs, reciting "that said party of the first part, in consideration of ten dollars and other valuable considerations to him paid by the parties of the second part, the receipt of which is hereby acknowledged, has bargained and sold" to the parties of the second part the *locus in quo,* and signed and acknowledged the same, stating at the time "that he was going to keep it (the deed) as long as he lived, and was going to give it to Mr. Austin and Mrs. Austin for taking care of him," and that said deed was found among the valuable papers of the deceased after his death. On these facts, the written deed describing the property, formally prepared at the behest of the defendants' testator, and held for delivery to the plaintiffs upon the completion of their contract to care for him as long as he lived, is a sufficient memorandum in writing within the intent and meaning of the statute of frauds, and the defendants' assignments of error must be overruled. *Harper v. Battle,* 180 N. C., 375.

"While the authorities elsewhere are conflicting, it is the rule in this jurisdiction that when one, who has agreed orally to sell land, prepares and signs a deed, which substantially expresses the bargain, and delivers the same in escrow, such writing is a sufficient memorandum to meet the requirements of our statute of frauds, and the contract may be considered and dealt with as a valid and binding agreement. Such was the holding in *Pope v. McPhail,* 173 N. C., 238, 91 S. E., 947, and *Vinson v. Pugh, ibid.,* 189, 91 S. E., 838; and the decisions in *Flowe v. Hartwick,* 167 N. C., 448, 83 S. E., 841, and *MaGee v. Blankenship,* 95 N. C., 563, are in recognition of the same principle." *Oxendine v. Stephenson,* 195 N. C., 238. While the deed in the instant case was not placed in the hands of a third person to be delivered upon the happening of a contingency or the performance of a condition, it was actually prepared and held by the grantor for the purpose of such delivery, and comes well within the principle adopted by this Court.

The judgment of the Superior Court is

Affirmed.

M. D. HAMME ET AL. v. J. G. JACKSON AND GASTONIA MUTUAL BUILDING AND LOAN ASSOCIATION.

(Filed 29 April, 1936.)

APPEAL by plaintiffs from *Hill, Special Judge,* and a jury, at December Civil Term, 1935, of GASTON. No error.

This is an action for injunctive relief, brought by plaintiffs against defendants J. G. Jackson, trustee of defendant Building and Loan, and the Gastonia Mutual Building and Loan Association, to restrain them from selling certain land in controversy. The plaintiffs filed complaint on 29 January, 1935. The defendants answered denying the material allegations of the complaint. Plaintiffs filed an amended complaint on 21 September, 1935. Defendants denied the material allegations of the amended complaint. J. L. Hamme was made a party to the action, with his wife, M. D. Hamme. The injunction was continued to the hearing.

The issues submitted to the jury indicate the controversy, and their answers thereto were as follows:

"1. In what amount, if any, as of 2 December, 1935, is due the defendants under the deed of trust referred to in the answer and recorded in Book 267, page 246, of the office of the register of deeds for Gaston County? Answer: '$2,298.27.'

"2. Are the plaintiffs and their predecessors in title in default with respect to the payment of the indebtedness referred to in the deed of trust? Answer: 'Yes.'"

The court below rendered judgment on the verdict. The plaintiffs made numerous exceptions and assignments of error and appealed to the Supreme Court. The material ones and necessary facts will be considered in the opinion.

J. L. Hamme for plaintiffs.
Cherry & Hollowell and J. W. Timberlake for defendants.

PER CURIAM. The first question involved, as stated by plaintiffs: "Was there error on the part of the lower court in instructing the jury as to the amount that their answer should be, in answer to the only issue submitted to the jury by the lower court?" We think not.

We have read the record and briefs with care, and on the record and all the evidence in the case we think the plaintiffs have no cause of action against the defendants, and the judgment of the court below is correct.

(1) On 1 December, 1930, L. L. McLean and wife executed to E. G. McLurd, trustee for Gastonia Mutual Building and Loan Association, a

deed in trust, duly recorded to secure a loan of $2,500. Note for $2,500 credit 2/13/1931 of $500. (2) On 26 September, 1932, there was an agreement entered into under seal between L. L. McLean, Thelma McLean, J. L. Hamme, M. D. Hamme, and E. G. McLurd, trustee. This agreement, in part, is as follows: "The parties of the first part further agree to give and do hereby give to the parties of the second part an option or privilege to buy said property at the expiration of said rental term for the sum of $3,000, provided said rental payments have been made regularly as agreed, and to accept in payment for same the sum of $30.00 per month to be paid on 30 shares of the capital stock of said Gastonia Mutual Building and Loan Association, including interest, on Series Special 10-32, which begins on 1 October, 1932, until the maturity of said stock shall have liquidated and paid the purchase price of $3,000. . . . It is understood and agreed by all parties that if within the 18 months period of this lease any default is made in the payment of the rental of $30.00 per month for a period of 30 days after the expiration of the month for which said payment was due, then this contract, in so far as it relates to a sale or an option for the sale of said property, shall be null and void and all payments made will be considered as rent and as liquidated damages for the use of said property, to be retained by said parties of the first part." (3) On 12 April, 1933, L. L. McLean and wife made a deed, duly recorded, to J. L. Hamme and wife, M. D. Hamme, the plaintiffs. This was a warranty deed "that they are seized of said premises and have right to convey in fee simple; that the same are free and clear from all encumbrances, and that they do hereby forever warrant and will forever defend the said title to the same against the claims of all persons whomsoever."

J. L. Hamme testified, in part, that he agreed to pay McLean $3,000 for the property over a period of 100 months. On 1 May, 1934, he found there was a judgment against the property. At the time he took the property under the option there was due the Building and Loan Association, on 13 February, 1931, $2,000, and on 22 December, 1935, there was due the Building and Loan Association a net balance of $2,298.27.

The plaintiffs contend that when they obtained the option agreement and deed to the property, there was a judgment against L. L. McLean and taxes, and the total outstanding liens amounted to $589.70. Before paying the amount of $3,000 they contracted to pay McLean less the lien due the Building and Loan Association, they could have kept back the surplus over what McLean owed the Building and Loan Association to pay the liens.

The plaintiffs entered into the possession of the house and lot and have continuously occupied the same since 1 October, 1932, or to the

date of 1 April, 1936, for a total period of 43 months, and are still occupying said premises. That during such 43 months and more, the plaintiffs have paid the total sum of $294.00, or an average monthly rent of less than $6.83 per month. Nothing has been paid or offered to be paid since 26 January, 1934. It appears that plaintiffs have been in default since the third month of their rental contract, and have never paid any property taxes levied on the property in question and have not expended anything for fire insurance premiums to protect said property.

The plaintiffs contend that E. G. McLurd (who is now dead) made certain fraudulent representations that there were no liens on the property. We do not think the charge of fraud is sufficiently pleaded. *Hawkins v. Carter,* 196 N. C., 538 (540). If the fraudulent allegations were sufficient, the evidence does not sustain same. The plaintiff J. L. Hamme testified, in part: "In answer to your question, 'You are not telling the jury that Mr. McLurd would make a false statement?' I would say, 'No, I'm not telling the jury that Mr. McLurd would make a false statement about anything.' "

The court below charged the jury, in part, as follows, which we think correct: "All evidence tends to show that plaintiffs are in default, and the court instructs you, if you believe the evidence and find the facts to be as testified to by the witnesses, your answer to that issue would be 'Yes.' (So, as to the first issue, if you believe the evidence and find the facts to be as all the evidence tends to show, it would be your duty to answer the first issue '$2,298.27'), and the second issue, if you believe and find the facts to be as the evidence tends to show, you will answer the second issue 'Yes,' in the affirmative."

The other matters complained of by plaintiffs, we think, were in the sound discretion of the court below, and we see no abuse of discretion. On the record we see no prejudicial or reversible error.

In the judgment of the court below, we find

No error.

D. O. PATRICK v. C. M. LAMM.

(Filed 29 April, 1936.)

APPEAL by plaintiff from *Harris, J.,* at January Term, 1936, of WASHINGTON. Affirmed.

Action for the recovery of personal property sold by plaintiff to defendant and upon which plaintiff claimed a lien. At the conclusion of plaintiff's evidence the court sustained a motion for judgment of nonsuit, and plaintiff appealed.

W. M. Darden and H. S. Ward for plaintiff.
Carl L. Bailey and Zeb Vance Norman for defendant.

PER CURIAM. An examination of the testimony of the plaintiff and that of the witnesses offered in his behalf fails to show evidence sufficient to be submitted to the jury that plaintiff by either written or oral agreement retained title to the property sold, or reserved or acquired a lien therein in any manner recognized by the law. Nor does the evidence sustain his allegation that the provision for retention of title was omitted from the written contract by mutual mistake or the mistake of draftsman. Defendant admits that he owes the balance on the purchase price of the personal property. Plaintiff replies that by reason of the insolvency of defendant that admission is worthless. We are unable to relieve the plaintiff of the consequences of a bad bargain.

Affirmed.

R. C. PETERSON v. E. B. McMANUS AND SHIVAR SPRINGS, INC.

(Filed 29 April, 1936.)

APPEAL by the defendants from *Shaw, Emergency Judge,* at Extra December Term, 1935, of MECKLENBURG. No error.

Carswell & Ervin for plaintiff, appellee.
John M. Robinson and Hunter M. Jones for defendants, appellants.

PER CURIAM. The plaintiff in his complaint alleges that he suffered damage by reason of personal injuries caused by the actionable negligence of the defendants. The defendants in their answer deny that they have been guilty of actionable negligence, and further plead the contributory negligence of the plaintiff in bar of any recovery. To the further answer of the defendants the plaintiff filed reply in which he denies any contributory negligence and alleges that the defendants had the last clear chance to avoid injuring him.

The evidence of the plaintiff tends to show that the plaintiff was sitting on a "swinging stage" while painting the outside of the windows on the mezzanine floor of the Charlotte Hotel, which open onto an alley; and that an automobile, owned by the corporate defendant and operated in its business by the individual defendant, was driven against ropes which were attached to and hung down from the "swinging stage," which

caused the stage to fall about 30 feet to the ground, thereby severely injuring the plaintiff.

The case was submitted to the jury upon the three issues of negligence, contributory negligence, and damage. It appears in the record that these issues were tendered by counsel for the defendants, who urged that the plaintiff's contentions as to the doctrine of the last clear chance could be presented thereunder.

At the close of the plaintiff's evidence, defendants moved for judgment as of nonsuit, which motion was denied. The defendants offered no evidence and renewed motion for judgment as of nonsuit. The refusal of the court to grant these motions constitutes the basis for exceptive assignments of error.

A perusal of the evidence clearly reveals that it was sufficient to carry the case to the jury.

We have examined the several exceptions to the rulings of the court upon the admission of evidence and conclude that they are without merit.

The charge was fair and impartial, and in substantial compliance with C. S., 564, and those portions thereof which are made the bases for exceptive assignments of error, when read contextually with the whole, are free from prejudicial error. If the defendants wished other or different contentions presented to the jury they should have called the court's attention thereto at the time, *S. v. Sinodis,* 189 N. C., 565; or if they desired special instructions upon any phase of the law involved, not given in the general charge, they should have filed written request therefore. *Harris v. Turner,* 179 N. C., 322 (325), and cases there cited.

No prejudicial errors appear, no new questions are presented, and no good purpose can be served by threshing over old straw.

No error.

LILLIAN B. GILL, WIDOW OF JAMES I. GILL, DECEASED, v. JOHN D. GILL, ADMINISTRATOR C. T. A. OF THE ESTATE OF JAMES I. GILL.

(Filed 29 April, 1936.)

APPEAL by defendant from *Williams, J.,* at June Term, 1935, of WAKE.

Bart M. Gatling for plaintiff.
B. C. Beckwith for defendant.

PER CURIAM. The plaintiff's petition for the widow's year's allowance under the statute, C. S., 4108, was allowed by the clerk, and upon appeal the clerk's judgment was approved and confirmed by the Superior Court. The plea of the statute of limitations, not having been interposed in apt time, was not available to the defendant.

Affirmed.

OLLIE MAE DUREN v. CITY OF CHARLOTTE.

(Filed 29 April, 1936.)

APPEAL by plaintiff from *Shaw, Emergency Judge,* at January Special Term, 1936, of MECKLENBURG.

Civil action to recover damages for alleged personal injury.

In 1934, the Civil Works Administration was filling in a ravine in the city of Charlotte, so that South Long Street could be extended across it and opened as a thoroughfare. There had been a small foot bridge across the branch for a number of years, not maintained or kept by the city, and used only by residents of the vicinity for their convenience. This was moved down the branch some distance while the construction work was going on, and on the night of 15 February, 1934, the plaintiff, in company with others, attempted to cross the ravine, fell and was injured.

From judgment of nonsuit entered at the close of plaintiff's evidence, she appeals, assigning error.

A. A. Tarlton for plaintiff.
Scarborough & Boyd for defendant.

PER CURIAM. Plaintiff's evidence fails to make out a case of actionable negligence against the city of Charlotte. *Walker v. Reidsville,* 96 N. C., 382, 2 S. E., 74. It is not perceived wherein the defendant omitted to discharge any duty which it owed to the plaintiff. She was not injured by reason of any defect in the street or sidewalk. *Haney v. Lincolnton,* 207 N. C., 282, 176 S. E., 573. The judgment of nonsuit is correct.

Affirmed.

ADELAIDE C. BROWN v. THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, MRS. JOHN LEONARD BROWN, MRS. GRACE BROWN SAUNDERS, AND MISS MAUDE BROWN.

(*Filed 29 April, 1936.*)

Appeal and Error J d—

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.

CLARKSON, J., not sitting.

APPEAL by defendants from *Daniels, J.*, at March Term, 1935, of WAKE. Affirmed.

This was an action instituted by plaintiff against the defendants to recover the proceeds of a certain life insurance policy written by the corporate defendant upon the life of Louis A. Brown, now deceased. The plaintiff's claim to the proceeds of said policy was based upon an allegation and contention that a purported assignment of the policy to Louis A. Brown, her husband, signed by her, was void for the reason that it carried with it a warranty and was not executed in conformity to section 2515 of the Consolidated Statutes. The defendants denied said allegation and contended that the assignment of the policy to Louis A. Brown was in all respects regular and valid.

From judgment for the plaintiff the defendants appealed to the Supreme Court.

Douglass & Douglass for plaintiff, appellee.

Hartsell & Hartsell for individual defendants, appellants.

S. Brown Shepherd and Wm. Vass Shepherd for the corporate defendant, appellant.

PER CURIAM. The Court being evenly divided in opinion, *Mr. Justice Clarkson* not sitting, the judgment of the Superior Court is affirmed and stands as the decision in this case, without becoming a precedent. *Hayes v. Hickory,* 208 N. C., 845, and cases there cited.

Affirmed.

CLARKSON, J., not sitting.

A. E. McLESTER AND WIFE, WRISSIE McLESTER, AND MRS. BETTY A. ALMOND, v. CHARLIE SMITH.

(Filed 20 May, 1936.)

APPEAL by defendant from *Finley, J.*, at September Term, 1935, of STANLY. No error.

The litigated question here was as to the title to a small strip of land, about one-fourth of an acre. The controversy arose by reason of a change in the channel of a creek which divided the lands of the plaintiffs from those of the defendant. By the deeds of both parties the adjoining lands were conveyed to the center of the stream. Plaintiffs allege that subsequent to the conveyances a sudden diversion of the waters of the creek was caused by the action of the highway force and by this defendant, resulting in the cutting off of a small portion of their land. This was denied by the defendant.

Upon issues submitted, verdict was rendered by the jury in favor of the plaintiffs. From judgment on the verdict defendant appealed.

Brown & Brown for plaintiffs.
R. L. Smith & Son for defendant.

PER CURIAM. The defendant excepted to the allowance of an amendment to the complaint and to the rulings of the court as to matters of evidence, and also to certain portions of the judge's charge. However, upon examination we find that none of these exceptions can be sustained. The case seems to have been properly submitted to the jury upon the issues raised by the pleadings. No new questions of law are presented.

No error.

K. CLYDE COUNCIL ET AL. v. R. P. FLOYD.

(Filed 20 May, 1936.)

APPEAL by defendant from *Williams, J.*, at November Term, 1935, of COLUMBUS.

Civil action, instituted 16 December, 1931, to recover on promissory note and to foreclose deed of trust given as security for loan. Judgment by default, for the want of answer or plea, entered 25 January, 1932,

foreclosure decreed and commissioner of sale appointed. Sale held 7 March, 1932, report filed same day, and sale confirmed 29 March, 1932.

On 29 September, 1933, the defendant herein instituted suit for usury, based upon the record in this case, and was nonsuited at the November Term, 1934, on the ground of estoppel and laches.

Thereafter, on 18 February, 1935, in preparation of renewing his usury claim and in an effort to remove the pleas in bar, the defendant entered "special appearance" (*Harrell v. Welstead,* 206 N. C., 817, 175 S. E., 283), and moved to set aside sale and judgments for alleged irregularities. Motion denied. Defendant appeals.

Lyon & Lyon for plaintiffs.
Bennett & McDonald for defendant.

PER CURIAM. On the facts found and embodied in the judgment denying motion to set aside sale and vacate original judgments, the defendant has no just ground to complain.

He sought to use the original record as basis for an action of usury, and not until he was frustrated in that action did he seek his present remedy. No error has been made to appear.

Affirmed.

C. W. RUSSELL, ADMINISTRATOR OF GATEWOOD RUSSELL, DECEASED, v. ERNEST RITCHIE AND GLENN RITCHIE.

(Filed 20 May, 1936.)

APPEAL by plaintiff from *McElroy, J.,* at October Term, 1935, of STANLY. Affirmed.

This is an action to recover damages for the death of plaintiff's intestate.

From judgment dismissing the action, the plaintiff appealed to the Supreme Court, assigning as error the allowance by the court of defendants' motion for judgment as of nonsuit at the close of the evidence for the plaintiff.

Morton & Smith for plaintiff.
Lee Smith and R. L. Smith for defendants.

PER CURIAM. In the absence of evidence at the trial of this action tending to show that the injuries which resulted in the death of plain-

tiff's intestate were caused by the negligence of the defendants as alleged in the complaint, there was no error in the allowance by the trial court of defendants' motion for judgment as of nonsuit, at the close of the evidence for the plaintiff.

The judgment is

Affirmed.

CHARLIE BURCHFIELD v. THE TRAVELERS INSURANCE COMPANY.

(Filed 15 June, 1936.)

Insurance F b—

In this action to recover disability benefits on a certificate issued to insured employee under a group policy, judgment for insured is affirmed under authority of *Dewease v. Ins. Co.*, 208 N. C., 732.

APPEAL by plaintiff from *Clement, J.*, at March Term, 1936, of ROCKINGHAM.

Civil action to recover on a certificate of group insurance identical in terms *mutatis mutandis* with the certificate sued upon in *Dewease v. Ins. Co.*, 208 N. C., 732, 182 S. E., 447.

Plaintiff left the employ of McAden Mills, 19 September, 1931. His premiums were continued by his daughter until January, 1933, when a new master policy was issued by defendant. Plaintiff's action is based upon the old policy, not on the new one. No further premiums were paid by plaintiff or his daughter after January, 1933.

On 10 March, 1934, plaintiff gave notice of claim to defendant Travelers Insurance Company, which notice was received 14 March. This action was instituted 3 October, 1934.

From judgment of nonsuit entered at the close of plaintiff's evidence, he appeals, assigning errors.

P. T. Stiers for plaintiff, appellant.
Sapp & Sapp for defendant, appellee.

PER CURIAM. The fact situation in the instant case is identical in principle with that appearing in the case of *Dewease v. Ins. Co.*, 208 N. C., 732, 182 S. E., 447. The cited case is a direct authority for the ruling here.

Affirmed.

INTERSTATE FOLDING BOX COMPANY v. CITY TRANSFER AND STORAGE COMPANY ET AL.

(Filed 15 June, 1936.)

APPEAL by defendant I. M. Lassiter from *Rousseau, J.,* at March Term, 1936, of GUILFORD.

Civil action to recover damages for breach of contract, it being alleged, and found by the jury, that the defendant City Transfer and Storage Company contracted and agreed with the plaintiff to store and keep insured certain paper and cardboard boxes, which plaintiff desired to have available for use in its business in High Point, and that said defendant in turn stored said boxes with the defendant I. M. Lassiter, trading as Tri-City Motor Express Company, under a like agreement, which was breached when plaintiff's property, on 24 August, 1934, while in the last-named defendant's warehouse, was destroyed by fire, the same not being insured.

The case was tried in the municipal court of the city of High Point, resulting in verdict and judgment for plaintiff, and on appeal to the Superior Court of Guilford County "on matters of law," the exceptions were overruled and the judgment of the municipal court was upheld.

Defendant I. M. Lassiter appeals, assigning errors.

R. T. Pickens for plaintiff, appellee.
Lovelace & Kirkman for defendant, appellant.

PER CURIAM. The controversy on trial narrowed itself principally to issues of fact, determinable alone by the jury. The case was heard on exceptions by the Superior Court of Guilford County and the judgment of the trial court was affirmed. The same exceptions are assigned as error here. No new question of law is presented. The rulings of the Superior Court are accordant with the authorities.

Affirmed.

GURNEY P. HOOD, COMMISSIONER OF BANKS, ET AL. v. E. D. ANDERSON ET AL.

(Filed 23 September, 1936.)

APPEAL by defendants from *Harris, J.,* at March Term, 1936, of EDGECOMBE.

Civil action to recover on two promissory notes.

Execution of notes admitted; also their nonpayment. Defendants allege, by way of set-off and counterclaim, damages for failure to make additional loans and to discount certain automobile purchasers' notes.

From directed verdict for plaintiffs and judgment thereon the defendants appeal, assigning errors.

Gilliam & Bond for plaintiffs, appellees.
George M. Fountain & Son for defendants, appellants.

PER CURIAM. The case is controlled by the decision in *Elks v. Ins. Co.*, 159 N. C., 619, 75 S. E., 808. The evidence offered by the defendants fails to establish contract for breach of which the plaintiffs can be held in damages.

No error.

MRS. O. G. McKELLER v. FLOYD MARTIN AND BLUE BIRD TAXIS, INC.

(Filed 23 September, 1936.)

APPEAL by the defendants from *McElroy, J.*, at April Term, 1936, of BUNCOMBE. Error.

This was an action to recover damages for personal injuries alleged to have been inflicted by the negligent operation of an automobile, and was tried upon the following issues:

"1. Was the plaintiff injured by the negligence of the defendants, as alleged in the complaint?

"2. What amount of damages, if any, is plaintiff entitled to recover of defendants?"

The first issue was answered "Yes" and the second "$500.00," and from judgment based on the verdict the defendants appealed, assigning errors.

Lee & Lee for plaintiff, appellee.
John C. Cheesborough for defendants, appellants.

PER CURIAM. The appellant assigns as error the following excerpt from his Honor's charge: "If you answer the (first) issue 'Yes,' you will proceed to the consideration of the second issue as to the damages sustained, if any, but if you fail to find by the greater weight of the evidence that the defendant was guilty of negligence, and that such negligence was the proximate cause of the plaintiff's injury, then you will answer the first issue 'Yes'; otherwise, you will answer it 'No.'" The error is obvious. His Honor used the word "Yes" where he should have

used the word "No," and "No" where he should have used "Yes." This error, evidently due to inadvertence, was one of the unavoidable casualties of the circuit, but, being material, it entitles the defendants to a new trial.

Error.

WILMA E. FERRELL v. METROPOLITAN LIFE INSURANCE COMPANY.

(Filed 23 September, 1936.)

Appeal and Error J d—

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.

DEVIN, J., not sitting.

APPEAL by defendant from *Small, J.*, at April Term, 1936, of CURRITUCK.

Civil action to recover on a $2,000 policy of life insurance.

Verdict and judgment for plaintiff, from which defendant appeals, assigning errors.

Chester Morris and John H. Hall for plaintiff, appellee.
Worth & Horner for defendant, appellant.

PER CURIAM. The case turns on whether the semiannual premium of $28.32, due 26 November, 1932, was paid by the insured. After plaintiff's husband's death on 5 February, 1933, she found among his papers the policy in suit, together with premium receipt for the November payment. It is the position of plaintiff that under "the law of the case," as declared on two former appeals, reported in 207 N. C., 51, and 208 N. C., 420, the issue was one for the jury. C. S., 567. The defendant, on the other hand, contends that under the evidence tending to show November premium payment was made by worthless check, which was later returned to the insured, a directed verdict denying liability should have been entered. *Penland v. Hospital,* 199 N. C., 314, 154 S. E., 406. The Court being equally divided in opinion, *Devin, J.*, not sitting, the judgment of the Superior Court is affirmed in accordance with the usual practice in such cases, and stands as the decision in the instant case without becoming a precedent. *Sessoms v. R. R.*, 208 N. C., 844, 182 S. E., 112.

No error.

DEVIN, J., not sitting.

FRED C. GOTT, JR., v. THE PRUDENTIAL INSURANCE COMPANY OF AMERICA.

(Filed 23 September, 1936.)

Appeal and Error J d—

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.

CLARKSON, J., not sitting.

APPEAL from *Phillips, J.*, at August Term, 1936, of BUNCOMBE. Affirmed.

This is an action to recover certain disability benefits alleged to have arisen from the contract of employment of the plaintiff by the defendant. The case was first heard in general county court, where the defendant's motion for judgment as of nonsuit was sustained, and then, upon plaintiff's appeal, was heard in the Superior Court, where the judgment of nonsuit was reversed. From the judgment of the Superior Court reversing the judgment of nonsuit in the general county court the defendant appealed to this Court, assigning error.

Don C. Young for plaintiff, appellee.

C. H. Gover, William T. Covington, Jr., and Hugh L. Lobdell for defendant, appellant.

PER CURIAM. The Court being equally divided in opinion, one of the members, *Mr. Justice Clarkson,* not sitting, the judgment of the Superior Court is affirmed and stands as the decision in this case, without becoming a precedent. *Nebel v. Nebel,* 201 N. C., 840, and cases there cited.

Affirmed.

CLARKSON, J., not sitting.

H. G. DOZIER v. H. D. BALLANCE.

(Filed 23 September, 1936.)

APPEAL by defendant from *Small, J.*, at April Term, 1936, of CURRITUCK. No error.

This was an action brought by plaintiff against defendant to recover $727.88, and interest, on a sealed note, dated 1/2/30, due 360 days after

date, less a credit of $100.00 paid on January 6, 1931. The defendant denied that there was a seal to the note when he signed it, pleaded the three-year statute of limitations, and also set up the defense of mistake on his part induced by fraud of plaintiff.

The issues submitted to the jury and their answers thereto were as follows:

"1. Was the word 'Seal' added to the note sued on after its execution? Ans.: 'No.'

"2. Is the plaintiff's cause of action barred by the three-year statute of limitations? Ans.: 'No.'

"3. Was the note sued on executed by the defendant through the mistake of the defendant induced by the fraud of the plaintiff? Ans.: 'No.'

"4. In what amount, if any, is the defendant indebted to the plaintiff?

Ans.: '$727.88
100.00
______
$627.88, with interest.' "

The defendant made certain exceptions as to the evidence and charge of the court below, assigned same as error, and appealed to the Supreme Court.

John H. Hall and Chester Morris for plaintiff.
M. B. Simpson for defendant.

PER CURIAM. We do not think any of the exceptions and assignments of error made by defendant can be sustained. The major contest was over whether the note when executed by defendant was not under seal, and therefore barred by the three-year statute of limitations. The testimony on this aspect was competent, but conflicting. Plaintiff testified it was and defendant to the contrary. The jury, the triers of the facts, decided with plaintiff, and this is binding on us. It was contended by defendant that the court below was in error in the charge on the defense of mistake of defendant induced by fraud of plaintiff and as to the burden of proof on this issue. However this may be, we think it immaterial on this record. From the record we see no sufficient evidence to be submitted to the jury on this defense of defendant.

In the judgment below there is

No error.

STATE v. WILLIAM A. IVEY.

(Filed 14 October, 1936.)

APPEAL by defendant from *Pless, J.*, at March Term, 1936, of HENDERSON.

Criminal prosecution, tried upon indictment charging the defendant, and two others, (1) with the larceny of a steer, of the value of $45.00, the property of one W. E. Redden, and (2) with feloniously receiving said steer, etc., knowing it to have been feloniously stolen or taken in violation of C. S., 4250.

Verdict: Guilty.

Judgment: 18 months on the roads.

Defendant appeals, assigning errors.

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

R. L. Whitmire for defendant.

PER CURIAM. On the hearing, the case narrowed itself principally to an issue of fact determinable alone by the jury. The record contains no exceptive assignment of error of sufficient merit to warrant a new trial. The verdict and judgment will be upheld.

No error.

S. B. ROSE v. ATLANTIC COAST LINE RAILROAD COMPANY
and
W. A. McDANIEL v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 14 October, 1936.)

Railroads D b—

One plaintiff was the driver and the other plaintiff a guest in an automobile that ran into a tank car standing across a grade crossing. ***Held:*** In plaintiffs' actions against the railroad company to recover the damages sustained, nonsuits were properly granted under authority of ***Goldstein v. R. R.***, 203 N. C., 166.

APPEAL by plaintiffs from *Parker, J.*, at January-February Term, 1936, of HALIFAX.

Civil actions to recover damages for personal injuries alleged to have been caused by the negligence of the defendant, consolidated and tried together, as both cases rest upon the same fact situation or arise out of the same crossing accident. *Fleming v. Holleman*, 190 N. C., 449, 130 S. E., 171.

Plaintiffs were returning from a fishing trip on the night of 20 July, 1934, in McDaniel's car, driven by Rose, when they ran into a Texaco oil tank car of defendant's freight train standing across the highway in the town of Hobgood, N. C., at about the hour of 10 p.m., and injured both of the plaintiffs. The night was dark and very foggy. The driver testified that he did not see the car across the road in front of him until he got within ten or fifteen feet of it, because his lights "went under the car." The automobile ran head-on into the side of the tank car. Plaintiffs were familiar with the road.

From a judgment of nonsuit entered at the close of all the evidence, the plaintiffs appeal, assigning errors.

E. B. Grant and George C. Green for plaintiffs, appellants.
Spruill & Spruill and Dunn & Johnson for defendant, appellee.
Thos. W. Davis of counsel for defendant.

PER CURIAM. The judgment of nonsuit must be affirmed on authority of *Goldstein v. R. R.*, 203 N. C., 166, 165 S. E., 337, and *Weston v. R. R.*, 194 N. C., 210, 139 S. E., 237. These cases are controlling upon the facts presently appearing of record.

The case of *Dickey v. R. R.*, 196 N. C., 726, 147 S. E., 15, cited and relied upon by plaintiffs, is distinguishable in that no town ordinance was being violated by the defendant at the time of the accident as was the situation in *Dickey's case, supra.*

The pertinent authorities are assembled in *Sessoms v. R. R.*, 208 N. C., 844, 182 S. E., 112.

Affirmed.

MRS. CLAUDIA HEWITT v. JOHN URICH
and
A. J. HEWITT v. JOHN URICH.

(Filed 14 October, 1936.)

APPEAL by plaintiffs from *Pless, J.*, at February Term, 1936, of McDOWELL. No error.

Separate actions were instituted by the plaintiffs for damages alleged to have been caused each of them by the negligence of the defendant in

the operation of an automobile in which they were riding as defendant's guests. There were allegations that the defendant drove at an excessive speed over pavement rendered slick by rain, causing the car to skid and overturn down an embankment. Two suits were, for convenience, consolidated for trial. The jury answered the issues of negligence in favor of the defendant, and from judgment on the verdict plaintiffs appealed.

W. R. Chambers for plaintiffs, appellants.
Winborne & Proctor for defendant, appellee.

PER CURIAM. There was no error in consolidating the two actions for trial. *Fleming v. Holleman,* 190 N. C., 449; *Ins. Co. v. R. R.,* 179 N. C., 255. Nor can the exceptions to the judge's charge be sustained. The instructions to the jury relative to the speed of the automobile were in accord with the decisions of this Court in *S. v. Webber, ante,* 137, and *S. v. Spencer,* 209 N. C., 827. The charge of the court as to the skidding of an automobile was free from error (*Springs v. Doll,* 197 N. C., 240; *Waller v. Hipp,* 208 N. C., 117), and the rule applicable to sudden emergencies was properly stated. *Ingle v. Cassady,* 208 N. C., 497; *Luttrell v. Hardin,* 193 N. C., 266.

Issues of fact were raised and these have been decided by the jury against the plaintiffs. In the trial we find

No error.

MINNIE GETTYS v. CLAY BLANTON ET AL.

(Filed 14 October, 1936.)

Appeal and Error F b—

An exception to the signing of the judgment limits the appeal to the sufficiency of the concessions and findings to support the judgment.

APPEAL by defendants from *Pless, J.,* at May Term, 1936, of RUTHERFORD.

Civil action in ejectment and to recover rents.

Demurrer originally interposed, but upon the hearing the parties seem to have agreed that the judge might determine the case on certain concessions and findings. This was done and resulted in judgment for plaintiff.

"Defendants except to the signing of the judgment," and appeal.

Quinn, Hamrick & Hamrick for plaintiff, appellee.
T. J. Moss for defendants, appellants.

PER CURIAM. The record in this case is not altogether clear, albeit the single exception "to the signing of the judgment," appearing on the record, limits the appeal to the sufficiency of the concessions and findings to support the judgment. *Blades v. Trust Co.*, 207 N. C., 771, 178 S. E., 565; *Wilson v. Charlotte*, 206 N. C., 856, 175 S. E., 306; *Mfg. Co. v. Lbr. Co.*, 178 N. C., 571, 101 S. E., 214.

In this view of the matter, we cannot say that error has been shown. Hence, the judgment will be

Affirmed.

HELEN DAVENPORT TAYLOR, BY HER NEXT FRIEND, MRS. R. M. DAVENPORT, v. J. A. TAYLOR ET AL.

(Filed 4 November, 1936.)

APPEAL by plaintiff from *Clement, J.*, at August Term, 1936, of MITCHELL.

Civil action for alienation of affections.

Plaintiff and C. P. Taylor were married 26 November, 1933, while they were students in high school. The marriage was not publicly known until February, 1934. In July, 1934, they separated. Plaintiff brings this action against her father-in-law and her mother-in-law jointly for alienation of her husband's affections.

From a judgment of nonsuit entered at the close of plaintiff's evidence, plaintiff appeals, assigning errors.

G. F. Washburn and W. C. Berry for plaintiff, appellant.
Charles Hutchins and McBee & McBee for defendants, appellees.

PER CURIAM. It would serve no useful purpose to detail the evidence in this case. Suffice it to say, it fails to establish liability under the principles announced in *Hankins v. Hankins*, 202 N. C., 358, 162 S. E., 766; *Townsend v. Holderby*, 197 N. C., 550, 149 S. E., 855; *Brown v. Brown*, 124 N. C., 19, 32 S. E., 320.

There was no error in dismissing the action as in case of nonsuit.

Affirmed.

DAVID CASPER v. BOB WALKER AND S. D. LOWE.

(Filed 4 November, 1936.)

APPEAL by plaintiff from *Oglesby, J.*, at March Term, 1936, of RANDOLPH. No error.

Action on a note and chattel mortgage for $120.40.

Defendant Lowe set up a counterclaim and alleged that upon a settlement of all items plaintiff would be due him $65.00.

On issues submitted to the jury there was verdict that defendant Lowe was indebted to plaintiff in the sum of $120.40, with interest from 9 April, 1932, and that the plaintiff was indebted to the defendant Lowe in the sum of $143.00 as of March 16, 1936.

From judgment for plaintiff for the small difference between said amounts, plaintiff appealed.

J. A. Spence for plaintiff.
J. V. Wilson for defendants.

PER CURIAM. The plaintiff principally complains that the amount awarded by the jury to the defendant Lowe on his counterclaim exceeded the amount alleged in his answer, but it appears from an examination of the pleading that this defendant alleged, in effect, that he was entitled to recover $65.00 over and above all items due plaintiff. The assignment of error on this score cannot be sustained.

The other exceptions are without substantial merit. The case presented questions of fact which have been determined by the jury, and in the trial, we find

No error.

WILLIAM PABODIE v. DISTRIBUTORS GROUP, INC.

(Filed 25 November, 1936.)

APPEAL by plaintiff from *Shaw, Emergency Judge,* at March Term, 1936, of MECKLENBURG.

Civil action for alleged breach of warranty in the sale of stock known as North American Trust Shares, purchased by plaintiff on 1 July, 1931.

The defendant denied liability, pleaded release and the statute of limitations. This action was instituted 16 April, 1935.

From a judgment of nonsuit entered at the close of plaintiff's evidence, he appeals, assigning errors.

Marvin L. Ritch for plaintiff, appellant.
Whitlock, Dockery & Shaw for defendant, appellee.

PER CURIAM. The plaintiff's evidence falls short of the required *prima facie* showing to carry the case to the jury. The judgment of nonsuit is correct.

Affirmed.

R. L. FALLS v. A. R. MOORE, N. J. PHILLIPS, S. C. DERRICK, S. L. SUGGS, W. A. McFARLAND, JAMES B. VOGLER, L. S. WIGGINS, H. F. ROBERTS, N. J. COVINGTON, R. P. COVINGTON, M. L. WATTS, MRS. D. B. OVERCASH, CARL A. ANDERSON, AND C. H. HUNTER.

(Filed 16 December, 1936.)

APPEAL by defendants from *Shaw, J.*, and a jury, at 20 April, 1936, Extra Civil Term of MECKLENBURG. No error.

This is an action brought by plaintiff against the defendants to recover for 26 weeks service rendered defendants, from 1 January, 1935, to 1 July, 1935, the sum of $650.00, less a credit of $111.10, leaving a balance of $538.90, and also for material defendants agreed to pay plaintiff for in the amount of $25.02.

The plaintiff alleged that this $650.00 was due him for services under section 11 of a contract between him and defendants, which is as follows: "From January 1, 1935, until and including June 30, 1935, the parties of the second part or such corporation shall pay to the party of the first part the sum of $25.00 per week for the services of the party of the first part, it being understood and agreed that during said period said party of the first part shall work exclusively in manufacturing said caskets or vaults."

The defendants denied the material allegations of the complaint and pleaded fraud, and set up a counterclaim for $900.00.

The issues submitted to the jury and their answers thereto were as follows:

"1. What amount, if any, are the defendants indebted to the plaintiff? Answer: '$564.12, plus interest from 7/1/35, until paid.'

"2. Was the contract described as 'Exhibit A' and attached to plaintiff's complaint procured from the defendants by false and fraudulent representations of the plaintiff, as alleged in the answer? Answer: 'No.'

"3. What amount, if any, is the plaintiff indebted to the defendants? Answer: 'Nothing.'"

The defendants made numerous exceptions and assignments of error, and appealed to the Supreme Court.

Chase Brenizer for plaintiff.
Stancill & Davis for defendants.

PER CURIAM. At the close of plaintiff's evidence and at the close of all the evidence, the defendants made motions in the court below for judgment as in case of nonsuit. C. S., 567. The court below overruled these motions, and in this we can see no error. The long contract, made in December, 1934, by the litigants, consisting of some 14 paragraphs, was not denied. In fact, the defendants in their further answer say: "That these defendants knew nothing of the value of said process or composition of matter which the plaintiff was supposed to have patented for the purpose of manufacturing permanent sealed air-tight waterproof burial casket or vault, but relied exclusively upon the fraudulent and false representations made by the plaintiff as to the merits of the said material. That relying on the said false and fraudulent representation made by the plaintiff as to the value of the said composition or material, these defendants entered, in good faith, and signed the alleged contract referred to in paragraph 3 of the first cause of action of plaintiff's complaint, known as 'Exhibit A.'"

The defendants further answered the complaint, and said: "That the said plaintiff, after wasting $900.00 of the defendants' money, thoroughly demonstrated that he was unable to manufacture or to make even one burial casket or vault. That the said materials were wholly unfit for the manufacture of said burial caskets and vaults. That the said burial caskets and vaults which the plaintiff attempted to make in a few months cracked, bursted, and melted down and were utterly worthless for any purpose."

There was evidence, *pro* and *con*, on the issues submitted. A burial casket was even brought into court by the defendants to show the worthlessness. Several witnesses for defendants testified, in effect: "That Falls (the plaintiff) represented that the caskets would be air-tight and waterproof and germ-proof, and would outlast anything on the market." On the contrary, plaintiff testified that the caskets were as represented. The matter of the patent was all gone into and considered by the jury, also the counterclaim of defendants.

The whole matter was one of fact, and on the evidence the jury could have decided either way. The charge of the court below contained some 14 pages. After a careful reading, we can see no error in it. In fact, the learned judge in the court below carefully charged the law applicable to the facts, charged what was fraud, properly placed the burden of proof, reviewed the evidence, gave the contentions carefully, and complied

with N. C. Code, 1935 (Michie), sec. 564. If defendants desired a more detailed charge, they should have requested same by proper prayers for instructions.

In the judgment of the court below we find

No error.

COMMERCIAL CREDIT COMPANY v. J. P. RAWLEY.

(Filed 16 December, 1936.)

APPEAL by defendant from *Shaw, Emergency Judge,* at September Term, 1936, of GUILFORD.

Civil action, tried upon the following issues:

"1. Is the plaintiff the owner and entitled to the possession of the automobile described in the complaint? Answer: 'Yes.'

"2. If so, what was the value of the automobile at the time it was taken by the defendant, as alleged in the complaint? Answer: '$777.40.'

"3. Is the defendant the purchaser of said automobile in controversy for value without notice of any equity in favor of the plaintiff? Answer: 'No.'"

Judgment on the verdict, from which the defendant appeals, assigning errors.

D. Newton Farnell, Jr., for plaintiff, appellee.
Dalton, Turner & Dickson for defendant, appellant.

PER CURIAM. A careful perusal of the record leaves us with the impression that the case is free from reversible error. At least, none has been made to appear.

The verdict and judgment will be upheld.

No error.

JOHN F. DEES, ADMINISTRATOR, v. HALL BALLARD ET AL.

(Filed 16 December, 1936.)

APPEAL by plaintiff from *Shaw, Emergency Judge,* at May Term, 1936, of RICHMOND.

Civil action to recover damages for death of plaintiff's intestate, a boy seven years of age, alleged to have been caused by the wrongful act, neglect, or default of the defendants.

On 3 July, 1934, an automobile in which plaintiff's intestate was riding collided with a car owned and operated at the time by Hall Ballard.

There was a verdict and judgment against the defendant Ballard for $650.00.

Plaintiff appeals from a judgment of nonsuit entered, at the close of all the evidence, in favor of the defendant John L. Everett, Jr.

William G. Pittman, Douglass & Douglass, and R. L. McMillan for plaintiff, appellant.

Jones & Jones for defendants, appellees.

PER CURIAM. It was alleged that Ballard was in the employ of the defendant Everett at the time of the collision, transporting "hands" to his threshing machine. The evidence fails to support this allegation. There was no error in dismissing the action as to the defendant Everett.

Affirmed.

A. L. CHAPMAN v. THE GREAT ATLANTIC & PACIFIC TEA COMPANY.

(Filed 16 December, 1936.)

APPEAL by plaintiff from *Rousseau, J.*, at May Term, 1936, of GUILFORD. Affirmed.

This is an action to recover damages for personal injuries which the plaintiff suffered when he was struck on the head by an awning which fell on him while he was standing on the sidewalk in front of defendant's store in the city of High Point, N. C.

The action was begun in the Superior Court of Guilford County on 3 January, 1936.

It is alleged in the complaint that plaintiff's injuries were caused by the negligence of the defendant, as specifically alleged therein.

This allegation is denied in the answer.

In further defense, and as a bar to plaintiff's recovery in this action, the defendant pleads a judgment of the municipal court of the city of High Point dismissing as of nonsuit an action begun in said court by the plaintiff against the defendant on the same cause of action as that alleged in the complaint in this action.

At the close of the evidence the court found that the cause of action alleged in the complaint in this action is substantially the same as that alleged in the complaint in the action instituted by the plaintiff against

the defendant in the municipal court of High Point; that the evidence at the trial of this action is substantially the same as that at the trial of the action instituted by the plaintiff against the defendant in the municipal court of High Point; that the action instituted by the plaintiff against the defendant in the municipal court of High Point, and tried in said court,.was dismissed by judgment as of nonsuit on 19 July, 1935, and that the plaintiff did not appeal from said judgment.

On these findings of fact, it was ordered, considered, and adjudged by the court that this action be and the same was dismissed.

The plaintiff excepted and appealed to the Supreme Court, assigning as errors the findings of fact and the judgment.

Silas B. Carey and Walser & Wright for plaintiff.
Dalton, Turner & Dickson and R. T. Pickins for defendant.

PER CURIAM. The findings of fact on which the judgment was rendered in this action were supported by the evidence at the trial.

An examination of the complaint in this action and of the complaint in the action instituted by the plaintiff against the defendant in the municipal court of High Point, discloses that the causes of action alleged in said complaints are substantially the same. The evidence at the trial of said actions is likewise substantially the same. There was no error in the findings of fact.

The judgment dismissing the action is supported by the findings of fact and is affirmed on the authority of *Hampton v. Spinning Co.*, 198 N. C., 235, 151 S. E., 266; *Brown v. Johnson*, 207 N. C., 807, 178 S. E., 570; *Batson v. Laundry Co.*, 209 N. C., 223, 183 S. E., 413.

Affirmed.

STATE v. DR. W. W. STANCELL.

(Filed 16 December, 1936.)

APPEAL by defendant from *Rousseau, J.*, at July Term, 1936, of RICHMOND. No error.

The defendant was tried on a criminal warrant in which it was charged that on 20 January, 1936, the defendant did willfully and unlawfully operate a motor vehicle on a public highway in Richmond County while under the influence of intoxicating liquors or narcotic drugs, contrary to the statute. C. S., 2621 (44).

Evidence offered by both the State and the defendant was submitted to the jury. There was a verdict of guilty.

From judgment that he be confined in the common jail of Richmond County for a period of ninety days, and that he be denied the privilege of operating a motor vehicle on the highways of this State for a period of twelve months (C. S., 4506), the defendant appealed to the Supreme Court, assigning errors in the trial.

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

Jas. E. Garrett and J. C. Sedberry for defendant.

PER CURIAM. The evidence at the trial of this action was properly submitted to the jury. There was no error in the refusal of the trial court to allow defendant's motion that the action be dismissed. C. S., 4643.

The defendant, as a witness in his own behalf, denied that he was under the influence of intoxicating liquors or of narcotic drugs at the time he was arrested. His testimony was corroborated by other witnesses offered by him. The evidence for the State, however, was to the contrary. For this reason the issue was for the jury.

There was no error in the charge of the court to the jury. The judgment is affirmed.

No error.

TIDE WATER POWER COMPANY v. W. D. CROSS AND DAISY E. CROSS, TRADING AS BLADEN ICE COMPANY.

(Filed 16 December, 1936.)

APPEAL by defendants from *Williams, J.*, at June Special Term, 1936, of BLADEN. No error.

Action for balance due on note for $1,557, executed 22 December, 1931, by defendants for electric service theretofore furnished by plaintiff.

Defendants in their answer admitted the execution of the note, but, as set-off and counterclaim, alleged negligent operation of plaintiff's power lines, causing damage to defendants' motors and to defendants' business prior to 22 December, 1931, and alleged negligent operation of said power lines in 1932 and 1933, causing further damage.

The jury answered the issues submitted to them as follows:

"1. Did the defendants execute and deliver to the plaintiff the note set forth in the complaint? Answer: 'Yes.'

"2. If so, what amount is due to the plaintiff by the defendants thereon? Answer: '$1,557, less payment 13 August, 1932, of $250.00, and payment of $250.00 on 21 September, 1932.'

"3. Were all matters and claims in controversy between plaintiff and defendants, on 22 December, 1931, settled and compromised by execution of the note described in the complaint? Answer: 'Yes.'

"4. Was the defendants' property injured by the negligence of the plaintiff prior to 22 December, 1931, as alleged in defendants' further answer and counterclaim? Answer: ....

"6. Was defendants' business injured by the negligence of plaintiff as a result of interruption of electric power in 1932 and 1933? Answer: 'No.'

"7. What damages, if any, are defendants entitled to recover for such injury in 1932 and 1933? Answer: 'None.'

"8. Did the defendants waive all claims which they had against plaintiff by payments to plaintiff on the said note in 1932? Answer: 'No.' "

From judgment on the verdict defendants appealed.

Louis J. Poisson and H. H. Clark for plaintiff, appellee.
Oliver Carter and Butler & Butler for defendants, appellants.

PER CURIAM. The jury having answered the determinative issues against the defendants, and there being competent evidence to support the verdict, the defendants' claim for damages as set-off and counterclaim against the note sued on cannot avail.

Appellants excepted to the ruling of the court on the evidence in sustaining objections to numerous questions relating to the third and sixth issues, but in some instances the record does not show what the witnesses would have answered in reply, and hence these assignments of error cannot be considered (*Winborne v. Lloyd,* 209 N. C., 483; *Newbern v. Hinton,* 190 N. C., 108); in other instances similar testimony was admitted without objection (*Light Co. v. Rogers,* 207 N. C., 751; *Colvard v. Light Co.,* 204 N. C., 97).

We find no reversible error in the rulings of the court on the testimony. The case resolved itself into a controversy as to the facts, and the jury's verdict thereon will not be disturbed.

No error.

DISPOSITION OF APPEALS FROM THE SUPREME COURT OF NORTH CAROLINA TO THE SUPREME COURT OF THE UNITED STATES

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(No digests in this volume)

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Cross-Reference: Creation of estates see Deeds § 13, Wills § 33; estates of decedents see Executors and Administrators; trust estates see Mortgages, Trusts, Wills, Title IX; estates less than freehold see Landlord and Tenant

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Cross-Reference: Evidence in criminal prosecutions see Criminal Law and particular titles of crimes; competency, relevancy, and sufficiency of evidence in particular actions see particular titles of actions and remedies; examination of adverse party prior to trial and inspection of writings see Bill of Discovery; order of admission of evidence see Trial, Title III; sufficiency of evidence to overrule nonsuit see Trial, Title V

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27. Discharge and Release of Judgment Debtor

EXECUTORS AND ADMINISTRATORS
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2. Persons Entitled to Appointment*
3. Appointment of Administrators
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6. Funds Exempt from Debts of Estate
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10. Collection of Assets
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 b. Application and Order*
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 d. Claims for Personal Services Rendered Deceased*
 e. Claims Arising from Payment of Obligations of Estate*
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Cross-Reference: Cancellation of instruments for fraud see Cancellation of Instruments; fraud in procuring insurance policies see Insurance; statute of frauds see Frauds, Statute of; obtaining property by false tokens or invalid instruments see False Pretenses, Forgery

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5. Deception and Reliance Upon Misrepresentation
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5. Application
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12. Parol Trusts
13. Pleadings
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15. Trial

IV. Contracts with Cherokee Indians
16. Application
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I. Nature and Elements of the Offense
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2. Parties and Offenses

II. Prosecution and Punishment
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5. Sufficiency of Evidence
6. Instructions
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GRAND JURY
(No digests in this volume)

GUARANTY
(No digests in this volume)

GUARDIAN AND WARD

Cross-Reference: Guardianship of insane persons and incompetents see Insane Persons; property and rights of infants irrespective of guardianship see Infants; guardians ad litem see Insane Persons, Infants

I. Nature and Grounds of the Relation
1. Grounds for Guardianship
2. Nature of the Relation

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4. Pleadings
5. Persons Qualified and Competent to be Appointed
6. Hearings
7. Execution of Bond and Order of Appointment

GUARDIAN AND WARD—Continued
8. Proof of Appointment and Attack of Proceedings*
9. Tenure of Guardian

III. Custody and Control of Ward's Person and Estate
10. In General
11. Custody and Control of Ward's Person
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IV. Sale or Mortgaging of Ward's Property
15. Absolute Sale
    a. Grounds
    b. Procedure
    c. Orders and Approval of Court
    d. Title and Rights of Purchaser
16. Mortgages and Deeds of Trust
    a. Purpose for Which Lien May be Executed
    b. Procedure
    c. Orders and Approval of Court
    d. Validity and Attack of Instruments*

V. Actions (Guardians ad litem see Infants)
17. Actions Which May be Instituted by Guardian
18. Parties and Process

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19. Duty to Account
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VII. Liabilities on Bonds (Acts constituting breach see above §§ 13, 14)
22. Nature and Extent of Liability in General
23. Bonds and Sureties Liable*

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I. Nature and Grounds of Remedy
1. In General
2. To Obtain Freedom from Unlawful Restraint
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Cross-Reference: Exemptions from taxation see Taxation, Title IV

I. Nature and Essentials of Rights in General
1. Nature or Rights
2. Abandonment or Waiver of Rights
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II. Homestead Exemptions
4. In General
5. Property in Which Right May be Asserted*
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HOMESTEAD AND PERSONAL PROPERTY EXEMPTIONS—Continued
7. Conveyance of Homestead and Lien of Judgment on Property in Hands of Transferee*
8. Waiver and Abandonment of Homestead Exemption
9. Appraisal and Allotment of Homestead*

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10. In General*
11. Amount and Extent of Personal Property Exemption
12. Property in Which Right May be Asserted
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14. Transfer and Waiver of Right
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Cross-Reference: Assault with intent to kill see Assault § 6c

I. Homicide in General
1. Elements of and Distinction Between Degrees of Homicide
2. Parties and Offenses

II. Murder in the First Degree
3. In General
4. Elements of the Offense
   a. Intentional Killing of Human Being
   b. Malice
   c. Premeditation and Deliberation*

III. Murder in the Second Degree
5. In General
6. Elements of the Offense
   a. Unlawful Killing of Human Being
   b. Malice

IV. Manslaughter (In negligent operation of automobiles see Automobiles § 30)
7. In General
8. Negligence or Culpability of Defendant
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V. Justifiable or Excusable Homicide
10. In General
11. Self-Defense
12. Defense of Others
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VI. Indictment and Pleas
14. Requisites and Sufficiency of Indictment
15. Arraignment and Pleas

VII. Evidence
16. Presumptions and Burden of Proof
17. Relevancy and Competency in General*
18. Dying Declarations*
19. Evidence Tending to Identify Defendant as Perpetrator of the Crime*
20. Evidence of Motive and Malice
21. Evidence of Premeditation and Deliberation
22. Evidence Competent on Issue of Self-Defense*
23. Demonstrative Evidence

VIII. Trial
24. Course and Conduct of Trial
25. Sufficiency of Evidence and Nonsuit*
26. Peremptory Instructions and Directed Verdict
27. Instructions
   a. Form and Sufficiency in General

HOMICIDE—Continued
   b. On Presumptions and Burden of Proof
   c. On Question of Murder in First Degree
   d. On Question of Murder in Second Degree
   e. On Question of Manslaughter
   f. On Question of Self-Defense*
   g. Form and Sufficiency of Issues and Instruction on Less Degrees of the Crime Charged*
28. Verdict
29. Judgment and Sentence

HOSPITALS

(No digests in this volume)

HUSBAND AND WIFE

Cross-Reference: Abduction of wife see Abduction; adverse possession by husband or wife see Adverse Possession § 4e; right to share in personalty of deceased spouse see Descent and Distribution § 5; dower see Dower; curtesy see Curtesy; divorce and alimony see Divorce; marriage see Marriage

I. Mutual Rights, Duties, and Disabilities of Coverture
1. In General
2. Wife's Right to Support and Maintenance (Criminal responsibility for abandonment see hereunder, Title VII; husband's liability to third persons for debts of wife see hereunder § 7)
3. Competency as Witnesses for or Against Each Other in Civil Actions (Right to refuse to testify on ground of privilege see Evidence § 12, Criminal Law § 39c; competency of testimony in criminal prosecutions see Criminal Law § 40c and particular titles of crimes)
4. Contracts and Conveyances
   a. Between Husband and Wife
   b. With Third Persons (Acknowledgment and private examination of wife see Deeds § 3)
5. Contracts and Business of Wife with Third Persons
   a. In General
   b. Where Wife is Free Trader
6. Right to Maintain Action Against Spouse

II. Liabilities to Third Persons Arising from the Relation
7. Husband's Liability for Debts of Wife
8. Husband's Liability for Torts of Wife (Family car doctrine see Automobiles § 25)

III. Liability of Third Persons for Injury to Spouse
9. Husband's Right of Action for Injury to Wife
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IV. Estates by Entirety
11. Creation
12. Nature and Incidents
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HUSBAND AND WIFE—Continued

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19. Requisites and Validity of Deeds of Separation
20. Construction and Operation of Deeds of Separation
21. Attack of Deeds of Separation
22. Revocation and Rescission of Deeds of Separation*

VII. Abandonment
23. Nature and Elements of the Offense
24. Defenses
25. Jurisdiction
26. Indictment
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28. Sufficiency of Evidence
29. Instructions
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VIII. Alienation
32. Nature and Essentials of Right of Action
33. Pleadings
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IX. Criminal Conversation
37. Nature and Essentials of Right of Action
38. Pleadings
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INDEMNITY
(No digests in this volume)

INDICTMENT

Cross-Reference: Sufficiency of indictment to charge particular offenses see particular titles of crimes; qualification and duties of grand jurors see Grand Jury; necessity for indictment see Constitutional Law § 26

I. Finding and Return of Indictment
1. Procedure in General
2. Duly Constituted Grand Jury
3. Jurisdiction of Grand Jury
4. Evidence and Proceedings Before Grand Jury
5. Endorsement and Finding of Grand Jury*
6. Return of Indictment

II. Form, Requisites, and Sufficiency of Indictment
7. Formal Requisites
8. Joinder and Severance of Counts and Parties
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10. Identification of Person Charged
11. Definiteness and Sufficiency in General

III. Motions to Quash
12. Time of Making Motion
13. Nature and Grounds of Motion in General (Particular grounds for quashal see above, Titles I and II)
14. Effect of Quashal or Dismissal

IV. Amendment
15. Right to Amend
16. Motions and Hearings

V. Bill of Particulars
17. Nature and Scope of Bill of Particulars
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INDICTMENT—Continued

VI. Issues, Proof, and Variance
19. Procedure to Raise Question of Variance
20. Proof of Guilt of Crime Other Than One Charged
21. Conviction on One Count and Acquittal on Others
22. Sufficiency of Indictment to Support Conviction of Lesser Degree of Crime Charged
23. Aider by Verdict

INFANTS
(No digests in this volume)

INJUNCTIONS

Cross-Reference: Review of injunctive proceedings see Appeal and Error § 41

I. Nature and Grounds of Injunctive Relief
(Enjoining levy and collection of taxes see Taxation § 37)
1. In General*
2. Inadequacy of Legal Remedy and Irreparable Injury
3. Abatement of Nuisance*
4. Contracts
5. Conveyances and Encumbrances
6. Torts
7. Crimes*
8. Personal Rights and Duties
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II. Preliminary and Interlocutory Injunctions
10. Grounds and Proceedings
11. Continuance, Modification, and Dissolution*

III. Permanent Injunctions
12. Hearings and Trial
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14. Violation and Enforcement

IV. Liabilities on Injunction Bonds
15. Grounds of Liability
16. Measure of Liability

INNKEEPERS
(No digests in this volume)

INSANE ASYLUMS
(No digests in this volume)

INSANE PERSONS

Cross-Reference: Capacity to commit crime see Criminal Law § 5; testimony as to mental capacity see Evidence § 45, Criminal Law § 31b; invalidity of instruments for want of mental capacity see Contracts § 2, Deeds § 2a, Wills §§ 2, 21b

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1. Petition
2. Service and Notice
3. Appointment of Guardian Ad Litem
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II. Guardianship
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6. Qualification and Tenure of Guardian
7. Attack of Appointment*
8. Control and Management of Estate
9. Custody and Support of Incompetent
10. Accounting and Settlement

III. Contracts and Conveyances and Torts
11. Validity
12. Attack and Setting Aside
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IV. Actions
14. Service of Process
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INSURANCE

I. Regulation and Control of Insurance Companies
1. Nature and Extent of Regulatory Power in General
2. Licensing and Permission to do Business
3. Rates (For compensation insurance see Master and Servant § 45)
4. Form and Provision of Policy*

II. Insurance Companies
5. Stock Companies
6. Mutual Companies
7. Benevolent Societies

III. Insurance Agents
8. Appointment and Representation of Insurer
9. Authority
10. Compensation and Commissions
11. Termination of Relationship

IV. The Contract in General (Avoidance of policy for fraud see hereunder § 31; cancellation of fire insurance see hereunder § 23; cancellation of life insurance see hereunder § 32)
12. Execution of Contract
13. Construction and Operation in General
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17. Insurable Interest
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19. Property Insured
20. Premiums and Assessments
21. Mortgagee Clauses
22. Avoidance or Forfeiture of Policy
   a. In General
   b. For Nonpayment of Premiums or Assessments
   c. For Breach of Condition Relating to Use and Condition of Property
   d. For Breach of Representation or Warranty of Sole Ownership
   e. For Breach of Condition or Warranty Against Additional Insurance
   f. Knowledge and Waiver by Insured
23. Cancellation of Policy
   a. By Insurer
   b. By Insured
   c. Effective Date of Cancellation
24. Extent of Loss and Liability of Insurer
   a. Notice and Proof of Loss and Waiver of Proof
   b. Arbitration and Adjustment of Loss
   c. Companies Liable
   d. Persons Entitled to Payment
   e. Payment and Subrogation
25. Actions on Policies
   a. Parties and Process
   b. Pleadings
   c. Evidence
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   e. Verdict and Judgment

VI. Life Insurance
26. Insurable Interest in Life of Another*
27. Effective Date of Policy
28. Conditions Precedent to or Limiting Liability
29. Incontestable Clauses*
30. Forfeiture of Policy for Nonpayment of Premiums or Dues
   a. In General

INSURANCE—Continued

   b. After Breach or Wrongful Termination of Contract by Insurer*
   c. Evidence and Proof of Payment
   d. Waiver of Prompt Payment or Nonpayment
31. Avoidance or Forfeiture of Policy for Misrepresentation or Fraud
   a. Policies Issued Without Medical Examination*
   b. Policies Issued Upon Medical Examination
   c. Knowledge and Waiver by Insurer
32. Cancellation of Policy
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33. Reinstatement of Policy
34. Disability Clauses
   a. Construction and Operation and Sufficiency of Evidence of Disability*
   b. Notice and Proof of Disability and Waiver of Proof*
   c. Occurrence of Disability During Life of Policy
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35. Notice and Proof of Death
   a. In General
   b. Presumptive Death
36. Payment and Discharge
   a. Persons Entitled to Payment*
   b. Amount Due Upon Death of Insured
   c. Cash Surrender Value
   d. Paid-up and Term Insurance
   e. Compromise and Settlement*
37. Actions on Policies

VII. Accident and Health Insurance
38. Construction of Policy as to Risks Covered and Sufficiency of Evidence Thereof
39. Provisions Limiting Liability or Constituting Conditions Precedent Thereto*
40. Notice and Proof of Loss
41. Actions on Policies
42. Payment and Subrogation

VIII. Liability Insurance Against Personal Injury or Damage to Property
43. Construction of Policy as to Risks Covered and Property Insured
44. Provisions Limiting Liability or Constituting Conditions Precedent Thereto
45. Notice and Proof of Loss
46. Acts and Admissions of Insured as Affecting Insurer
47. Rights and Remedies of Insured
48. Rights of Persons Injured or Damaged as Against Insurer
49. Defense of Action by Insurer
50. Actions on Policies
51. Payment and Subrogation

IX. Hail and Windstorm Insurance
52. Construction of Policy as to Risks Covered
53. Notice and Proof of Loss
54. Actions on Policies

INTEREST

(No digests in this volume)

*Digests in this volume.

INTOXICATING LIQUOR

Cross-Reference: Intoxication as affecting mental capacity to commit crime see Criminal Law § 6; as affecting ability to premeditate and deliberate see Homicide § 4c; drunken driving see Automobiles § 29; drunkenness as avoiding liability under accident policy see Insurance § 40

I. Regulation and Control
1. Validity of Control Statutes
2. Construction and Operation
3. Violation and Enforcement

II. Prohibition
4. Possession
   a. Actual Possession
   b. Constructive Possession
   c. Possession of Husband or Wife
   d. Presumptions from Possession
   e. Effect of Repeal Statute*
5. Manufacture
   a. In General
   b. Possession of Property Designed for Manufacture
6. Sale
   a. In General
   b. Effect of Repeal Statute
7. Transportation
8. Forfeitures
9. Prosecution and Punishment
   a. Indictment*
   b. Competency and Relevancy of Evidence
   c. Sufficiency of Evidence*
   d. Directed Verdict*
   e. Instructions
   f. Verdict and Judgment

JUDGES

Cross-Reference: Jurisdiction to hear motion after order of judgment of another Superior Court Judge see Courts § 3
1. Appointment and Qualification
2. Rights, Powers, and Duties
   a. Regular Judges
   b. Special and Emergency Judges

JUDGMENTS

Cross-Reference: Form of judgment in particular actions see particular titles of actions; judgment in criminal prosecutions see Criminal Law, Title X, and particular titles of crimes; execution on judgments see Execution; arrest of judgment see Trial § 46; judgment non obstanti veridicto see Trial § 45; judgment on the pleadings see Pleadings § 28

I. Judgments by Consent
1. Nature and Essentials
2. Jurisdiction to Enter
3. Rendition
4. Attack and Setting Aside

II. Judgments by Confession
5. Nature and Essentials
6. Jurisdiction to Enter
7. Rendition
8. Attack and Setting Aside

III. Judgments by Default (Setting aside for excusable neglect see hereunder § 23)
9. By Default Final
10. By Default and Inquiry
11. Rendition

IV. Summary Judgments
12. In What Proceedings Summary Judgment May Be Entered
13. Proceedings and Rendition

JUDGMENTS—Continued

V. Judgments in Rem
14. Nature and Essentials
15. Operation and Effect

VI. Judgments on Trial of Issues or Hearing of Motions
16. Parties
17. Forms and Requisites
   a. In General
   b. Conformity to Verdict and Pleadings
   c. Condition and Alternative Judgments*
18. Time and Place of Rendition

VII. Docketing and Lien
19. Attachment of Lien and Priorities
   a. Judgment on Trial of Issues
   b. Judgment by Consent and Confession
20. Land upon Which Lien Attaches
21. Life of Lien

VIII. Attack and Setting Aside (Of judgment by consent see above judgments by consent and confession)
22. Procedure: Collateral and Direct Attack*
23. For Surprise, Inadvertence, and Excusable Neglect
24. For Fraud
25. For Irregularity
26. For Want of Jurisdiction
27. For Error of Law
28. Rights of Parties upon Vacating of Judgment

IX. Conclusiveness of Judgment
29. Parties Concluded
30. Matters Concluded
31. Foreign Judgments

X. Operation of Judgments as Bar to Subsequent Actions
32. In General*
33. Judgments as of Nonsuit*
34. Judgments of Federal Courts and of Other States*
35. Plea of Bar, Hearings, and Determination

XI. Assignment
36. Right to Assign
37. Rights and Remedies of Assignee*
38. Rights and Liabilities of Judgment Debtor

XII. Actions on Judgments
39. Domestic Judgments
40. Foreign Judgments

XIII. Payment and Discharge (Right to assignment of tort-feasor paying judgment as against joint tort-feasors see Torts § 6)
41. Payment to Judgment Creditor
42. Payment to Clerk

JUDICIAL SALES

(No digests in this volume)

JURY

I. Competency of Jurors, Challenges, and Exceptions
1. Competency, Qualifications, and Challenges for Cause
2. Peremptory Challenges
3. Challenges to the Poll
4. Examination of Prospective Jurors*

II. Right to Trial by Jury (Right of person accused of crime to jury trial see Constitutional Law § 27)
5. In General

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JURY—Continued

6. In Particular Proceedings
7. Waiver, Preservation, and Enforcement of Right

III. Summoning, Attendance, and Compensation

8. Jury Rolls
9. Summoning and Compelling Attendance
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IV. Impaneling for Trial

12. Oath
13. Number of Jurors

JUSTICES OF THE PEACE

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KIDNAPING

1. Nature and Elements of the Offense
2. Prosecutions*
3. Judgment and Sentence

LABORERS' AND MATERIALMEN'S LIENS

(No digests in this volume)

LANDLORD AND TENANT

Cross-Reference: Agricultural tenancies see Agriculture, Title II; ejectment see Ejectment; fixtures see Fixtures; lease contracts required to be in writing see Frauds, Statute of, § 11

I. The Contract in General

1. Creation of the Relationship
2. Form, Requisites, and Validity of Leases in General
3. Title of Landlord and Estoppel of Tenant

II. Kinds of Tenancies (Agricultural tenancies see Agriculture, Title II)

4. Terms for Years
5. Tenancies from Year to Year and Month to Month
6. Tenancies at Will and at Sufferance

III. Construction and Operation of Contract

7. General Rules of Construction
8. Possession and Use
9. Encumbrances, Taxes, and Assessments
10. Duty to Repair* (Right to terminate lease for disrepair see hereunder § 16)
11. Liability for Injuries from Defective or Unsafe Conditions*
12. Actions for Breach

IV. Assignment and Subletting

13. Right to Assign or Sublease
14. Rights and Liabilities of Parties

V. Termination of Lease

15. Termination or Cancellation by Terms of the Lease
16. Termination by Destruction of or Damage to Premises
17. Termination by Consent of Parties
18. Termination for Failure to Pay Rent
    a. In General
    b. Tender Prior to Judgment
19. Notice of Intent to Terminate
20. Condition of Premises upon Surrender
21. Emblements

VI. Rents

22. Rights and Liabilities
23. Lien
24. Bonds to Secure Rent

*Digests in this volume.

LARCENY

(No digests in this volume)

LIBEL AND SLANDER

(No digests in this volume)

LIMITATION OF ACTIONS

Cross-Reference: Limitation of actions for recovery of real property see Adverse Possession; limitation of suits under Federal Employers' Liability Act see Master and Servant § 30; time for filing claim under Compensation Act see Master and Servant § 47; limitation of actions for wrongful death see Death § 4; time for filing notice and claim for damages against municipal corporations see Municipal Corporations § 46; laches see Equity § 2

I. Statutes of Limitation

1. Nature and Construction in General*
2. Limitations Applicable to Particular Actions
    a. Actions Barred in Ten Years
    b. Actions Barred in Seven Years
    c. Actions Barred in Six Years
    d. Actions Barred in Five Years
    e. Actions Barred in Three Years*
    f. Actions Barred in Two Years
    g. Actions Barred in One Year
    h. Actions Barred in Six Months

II. Computation of Period of Limitation

3. Accrual of Right of Action*
4. Fraud and Ignorance of Cause of Action*
5. Notice and Demand
6. Continuing and Separable Trespass
7. Disabilities in General
8. Absence and Nonresidence*
9. Fiduciary Relationships
10. Death and Administration
11. Institution of Action*

III. Matters Effecting Waiver of Plea or Estoppel

12. Part Payment
    a. In General
    b. As Affecting Parties Secondarily Liable*
13. New Promise*
14. Agreement or Promise not to Plead

IV. Actions

15. Pleadings*
16. Burden of Proof
17. Competency and Relevancy of Evidence
18. Sufficiency of Evidence
19. Verdict and Judgment

LIS PENDENS

(No digests in this volume)

LOST OR DESTROYED INSTRUMENTS

(No digests in this volume)

MALICIOUS PROSECUTION

Cross-Reference: Wrongful use of process see Process, Title IV; arrest on invalid process see False Arrest

I. Right of Action and Defenses

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12. Exercise of Governmental and Corporate Powers in General
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17. Condition and Use of Public Buildings or Other Public Places
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21. Assignment
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Cross-Reference: Negligence of employer see Master and Servant, of power companies see Electricity, of manufacturers or processers of food see Food, of municipal corporations see Municipal Corporations, of railroad companies see Railroads, of carriers see Carriers; negligence in operation of vehicles see Automobiles

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  a. In General
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8. Primary and Secondary Liability
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17. Burden of Proof
18. Competency and Relevancy of Evidence
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Abatement of Nuisances see Injunctions § 3 (No digests in this volume)

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Cross-Reference: Adoption, see Adoption; bastardy proceedings see Bastards; guardianship of minors see Guardian and Ward; family car doctrine see Automobiles § 25; contracts and torts of infants see Infants.

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4. Custody* (Awarding custody upon divorce of parents see Divorce, Title IV; availability of habeas corpus to determine right to custody see Habeas Corpus § 3)
5. Support*

III. Rights and Liabilities of Parent to Third Persons
6. Debts of Child
7. Torts of Child
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IV. Prosecutions for Abandonment (Civil actions for support see supra § 5)
9. Nature and Elements of the Offense
10. Defenses
11. Jurisdiction
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PARTIES

Cross-Reference: Capacity of particular persons to sue see Infants, Insane Persons; persons who may sue for particular relief see Death § 5, Dead Bodies § 3, Declaratory Judgment Act § 3; parties in particular actions see Contracts § 19, Negligence § 15, Fraudulent Conveyances § 8, and particular titles of actions; joinder of defendants in criminal prosecutions see Indictment § 8; parties and offenses see Criminal Law, Title III, and particular titles of crimes

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1. Necessary Parties
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7. Operation and Effect

IV. Interveners (Burden of proof see Evidence § 9; interveners in attachment see Attachment § 20)
8. Right to Intervene and Claim Property*
9. Time Within Which Intervention May be Allowed

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Cross-Reference: Title and rights of tenants in common other than right of partition see Tenants in Common

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1. In General*
2. Waiver of Right and Agreements Relating Thereto*
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II. Partition by Action
4. Parties and Procedure*
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6. Sale and Confirmation
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III. Partition by Acts of the Parties
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Cross-Reference: Nurses see Hospitals, Title IV; communications between physician and patient privileged see Evidence § 14, Criminal Law 39b

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1. Validity of Regulatory Statutes*
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5. Revocation of License
6. Practice of Healing Arts Requiring License
7. Expiration, Renewal, and Reissuance of License*
8. Prosecution and Punishment for Practicing without License

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13. Compensation and Remedies of Physician

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c. Application and Use of Knowledge and Skill
d. Competency and Relevancy of Evidence in Actions for Malpractice*
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f. Issues, Verdict, and Judgment
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PILOTS
(No digests in this volume)

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Cross-Reference: Pleadings in particular actions or by particular persons see particular titles of actions and Executors and Administrators, Insane Persons, Infants; pleas in abatement see Abatement and Revival § 17, Criminal Law § 20

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3. Contents and Statement of Cause
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b. Anticipation of Defenses
4. Verification
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9. Dilatory Pleas
10. Counterclaims, Set-Offs, and Cross Complaints*
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17. Statement of Grounds, Form, and Requisites*
18. Defects Appearing on Face of Pleading and Speaking Demurrers*
19. Time of Filing Demurrer and Waiver of Right to Demur*
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21. Amendment before Trial
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VI. Issues, Proof, and Variance
24. In General: Allegation without Proof, Proof without Allegation
25. Questions and Issues Raised by Pleadings
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27. Motions for Bill of Particulars or that Allegations be Made More Definite and Certain
28. Motions for Judgment on the Pleadings*
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VIII. Defects and Waiver
30. Waiver of Defects
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Cross-Reference: Pledges by banks to secure deposits see Banks and Banking § 7d; pledges to bank to secure loans see Banks and Banking 9; right of pledgee of note to maintain action thereon see Bills and Notes § 21
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PRINCIPAL AND AGENT

Cross-Reference: Brokers see Brokers; insurance agents see Insurance, Title III

I. The Relation
1. Distinction between This and Other Relationships
2. Creation and Existence
3. Representation of Two Parties by Agent
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II. Mutual Rights, Duties, and Liabilities
5. Execution of Agency
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III. Rights and Liabilities as to Third Persons (Principal's liability for negligent driving of agent see Automobiles § 24)
7. Evidence and Proof of Agency
8. Powers and Authority of Agent (Of corporate agents see Corporations § 20, Banks and Banking § 6, Municipal Corporations § 11c; liability of principal for wrongful acts of agent see hereunder § 10)
9. Notice and Knowledge of Agent* (Insurance agents see Insurance § 11)
10. Wrongful Acts of Agent (Rule that where one of two innocent parties must suffer loss it must be born by person first reposing confidence in wrongdoer see Estoppel § 6e)
11. Undisclosed Agency

PRINCIPAL AND SURETY

Cross-Reference: Contracts to make good loss of damage sustained by acts of others as well as party indemnified see Indemnity; contracts to make good loss or damage sustained by acts of principal debtor but not third persons see Guaranty; bonds of executors and administrators see Executors and Administrators; bonds of guardians see Guardian and Ward

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PRINCIPAL AND SURETY—Continued

I. Execution, Requisites, and Validity of Surety Bonds
1. In General
2. Execution
3. Form and Contents in General
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5. Bonds of Public Officers and Agents
 a. In General*
 b. Renewals and Subsequent Bonds
6. Bonds of Private or Corporate Officers and Agents
7. Bonds for Public Construction
8. Bonds for Private Construction

III. Satisfaction, Cancellation, and Discharge of Surety
9. Compromise and Settlement
10. Notice and Cancellation under Terms of the Contract
11. Payment and Discharge of Surety
12. Waiver and Discharge of Surety

IV. Rights and Remedies of Surety
13. As to Creditor
14. As to Principal
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V. Actions on Bonds
16. Provisions of the Contract as to Time of Notice and Claim
17. Parties and Pleadings
18. Competency of Judgment against Principal in Establishing Liability of Surety
19. Issues, Verdict, and Judgment
20. Summary Proceedings on Bonds

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Cross-Reference: Waiver of process by general appearance see Appearance § 2b

I. Nature and Validity
1. Forms and Requisites
2. Issuance
3. Defective Process and Amendment*

II. Service of Process (Service in actions against infants see Infants § 13; in lunacy inquisitions see Insane Persons § 2)
4. Personal Service
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 b. On Domestic Corporations
5. Service by Publication
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7. Service on Foreign Corporations by Service of Secretary of State
8. Service on Foreign Insurance Companies by Service on Insurance Commissioner
9. Service on Fraternal Associations
10. Service on Nonresident Automobile Owners*
11. Proof of Service
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III. Warrants and Criminal Process (Arrest see Arrest)
13. Requisites and Validity
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IV. Abuse of Process (Prosecutions instituted without probable cause and with malice see Malicious Prosecution; arrest on void process see False Imprisonment)
15. Nature and Essentials of Right of Action
16. Actions

PROFANE LANGUAGE
(No digests in this volume)

PUBLIC OFFICERS

Cross-Reference: Include matters relating to public offices generally; county officers see Counties, Title II; municipal officers see Municipal Corporations, Title III; election of officers see Elections; particular offices see Register of Deeds, Clerks of Court, Sheriffs, Attorney-General, etc.
(No digests in this volume)

QUIETING TITLE
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QUO WARRANTO
1. Nature and Grounds of Remedy*
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RAILROADS

Cross-Reference: As common carriers see Carriers; Federal Employers' Liability Act see Master and Servant, Title V

I. Rights in and Regulation of Property and Facilities
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2. Rights of Way
3. Rolling Stock
4. Sales, Leases, and Contracts

II. Operation
5. Duty to Operate
6. Statutory and Municipal Regulations as to Speed and Warnings
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9. Accidents at Crossings*
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(No digests in this volume)

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RECEIVERS

Cross-References: Receivership of insolvent corporations see Corporations, Title VI; receivership for insolvent banking corporations see Banks and Banking, Title IV; right of receiver to appeal see Appeal and Error § 5; receivership for mortgaged property pending foreclosure see Mortgages 30g

I. Receivership to Preserve Property Pending Litigation or to Apply Property to Specific Judgment
1. Nature and Grounds of the Remedy*
2. Proceedings and Appointment of Receiver
3. Right of Debtor to Execute Bond to Prevent Receivership
4. Powers and Duties of Receiver
5. Execution of Orders
6. Accounting, Settlement, and Commissions

II. Receivership of Insolvents
7. Nature and Grounds of the Remedy
8. Proceedings and Appointment of Receiver
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    a. Filing and Proof of Claims
    b. Claims Valid against Receiver
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14. Costs and Charges of Receivership
15. Accounting and Compensation
16. Liabilities on Receivership Bonds

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2. Compulsory Reference
3. Pleas in Bar
4. Effect of Reference

II. Proceedings before Referee
5. Notice and Hearings
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7. Report
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III. Review of Report under Consent Reference
9. Duties and Powers of Court in General
10. Setting Aside and Rereference
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IV. Trial upon Exceptions under Compulsory Reference
13. Right to Jury Trial
14. Questions of Law and of Fact
15. Introduction of Proceedings before Referee
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V. Costs and Commissions
18. Items of Cost, Amount, and Allowance
19. Commissions of Referee
20. Taxing of Costs and Persons Liable

REFORMATION OF INSTRUMENTS

Cross-Reference: Cancellation of instruments for fraud see Cancellation of Instruments; reformation of insurance contracts see Insurance § 15

I. Nature and Grounds of Right of Action
1. In General
2. Mistake Induced by Fraud
3. Mutual Mistake
4. Mistake of Draftsman*
5. Defenses and Waiver of Right to Reformation

II. Proceedings and Relief
6. Parties
7. Pleadings
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9. Competency and Relevancy of Evidence*
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11. Issues and Verdict
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13. Title, Rights, and Remedies of Third Persons*

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1. Nature of Right and Statutory Provisions in General
2. Actions and Proceedings Removable
3. Diverse Citizenship in General
4. Separable Controversy and Fraudulent Joinder
    a. Determination of whether Controversy is Separable*
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5. Jurisdictional Amount

II. Effect of Removal and Subsequent Proceedings
6. Effect of Removal in General
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Cross-Reference: Conditional sales see Chattel Mortgages and Conditional Sales; sales of fertilizer see Agriculture, Title III; sales of automobiles and warranties and manufacturer and distributor see Automobiles, Title II

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2. Agreement
3. Consideration
4. Modification and Rescission

II. Performance or Breach
5. Title and Possession of Seller
6. Condition and Quality of Goods and Right of Buyer to Reject
7. Payment of Purchase Price
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ABATEMENT AND REVIVAL.

§ 9. Identity of Actions.

The court's findings of fact upon a plea in abatement on the ground of a prior action pending that the parties are not identical nor the actions substantially alike and his denial of the plea upon his findings will not be disturbed on appeal when the findings are supported by the record and evidence before him. *Baushar v. Willis*, 52.

§ 16. Actions Involving Legal or Domestic Relationships.

An action to set aside a decree of absolute divorce abates upon the death of defendant husband unless at the time of his death he owned property, but where the court finds from admissions in the pleadings that the husband owned property at the time of his death, his refusal to submit the issue of whether the husband then owned property is not erroneous, and his holding as a matter of law that the action did not abate is without error. *Poole v. Poole*, 536.

§ 17. Pleading Matters in Abatement.

A special plea in abatement must ordinarily be made before pleading to the merits: otherwise, the right to file such plea is waived. *Poole v. Poole*, 536.

ACTIONS.

§ 3. Wrongful Act: Damnum Absque Injuria.

In a suit instituted by carriers by rail against carriers by truck to enjoin the promulgation of lower rates by defendants, plaintiffs *held* not entitled to the relief sought in the absence of allegations setting forth the invasion of some property right, defendants having the right under the applicable statute to lower rates at will, and the alleged prospective injury to plaintiffs' business being *damnum absque injuria* by way of fair competition against which the law does not protect. *Motor Service v. R. R.*, 36.

§ 7. Actions in Tort and on Contract.

Held: This was an action to establish a parol trust and not an action to enforce a contract. *Minton v. Lumber Co.*, 422.

ADVERSE POSSESSION.

§ 4a. Hostile Possession by Tenant in Common.

Rule that tenant in common cannot hold adversely to cotenants *held* inapplicable to facts of this case. *Owens v. Lumber Co.*, 504.

§ 4f. Hostile Possession by Widow Against Heirs.

Where dower is not allotted, widow's registered deed in fee is sufficient ouster and notice to heirs. *Owens v. Lumber Co.*, 504.

§ 8. Disabilities.

Whether possession was taken during life of ancestor *held* determinative, since heirs' disabilities would not stop running of statute if it began to run against ancestor. *Caskey v. West*, 240.

§ 19. Sufficiency of Evidence, Nonsuit, and Directed Verdict.

Evidence that plaintiffs had been in possession for twenty years adversely to defendant *held* for jury. *Owens v. Lumber Co.*, 504.

ANIMALS.

§ 1. Ownership and Right to Recover for Death of or Injury to Animals.

Dogs constitute a species of property, and the owner may maintain an action for the negligent injury of his dog, the right of action existing when the injury is caused by the negligent operation of an automobile as well as when it results from other forms of negligence. *Jones v. Craddock*, 430.

APPEAL AND ERROR.

§ 2. **Judgments Appealable.**

An appeal from a judgment sustaining a plea in bar is not premature. *Yerys v. Ins. Co.*, 442.

This appeal from the refusal of the court to set aside an order of the clerk for the examination of an adverse party under C. S., 900, *is held* not premature, the appeal presenting the question of whether plaintiff's affidavit upon which the order was made states facts sufficient to constitute a cause of action. *Bohannon v. Trust Co.*, 679.

§ 3a. **Parties Entitled to Appeal.**

Where judgment is entered on appeal to the Superior Court granting defendants a new trial, they are not entitled to be heard on their appeal to the Supreme Court unless and until reversible error has been made to appear on plaintiff's appeal. *Trust Co. v. Greyhound Lines*, 293; *Williams v. Bus, Inc.*, 400.

§ 3b. **Death and Substitution of Parties in Supreme Court.**

Where a party dies pending appeal, his personal representatives will be made a party by order of the Court. Rule 37. *Bank v. Toxey*, 470.

§ 6d. **Exceptions to Findings of Fact or Judgments on Findings.**

An exception to the failure of the court to find certain facts deemed material by a party will not be considered unless the party has aptly requested the court to make such findings, and the mere tender of judgment and exception to the court's refusal to sign same is insufficient for this purpose. *Stone v. Comrs. of Stoneville*, 226.

In an action tried by the court by agreement, an exception to the judgment presents the single question of whether the findings of fact are sufficient to support the judgment. *Shuford v. Building & Loan Asso.*, 237.

A sole exception to the judgment rendered presents the single question of whether the judgment is supported by the findings of fact, and the judgment will be affirmed when it is regular upon its face and is supported by the findings. *Dennis v. Redmond*, 780.

An exception to the signing of the judgment limits the appeal to the sufficiency of the concessions and findings to support the judgment. *Gettys v. Blanton*, 836.

§ 6f. **Parties Entitled to Complain and Take Exception.**

An exception taken by one defendant to the charge of the court on an issue relating solely to the other defendant's liability and in no way affecting the interest of the excepting defendant, will not be considered. *Taylor v. Rierson*, 185.

§ 8. **Theory of Trial in Lower Court.**

An appeal will be determined in accordance with the theory of trial in the lower court. *Minton v. Lumber Co.*, 422; *Mercer v. Williams*, 456.

Where defendant does not move for nonsuit in the court below, but the case is tried upon the theory of defendant's violation of implied warranty, defendant's contention on appeal that in no event could plaintiff recover will not be considered, but the appeal will be determined on the theory of trial in the lower court as to whether defendant is liable for breach of implied warranty. *Keith v. Gregg*, 802.

§ 10d. **Effect of Failure to File Exceptions and Countercase.**

Where appellant duly makes out and serves his statement of case on appeal within the time allowed, and appellee fails to except and file countercase, appellant's statement of case becomes the "case on appeal." C. S., 643. *Abernethy v. Burns*, 636.

APPEAL AND ERROR—*Continued.*

§ 12. Pauper Appeals.

The requirements of the statute regulating appeals *in forma pauperis* are mandatory and jurisdictional, C. S., 649, and where the affidavit fails to aver, as required by the statute, that appellant is advised by counsel learned in the law that there is error in matter of law in the decision of the lower court, the appeal must be dismissed, nor is there authority for granting an appeal upon such affidavit. *Lupton v. Hawkins*, 658.

Where the jurisdictional affidavit for leave to appeal *in forma pauperis* fails to aver that appellant is advised by counsel learned in the law that there is error of law in the judgment, C. S., 649, the affidavit is fatally defective and the appeal must be dismissed, and the defect may not be cured by an additional affidavit filed after the expiration of the five days prescribed by the statute, or one filed after the date for docketing the appeal. *Berwer v. Ins. Co.*, 814.

§ 21. Matters Not Appearing of Record Deemed Without Error.

Where the charge of the lower court is not in the record, it will be presumed that the court correctly charged the law applicable to the facts in the case. *Miller v. Wood*, 520; *Matthews v. Cheatham*, 593; *Exum v. Baumrind*, 650; *Parks v. Allen*, 668.

§ 22. Conclusiveness and Effect of Record.

Where appellee does not except and file countercase to appellant's statement of case on appeal, appellant's statement of case, having become the "case on appeal," imports verity, and the Supreme Court is bound thereby. *Abernethy v. Burns*, 636.

§ 25. Waiver of Exceptions by Failure to Assign Same as Error.

Where a ruling of the court upon one of the conclusions of law is not assigned as error upon appeal to the Supreme Court, the judgment in accordance with the ruling will be affirmed without consideration. *Buncombe County v. Cain*, 766.

§ 29. Abandonment of Exceptions by Failure to Discuss Same in Briefs.

Exceptions not discussed in appellant's brief are deemed abandoned. Rule of Practice in Supreme Court No. 28. *Hicks v. Nivens*, 44; *Taylor v. Rierson*, 185; *Texas Co. v. Elizabeth City*, 454.

§ 37b. Matters Reviewable Upon Appeal from Discretionary Orders and Judgments.

An order making additional parties upon a proper amendment of the complaint is within the discretionary power of the trial court and is not reviewable. *Wilmington v. Board of Education*, 197.

Where the court finds no facts and gives no reasons for his action in setting aside the verdict, it will be presumed on appeal that he set aside the verdict in the exercise of his discretionary power, which is not subject to review. *Jones v. Ins. Co.*, 559.

A motion, made in writing before time for answering expires, that certain paragraphs of the complaint be stricken out under C. S., 537, is made as a matter of right, and the court's order granting the motion is reviewable even though the order recites that the motion was allowed in the court's discretion. *Poovey v. Hickory*, 630.

§ 37d. Verdict of Jury.

The verdict of the jury upon conflicting evidence is conclusive on appeal. *Kirby v. Stores Corp.*, 808; *Dozier v. Ballance*, 832.

APPEAL AND ERROR—*Continued.*

§ 37c. Matters Reviewable Upon Appeal from Judgments on Findings of Fact.

Findings of fact on plea in abatement will not be disturbed when supported by evidence. *Baushar v. Willis*, 52.

Where the parties have waived trial by jury and have agreed that the court may find the facts, the court's findings, when supported by competent evidence, are conclusive and not reviewable on appeal. *Crews v. Crews*, 217; *Hill v. Lindsay*, 694.

Where a receiver of the estate of a deceased clerk of court is authorized and directed by the court to hear claims against the estate of the clerk and the sureties on his official bond, the findings of fact made by the receiver in regard to a claim embraced in the order are conclusive on appeal to the Supreme Court when the findings are supported by competent evidence and are approved by the court. *Buncombe County v. Cain*, 766.

§ 38. Presumptions and Burden of Showing Error.

The burden is on appellants to show error.—*Hicks v. Nivens*, 44.

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. *Brown v. Assurance Society*, 825; *Ferrell v. Ins. Co.*, 831; *Gott v. Ins. Co.*, 832.

§ 39. Prejudicial and Harmless Error in General.

A new trial will not be awarded for error which is not material or prejudicial. *Wilson v. Casualty Co.*, 585.

§ 42. Harmless Error in Admission or Exclusion of Evidence.

The exclusion of testimony, if erroneous, is rendered harmless when the same witness is thereafter allowed to testify to the same import on redirect and cross-examination. *Albritton v. Albritton*, 111.

Plaintiff's objection to the testimony of defendant's witness cannot be sustained when plaintiff elicits the same evidence from the witness on cross-examination. *Keith v. Gregg*, 802.

Where the record does not show what the evidence excluded would have been, an exception to its exclusion cannot be sustained, since it cannot be ascertained if its exclusion was prejudicial. *Power Co. v. Cross*, 844.

An exception to the admission of testimony cannot be sustained when similar evidence is admitted without objection. *Power Co. v. Cross*, 844.

§ 43. Harmless and Prejudicial Error in Instructions.

An erroneous instruction upon a defense raised by the answer and supported by defendant's evidence cannot be held harmless upon defendant's appeal upon plaintiff's contention that the error was immaterial because defendant's evidence was insufficient to support the defense. *Wright v. Grocery Co.*, 462.

§ 45a. Review of Findings of Fact.

Where no evidence is set forth in the record, it will be presumed on appeal that the court's finding of fact was supported by sufficient evidence. *Wagner v. Realty Corp.*, 1.

In this action certain defendants moved to set aside the judgment for non-service of summons upon their evidence that in fact no service had been had, although the officer's return showed service, and defendants requested the court to find the facts. The court denied the request, and refused the motion of such defendant to set aside the judgment. *Held:* The presumption that the court found facts sufficient to support his judgment does not prevail in the face of a request for findings refused by the court, and the cause will be

APPEAL AND ERROR—*Continued.*

remanded for findings of fact sufficient to enable the Supreme Court to review the questions of law involved. *Dunn v. Wilson*, 493.

§ 45b. Review of Orders on Motions to Strike Out.

Ordinarily, the refusal of a motion to strike out will not be disturbed on appeal when the questions involved can be better determined on the trial by rulings on the evidence. C. S., 537. *Scott v. Bryan*, 478.

§ 45c. Review of Judgments on Motions to Nonsuit.

Upon appeal from judgment granting defendant's motion to nonsuit, the Supreme Court will examine the evidence to determine whether it was of sufficient probative force to be submitted to the jury, considering the evidence in the light most favorable to plaintiff. *Jones v. Craddock*, 429; *Abernethy v. Burns*, 636.

§ 45g. Review of Constitutional Questions.

The constitutionality of a statute will not be determined on appeal, even when properly presented, when there is also presented some other ground upon which the appeal can be decided. *S. v. Ellis*, 166.

§ 46. Questions Necessary to Determination of Appeal.

Where rights of parties are determined by holding on one exception, other exceptions need not be considered. *Ins. Co. v. Stinson*, 69.

Where a new trial is awarded on one exception, other exceptions relating to matters which may not arise upon a subsequent hearing need not be considered. *Trust Co. v. Greyhound Lines*, 293; *Bank v. Robertson*, 436; *Hardy v. Dahl*, 530.

Where it is determined on appeal that plaintiffs were properly nonsuited in accordance with the contentions of one defendant, the contentions of other defendants, presented as a further bar of recovery by plaintiffs against them, need not be considered. *Hill v. Fertilizer Co.*, 417.

Where it is determined on appeal that an issue of wanton negligence submitted was not supported by the evidence, alleged error in the judgment of the court relating to plaintiff's right to execution against the person of defendant based upon the jury's answer to the issue, need not be considered. *Turner v. Lipe*, 627.

§ 55. Jurisdiction and Proceedings in Lower Court After Remand.

The decision of the Supreme Court on a former appeal constitutes the law of the case, and may not thereafter be attacked in subsequent proceedings. *George v. R. R.*, 58.

APPEARANCE.

§ 1. Special Appearance.

A defendant has the right to make a special appearance and move to dismiss the action for want of jurisdiction. *Lindsay v. Short*, 287.

ARREST ON CRIMINAL CHARGES.

§ 1b. Right of Officer to Make Arrest Without Warrant.

Officer, acting in good faith with reasonable grounds to believe suspects have committed felony may make arrest without warrant. *Hicks v. Nivens*, 44.

Officers attempting to make an arrest without a warrant outside the district in which they are authorized to arrest without a warrant are liable in damages for wrongful assault in shooting plaintiff's tire in order to stop him. *Martin v. Boyd*, 662.

ASSAULT AND BATTERY.

§ 1. Elements and Essentials of Right of Action.

Employer *held* liable to customer for abusive language and threats shouted at customer in her doorway by collecting agent at street curb, which produced

ASSAULT AND BATTERY—*Continued.*

fright resulting in miscarriage when agent had knowledge of customer's advanced pregnancy. *Kirby v. Stores Corp.*, 808.

§ 10. Sufficiency of Evidence.

Evidence *held* sufficient to be submitted to the jury on question of guilt of one of defendants on charge of simple assault. *S. v. Smith*, 63.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

§ 6. Transfers by Debtor Within Four Months of Assignment.

A judgment duly rendered by a court of competent jurisdiction against a debtor assigning his property to a trustee for the benefit of creditors is not a transfer or conveyance of property by the assignor, although the judgment is rendered within four months prior to the assignment to the trustee, and the judgment is not a preference prohibited by C. S., 1611, and will not be declared void upon suit of the trustee. *Pritchett v. Tolbert*, 644.

§ 7c. Liens and Priorities.

Where a valid judgment is rendered within four months prior to an assignment for benefit of creditors by the judgment debtor, and execution is issued thereon and personal property of the debtor levied upon prior to the registration of the deed of assignment, the judgment is a lien upon the personal property levied upon prior to the title of the trustee in the deed of assignment. *Pritchett v. Tolbert*, 644.

ATTACHMENT.

§ 4. Property Subject to Attachment.

The interest of the *cestui que trust* in a spendthrift trust is not subject to attachment, C. S., 798, *et seq.*, since by express provision of C. S., 1742, the property is not liable for the debts of the *cestui que trust* in any manner. *Chinnis v. Cobb*, 104.

§ 14. Attachment of Lien and Priorities.

Plaintiff attached property which had belonged to defendant's mother prior to her death. Thereafter, within one year after the death of defendant's mother, the will was probated in the county, which will devised the property in trust for defendant under a spendthrift trust. *Held:* Defendant took nothing as heir at law of her mother, and her interest in the land under the spendthrift trust was not subject to attachment, and the fact that the attachment was attempted to be levied prior to the probate of the will created no lien on the land. *Chinnis v. Cobb*, 104.

AUTOMOBILES.

§ 8. Due Care in Operation in General.

The driver of an automobile may not escape liability for the injury to a dog in the street by relying exclusively upon the dog's ability, through agility and celerity, to avoid being struck, but the rule of the reasonably prudent man under the circumstances will be applied. *Jones v. Craddock*, 429.

§ 9. Attention to Road.

Evidence *held* sufficient to be submitted to jury on question of negligence in failing to keep proper lookout. *Taylor v. Rierson*, 185.

§ 11. Passing Vehicles on Highway.

The evidence disclosed that the car owned by the corporate defendant and operated by the individual defendant was parked on the hard surface of the highway, in daylight, that plaintiff turned his car to the left to pass the parked car when he saw another car approaching from the opposite direction, apprehended he could not pass the parked car without hitting the oncoming

AUTOMOBILES—*Continued.*

car, turned back to the right and was unable to stop before hitting the parked car. *Held:* Conceding defendants were negligent in parking the car on the hard surface in violation of C. S., 2621 (66), the evidence discloses contributory negligence of plaintiff as a matter of law in attempting to pass the parked car without first ascertaining that he could pass the car in safety. *McNair v. Kilmer & Co.*, 65.

Driver must ascertain that left side of road is clear before driving to the left to pass cars going in same direction. *Joyner v. Dail*, 663.

§ 12a. Speed on Highway in General.

The driving of an automobile upon a highway at a speed in excess of forty-five miles per hour is not negligence *per se* or as a matter of law, but only *prima facie* evidence that the speed is unlawful under the provisions of ch. 311, sec. 2, Public Laws of 1935. *S. v. Webber*, 137; *Exum v. Baumrind*, 650.

Jury must find that truck's attachment was trailer as defined by statute before applying speed limit of thirty miles per hour. *S. v. Brooks*, 273.

§ 12c. Speed at Intersections and Bridges.

Under C. S., 2616, 2618, it is negligence *per se* to drive a car at a speed in excess of 15 miles per hour in traversing an intersecting highway when the driver's view is obstructed one hundred feet therefrom, and the amendment, ch. 3, Public Laws of 1935, reducing the distance from one hundred feet to fifty feet has no retroactive effect. *Hinshaw v. Pepper*, 573.

Driving into obstructed intersection at speed in excess of 15 miles per hour is negligence *per se*. *Turner v. Lipe*, 627.

§ 14. Parking and Parking Lights.

Stopping on highway for fraction of minute because of wrecked cars ahead on highway *held* not parking in violation of statute. *Stallings v. Transport Co.*, 201.

§ 17. Skidding.

The mere fact of skidding is insufficient to establish negligence on the part of the driver of an automobile, but where the skidding is caused by the negligent operation of the car, the driver is liable for injuries resulting therefrom. *Taylor v. Rierson*, 185.

§ 18b. Willful and Wanton Negligence.

Evidence that defendant drove his car into an obstructed intersection at a speed in excess of fifteen miles per hour, although sufficient to establish negligence *per se*, is insufficient to support an issue relating to wanton negligence. *Turner v. Lipe*, 627.

§ 18c. Contributory Negligence.

Testimony *held* not to disclose contributory negligence, as matter of law, on part of twelve-year-old plaintiff, who was hit by speeding car when he skated into infrequently used street while playing. *Hollingsworth v. Burns*, 40.

Evidence *held* to disclose contributory negligence of plaintiff in attempting to drive past defendant's parked car. *McNair v. Kilmer & Co.*, 65.

Held: Plaintiff's evidence shows contributory negligence of his intestate as a matter of law in driving at an unlawful speed at the intersection, under the statutes in force at the time of the accident, and that intestate took a chance and lost, and defendant's motion to nonsuit was properly granted. *Hinshaw v. Pepper*, 573.

Motion to nonsuit for that plaintiff's own testimony showed contributory negligence *held* correctly denied when plaintiff's testimony is conflicting on the issue. *Matthews v. Cheatham*, 592.

AUTOMOBILES—*Continued.*

§ 18d. Intervening Negligence.

Held: Evidence failed to show intervening negligence, since driver's negligence was active and not passive. *Taylor v. Rierson,* 185.

§ 18g. Sufficiency of Evidence of Negligence.

The evidence favorable to plaintiff tended to show that defendant's intestate was driving his car at a speed of forty-five miles per hour along a wet street in heavy traffic in a thickly populated residential section of a city when the car skidded fifty feet and careened to the left over the center of the street and hit another car going in the opposite direction, resulting in the injuries in suit. *Held:* The evidence was sufficient to be submitted to the jury on the question of whether the skidding of the car was caused by its negligent operation by defendant's intestate. *Taylor v. Rierson,* 185.

The evidence disclosed that the car in which plaintiff was riding as a guest skidded approximately fifty feet and careened to the left so that its left front wheel was about seven feet over the center of the street when it struck the car driven by defendant, that defendant was driving his car on the right side of the street at about twenty miles per hour, but that he could have seen that the car in which plaintiff was riding was out of control, and that he could have avoided the collision by turning three feet further to his right, there being about seventeen feet between his car and the right curb. *Held:* The evidence was sufficient to be submitted to the jury upon plaintiff's allegations that the driver of the car failed to keep a proper lookout, and was driving in a reckless manner in view of the conditions of the street and the surrounding circumstances. *Ibid.*

Evidence that plaintiff's dog was standing in the street about seven feet from the curb and was attentive to and had started to move toward his mistress, who was standing on the sidewalk and had attracted his attention and caused him to stop as he was crossing the street by yelling a warning to the driver of an on-coming car, that the driver of the car was then two hundred feet away and could have easily observed the situation, that the street was broad and free of traffic, but that the driver of the car, without slackening speed or turning to the left to avoid hitting the dog, ran over and killed the dog near the right curb, *is held* sufficient to be submitted to the jury on the issue of the driver's negligence, and not to show contributory negligence as a matter of law on the part of the owner of the dog. *Jones v. Craddock,* 429.

Conflicting evidence as to the identity of defendant as the driver of the car inflicting the negligent injury in suit raises a question for the jury. *Ibid.*

Evidence of defendant's actionable negligence in traversing intersection *held* sufficient for jury. *Matthews v. Cheatham,* 592.

Evidence that defendant drove his car into an intersection of highways at a speed in excess of 15 miles per hour when his vision of the intersecting highway was obstructed by growing corn, and that his speed was a proximate cause of the accident in suit, is sufficient to overrule his motion as of nonsuit, speed in excess of 15 miles per hour, under the circumstances, being in violation of statute, C. S., 2618, and constituting negligence *per se.* *Turner v. Lipe,* 627.

Evidence that the driver of a truck, in attempting to pass cars going in the same direction, pulled out in the center of the road and hit the car which plaintiff was driving in the opposite direction, causing damage to the car and injury to plaintiff, *is held* sufficient to be submitted to the jury on the question of the actionable negligence of the driver of the truck. N. C. Code, 2621 (55) (a). *Joyner v. Dail,* 663.

AUTOMOBILES—*Continued.*

§ 19. Right of Action for Injuries in General.

The "gross negligence" rule does not apply in this jurisdiction to actions by a gratuitous guest to recover from the driver for injuries sustained in a collision. *Taylor v. Rierson*, 185.

§ 20a. Contributory Negligence of Guest in General.

Conflicting evidence as to whether plaintiff's intestate knew the general reputation of the driver of the car as reckless and incompetent and addicted to drink when intestate got into the car as such driver's guest *is held* to raise an issue of fact for the jury on the question of intestate's contributory negligence. *Taylor v. Caudle*, 60.

§ 21. Parties Liable to Guests and Passengers.

The complaint alleged that a piece of timber from a bridge over the corporate defendant's tracks struck and killed intestate when the car in which he was riding as a guest was driven into the side of the bridge, that the driver of the car was intoxicated and was driving at an excessive speed, and that the bridge was allowed to remain with broken guard rails projecting in a manner hazardous to the traveling public, and that the corporate defendant had prior knowledge of its condition, and that intestate's death was proximately caused by the concurrent negligence of the driver and the railroad company. *Held:* The complaint states a cause of action against defendants as joint tort-feasors, entitling plaintiff to maintain an action against either or both, and the corporate defendant's demurrer on the ground that it appeared from the facts alleged that the negligence of the driver of the car was the sole proximate cause of the injury was properly overruled. *Smith v. Sink*, 815.

Evidence *held* to disclose that negligence of driver was sole proximate cause of accident at railroad crossing, and railroad company's motion to nonsuit was properly granted. *Rose v. R. R.*, 834.

§ 23. Liability of Owner for Driver's Negligence in General.

Evidence that the owner of an automobile permitted a person to drive the car who was a reckless and incompetent driver and given to the habitual and excessive use of liquor *is held* sufficient to be submitted to the jury on the issue of the owner's negligence in permitting such person to drive his car. *Taylor v. Caudle*, 60.

In order for the owner of an automobile to be held liable for injury inflicted by a person to whom he had loaned the car, the injured person must show, in addition to the fact of ownership, that the person to whom the car was loaned was reckless and incompetent, and that the owner had knowledge of this fact. *Cook v. Stedman*, 345.

§ 24a. Liability of Owner for Negligence of Agents and Employees in General.

In order to hold an employer liable for the negligent driving of his employee, plaintiff must establish not only the fact of employment, but also that the employee, at the time of the collision, was engaged in the performance of some duty incident to his employment. *Terry v. Montgomery Ward Co.*, 351.

§ 24c. Competency and Sufficiency of Evidence That Driver Was Acting in Scope of Employment.

Evidence *held* for jury on issue of whether employee was acting within scope of employment at time of accident. *Miller v. Wood*, 520.

§ 25. Family Car Doctrine.

The evidence disclosed that the *feme* defendant was driving a car owned by her daughter, but that the daughter was a minor and used the car

AUTOMOBILES—*Continued.*

only with the consent of her parents, that all members of the family used the car, which was kept in a garage with two other cars belonging to the *feme* defendant's husband, and that he listed and paid taxes on the car in his own name, secured or attempted to secure insurance thereon in his name, and furnished gasoline and paid repair bills thereon, that at the time of the accident the *feme* defendant had gone for a dress belonging to her daughter and was going to bring her daughter home from work, and that after the accident the husband had title to the car placed in his name, *is held* sufficient to show that the husband controlled and maintained the car as a "family car," and the evidence was correctly submitted to the jury on the issue of his liability under the doctrine. *Matthews v. Cheatham*, 592.

§ 29. Drunken Driving.

Statute prohibiting operation of vehicle by person under influence of intoxicants imports motion of the vehicle and does not embrace holding vehicle still by putting foot on brake. *S. v. Hatcher*, 55.

In absence of evidence that owner knew driver was intoxicated, owner may not be held criminally liable. *S. v. Creech*, 700.

Conflicting evidence as to whether defendant was drunk at the time *held* for jury. *S. v. Stancell*, 843.

§ 30. Passing Standing School Buses.

N. C. Code, 2618 (b), requiring motor vehicles to stop before passing a school bus standing on the highway applies to passing a school bus from either direction, from the rear or from the front. *S. v. Webb*, 350.

§ 31. Negligence of Defendant.

Evidence that defendant was driving his car at a speed of from 50 to 55 miles per hour, on or near the center of the highway, when he collided with another car, resulting in the death of the driver thereof, *is held* sufficient to overrule defendant's motion to nonsuit in a prosecution for manslaughter, although defendant introduces evidence in sharp conflict; but an instruction that the driving on the highway at such speed was negligence *per se* is error entitling defendant to a new trial. *S. v. Webber*, 137.

BANKRUPTCY.

§ 10. Effect of Discharge on Liability of Codebtors of Bankrupt.

The discharge in bankruptcy of the maker of a note does not affect the liability of an endorser of the note before delivery. *Luther v. Lemons*, 278.

BANKS AND BANKING.

§ 5c. Powers of Reserve Banks.

Where a note executed by the makers for a valid debt is rediscounted by the payee bank, the makers cannot complain that the note was not subject to rediscount under the Federal Reserve Act, only the Federal Government being in a position to complain that a reserve bank exceeded the powers conferred upon it by the Government. *Bank v. Duffy*, 598.

§ 8a. Duties and Liabilities in Payment of Checks.

Depositor must notify bank of forgeries within sixty days from receipt of bank's statement by depositor's authorized agent. *Fuel Co. v. Bank*, 244.

Evidence *held* not to disclose that corporation was negligent in failing to discover forgeries of its bookkeeper. *Ibid.*

§ 10. Rediscounting.

Where a national bank acts in its own interest in rediscounting a note with a Federal Reserve Bank, knowledge of the national bank of matters not

BANKS AND BANKING—*Continued.*

appearing upon the face of the note which render it ineligible for rediscount, is not imputed to the reserve bank. *Bank v. Duffy,* 598.

§ **18. Claims and Priorities.**

The foundation of a benevolent society selected a bank to act as custodian of its funds, agreeing that the bank acting as custodian should receive a stipulated sum annually for its services and should treat the funds like other savings deposits, the foundation retaining control over the funds and receiving interest thereon. At the time the bank became insolvent and closed its doors, the funds were represented by certificates of deposit. *Held:* The foundation is entitled to prove its claim against the bank for the deposit as a common claim, but is not entitled to a preference thereon. *Masonic Foundation v. Hood,* 67.

Property bequeathed to a bank to be held by it in trust and used by it in the education of testatrix' grandson, and balance remaining to be paid him upon his majority, *is held* to entitle the grandson to a preference in the bank's assets upon its insolvency upon his majority, no part of the fund having been used for his education. *Brookshire v. Hood,* 581.

The preferred claim of a nonresident against an insolvent bank is not barred because not filed until three and a half years after his majority and six years after its receivership, when the nonresident had no notice, actual or constructive, of the bank's receivership until the time of filing claim, and an action thereon begun before the expiration of ninety days from the rejection of the claim can be maintained. *Ibid.*

§ **27. Distinction Between Merger and Consolidation.**

A national bank, in order to effectuate its agreement with certain State banks for a consolidation, transferred all its assets, with the approval of the Comptroller of the Currency, to a State bank incorporated for that purpose, and thereafter the national bank was duly dissolved. The State banks involved in the agreement, with the approval of the Commissioner of Banks, transferred all their assets to one new State bank, and each of the constituent State banks was dissolved and ceased to exist as a corporation. *Held:* The new State bank was created as a result of a consolidation rather than a merger, since none of the constituent banks remained in existence, but each was dissolved to form a new corporation. *Braak v. Hobbs,* 379.

§ **29. Operation and Effect of Merger or Consolidation.**

A bank created as a result of the consolidation of constituent banks succeeds to all the rights, powers, duties, and liabilities of its constituent banks. N. C. Code, 217 (p). *Braak v. Hobbs,* 379.

BASTARDS.

§ **1. Nature, Validity, and Construction of Bastardy Statutes.**

N. C. Code, 276 (a), making the parent's willful neglect to support his illegitimate child a misdemeanor, does not violate due process of law or impose imprisonment but by the law of the land (14th Amendment to the Federal Constitution, Art. I, sec. 17, of the Constitution of North Carolina), since the statute raises no presumption against a person accused thereunder, the failure to support being evidence of willfulness, but raising no presumption thereof, but to the contrary, the statute requires the State to overcome the presumption of innocence both as to the willfulness of the neglect to support the illegitimate child and defendant's paternity of the child. *S. v. Spillman,* 271.

§ **4. Procedure.**

It is not necessary to a prosecution for willful neglect to support an illegitimate child that defendant's paternity of the child should be first judicially

BASTARDS—*Continued.*

determined, but the State must prove on the trial, first, defendant's paternity of the child, and then his willful neglect or refusal to support the child. *S. v. Spillman*, 271.

BETTERMENTS.

§ 2. Claim of Betterments by Purchaser in Contract to Convey.

The vendor in a contract to convey represented to the purchaser that he had title to the land and agreed to sell upon payment by the purchaser of the contract price in installments, the contract providing that it should be void if the purchaser failed to make the payments as stipulated. The purchaser paid the first installments, went upon the land and made improvements thereon, but failed to make the last payments called for in the contract. The vendor did not have title, and the purchaser was ousted by the holder of the good record title. *Held:* The purchaser is entitled to recover from the vendor the amount paid on the purchase price, plus the value of the improvements, less the reasonable rental value of the property during the time the purchaser had possession, notwithstanding the provision for forfeiture, the vendor having induced the purchaser to pay a part of the purchase price and make improvements under a contract which the vendor could not perform. *Knowles v. Wallace*, 603.

§ 4. Good Faith in Making Improvements.

In an action between the parties it was determined that the relation between plaintiff and defendant was in effect that of mortgagor and mortgagee, although the form of the instrument executed by plaintiff was a deed of trust, and under the presumption raised by the relationship a deed in fee thereafter executed by plaintiff to defendant was set aside, and judgment rendered for defendant for the amount of the debt constituting a lien against the land. After the execution of the deed and prior to the institution of action defendant went into possession and made improvements on the land, and this proceeding was instituted to recover the value of such improvements against plaintiff. *Held:* In the action setting aside the deed in fee no actual fraud was proven against defendant, but the deed was set aside under the presumption raised by the relationship between the parties, and defendant is entitled to recover against the plaintiff the value of the improvements under the doctrine that he who seeks equity must do equity. *Hinton v. West*, 712.

BILL OF DISCOVERY.

§ 3. Affidavit and Proceedings to Secure.

An order for the examination of an adverse party under C. S., 900, may be granted upon proper affidavit before the filing of a complaint. *Bohannon v. Trust Co.*, 679.

§ 4. Compelling Attendance.

Order that answer be stricken out unless defendant, a resident of another state, should appear and be adversely examined *held* void as alternative. The order being void, the question of whether, upon the facts alleged and found by the court, the court had the power to order the individual defendant, who had moved to another state, to appear and to strike out the answer upon his failure to do so is not presented for decision. *Hagedorn v. Hagedorn*, 164.

§ 6. Right to Introduce Examination at Trial.

Where a party reads in evidence an examination of an adverse party had under the provisions of C. S., 899, *et seq.*, he must read the whole of the examination, and the admission in evidence of the direct examination of such party while omitting the cross-examination is reversible error. C. S., 902. *Enloe v. Bottling Co.*, 262.

BILLS AND NOTES.

§ 9d. Assignees and Holders for Collection.

Whether volunteer paying note after maturity was entitled to assignment or whether note was discharged *held* dependent upon understanding of parties at the time. *Shelton v. Cody*, 444.

§ 9e. Purchasers and Holders in Due Course.

Federal Reserve Bank discounting note of member bank without knowledge that note was secured by mortgage *held* holder in due course. *Bank v. Duffy*, 598.

§ 10b. Rights and Liabilities of Endorsers and Persons Secondarily Liable.

Subsequent endorser *held* liable on check obtained by original holder by fraud and endorsed by him by forging name of payee. *Keel v. Wynne*, 426.

§ 17. Payment in General.

Whether holder intended to sell notes to volunteer paying same after maturity *held* for jury under the evidence. *Shelton v. Cody*, 444.

§ 26. Competency and Relevancy of Evidence in Actions on Notes.

Where a party denies that he endorsed the note sued on or authorized his signature thereto, evidence that he endorsed the original note, and that the note sued on was executed in renewal of the original note, is competent on the issue. *Bank v. Toxey*, 470.

§ 27. Sufficiency of Evidence, Nonsuit, and Directed Verdict.

Where party admits execution of note and fails to introduce evidence on affirmative defense upon which he prays reformation, directed verdict for holder is not error. *Eggleston v. Quinn*, 666.

Introduction of note with further evidence of its execution and consideration entitles holder to go to the jury, although defendant introduces evidence that signature was a forgery. *Parks v. Allen*, 668.

§ 28. Voluntary Nonsuit.

Since the holder of a note may sue any or all persons severally liable thereon, C. S., 458, an endorser may not attack for fraud a judgment entered against him on the note in a suit maintained by the maker in his capacity of administrator of the holder, in which suit he takes a nonsuit against himself as maker of the note. *Castleberry v. Sasser*, 576.

BOUNDARIES.

§ 1. General and Specific Descriptions.

When the specific description by metes and bounds contained in a deed or deed of trust does not include land which it was the intention of the parties to the instrument to convey, but such land is included in and is covered by a general description, the general and not the specific description will control, and the grantee in the deed, or the trustee in the deed of trust, acquires title to the larger tract embraced in the general description. *Crews v. Crews*, 217.

BUILDING AND LOAN ASSOCIATIONS.

§ 9. Claims and Priorities.

Borrowing stockholder *held* not entitled to preference for amount paid on stock after limitation of association's operations by Insurance Commissioner. *Shuford v. Building & Loan Asso.*, 237.

BURGLARY AND UNLAWFUL BREAKINGS.

§ 9. Sufficiency of Evidence.

Evidence that the house of the prosecuting witness was broken into by twisting the knob off the locked door and forcing the door open, that the time

BURGLARY AND UNLAWFUL BREAKINGS—*Continued.*

was late at night, and that the prosecuting witness and his wife were asleep in the room entered, together with evidence that tracks in the freshly fallen snow were followed and led to defendant's room in another house in a distant part of the city, where defendant was apprehended, *is held* sufficient to be submitted to the jury on the question of defendant's guilt of burglary in the first degree. N. C. Code, 4232. *S. v. Oakley*, 206.

CANCELLATION OF INSTRUMENTS.

§ 12. Sufficiency of Evidence and Nonsuit.

A nonsuit is properly entered upon an interplea seeking to have certain instruments canceled for fraud when the parties seeking the relief fail to introduce any evidence that they were defrauded. *Minton v. Lumber Co.*, 422.

Evidence that plaintiff owed nothing on her car, but was induced to sign a conditional sales contract thereon securing a debt owed the dealer by plaintiff's son, for which plaintiff was not liable, by false representations by the dealer's agents that the writing was an application for insurance on the car, and that plaintiff could not read the writing at the time because she did not have her glasses, *is held* sufficient to be submitted to the jury in plaintiff's action for the cancellation of the writing for fraud. *Edney v. Motor Sales*, 569.

CARRIERS.

§ 4. Rates and Tariffs.

Plaintiffs, carriers by truck, instituted this action against certain railroad companies and the Utilities Commissioner to enjoin the promulgation of lower rates on a certain product by defendant carriers and the acceptance of such rates by the Utilities Commissioner, in shipments from a designated terminal to other points within the State, alleging that the rates were unjustly discriminatory against other products over the same route and against products shipped from other termini in the State, and in violation of N. C. Code, 1112 (1), and that such reduction in rates would tend to injure plaintiffs in their business of hauling the product in question by contract with shippers. *Held:* Plaintiffs allege no invasion of property rights entitling them to injunctive relief, since the alleged discrimination against other products over the same route and against other termini in the State would injure shippers having such other products for shipment over the same route and shippers having products for shipment from such other termini, and would invade no property rights of plaintiffs, and since the alleged prospective injury to plaintiffs' business is by way of fair competition, against which the law does not protect, such injury being *damnum absque injuria*, defendant carriers being entitled to reduce their rates at will under ch. 134, sec. 16, Public Laws of 1933. *Motor Service v. R. R.*, 36.

CHATTEL MORTGAGES AND CONDITIONAL SALES.

§ 9a. Notice, Lien, and Priorities.

The registration of a chattel mortgage in the proper county in this State is constructive notice of the lien in all states except those requiring registration therein in order to charge purchasers for value without notice who purchase the property after it has been removed to such state and brought to rest therein. *Applewhite Co. v. Etheridge*, 433.

Purchaser for value without notice in state requiring registration therein *held* to take property free from chattel mortgage registered only in this State. *Ibid.*

CLERKS OF COURT.

§ 2. Assistant Clerks.

While the clerk of the Superior Court is a constitutional officer, the duties of clerks are prescribed by statute, with the exception of the duty to fill vacancies in the office of justice of the peace by appointment, and the Legislature, as creator of the statutory duties of clerks, may prescribe that such duties may be performed by assistant clerks, N. C. Code, 934 (a), *et seq.*, ch. 32, Public Laws of 1921, and an attack upon the appointment of a guardian for an incompetent by an assistant clerk on the ground that the statute delegating the powers of clerks to assistant clerks is unconstitutional is untenable. *In re Barker*, 617.

COMMON LAW.

§ 1. Rule as to Parts of Common Law in Force in This State.

So much of the common law as is not destructive of, repugnant to, or inconsistent with our form of government, and which has not been repealed or abrogated by statute or become obsolete, is in full force and effect in this jurisdiction. C. S., 970. *S. v. Hampton*, 283.

§ 2. Parts of Common Law Which Are in Force in This State.

Common law rule that solicitation of another to commit a felony is a crime, even though the solicitation is without effect, is in force in this State. *S. v. Hampton*, 283.

Under the common law rule obtaining in this jurisdiction, a lessor is under no implied covenant to repair the premises. *Mercer v. Williams*, 456.

COMPROMISE AND SETTLEMENT.

§ 2. Operation and Effect of Agreements.

After the absence of insured for over seven years without being heard from, the beneficiary, who had kept the policy in force by paying premiums, agreed with insurer to accept the cash surrender value of the policy with the privilege of reopening the case in the event the beneficiary could ever prove insured died prior to the lapsing of the contract. *Held:* The compromise agreement precludes the beneficiary from reopening the case except upon proof of actual rather than presumptive death. *Head v. Ins. Co.*, 203.

CONCEALED WEAPONS.

§ 4. Warrant and Indictment.

In this prosecution for carrying a concealed weapon, the warrant *is held* fatally defective in failing to embrace in the charge the essential element of the offense that the weapon was carried concealed by defendant off his own premises, the warrant itself excluding the charge that the weapon was carried off the premises by charging that defendant carried an unconcealed weapon off his premises. C. S., 4410. *S. v. Bradley*, 290.

CONSPIRACY.

§ 6. Sufficiency of Evidence.

Evidence *held* sufficient to be submitted to the jury on question of guilt of two of defendants on charge of unlawful conspiracy to assault the State's witness. *S. v. Smith*, 63.

CONSTITUTIONAL LAW.

§ 6b. Power and Duty of Courts to Determine Constitutionality of Statutes.

The courts have the power and duty to declare an act of the General Assembly unconstitutional when the question is properly presented and the act is clearly unconstitutional. *Glenn v. Board of Education*, 525.

CONSTITUTIONAL LAW—*Continued.*

Supreme Court will not determine constitutionality of statute when appeal may be decided on other grounds. *S. v. Ellis*, 166.

§ 8. Regulation of Trades and Professions.

Public Laws of 1935, ch. 66, sec. 11, providing that a licensed dentist who shall have retired, or who shall have moved to another state and thereafter returned to this State, shall stand and pass an examination by the State Board of Dental Examiners as to his proficiency in the profession of dentistry, and shall show good moral character, before issuance of license to resume practice in this State, *is held* constitutional and valid as an exercise of the police power of the State for the good and welfare of the people. *Allen v. Carr*, 513.

§ 12. Monopolies and Exclusive Emoluments and Privileges.

Act requiring second examination before issuance of license to resume practice of dentistry *held* not to deny equal protection of laws or to confer exclusive privileges. *Allen v. Carr*, 513.

§ 13. Equal Protection, Application, and Enforcement of Laws.

Act requiring second examination before issuance of license to resume practice of dentistry *held* not to deny equal protection of laws or to confer exclusive privileges. *Allen v. Carr*, 513.

§ 16. What Constitutes Due Process of Law.

Taxation of personalty of nonresidents having "business *situs*" in this State does not violate 14th Amendment of Federal Constitution. *Mecklenburg County v. Sterchi Bros.*, 79.

Street assessments made under charter provisions failing to provide notice and an opportunity to be heard to those assessed are void as violating due process of law, and may not be validated by curative acts of the Legislature. Art. XIV, sec. 1, of the Federal Constitution, Art. I, sec. 17, of the State Constitution. *Lexington v. Lopp*, 196.

§ 18. Vested Substantive Rights and Titles.

A statute requiring registration of a chattel mortgage in the state when the property, subject to a chattel mortgage registered in another state is removed to the state, in order to affect the rights of innocent purchasers for value without notice does not deprive the mortgagee of his rights in violation of the due process clause of the 14th Amendment to the Federal Constitution. *Applewhite Co. v. Etheridge*, 433.

§ 20. Nature and Extent of Mandate Against Impairing Obligations of Contract in General.

A statute in effect at the time of the execution of a contract cannot be successfully attacked as impairing the obligations of the contract, since in such instance the contract is presumed to have been made with reference to the existing law. Federal Constitution, Art. I, sec. 10. *Applewhite Co. v. Etheridge*, 433.

§ 21. Substantive Provisions of Contractual Obligations.

Sec. 3 of ch. 275, Public Laws of 1933, providing that upon the purchase of the property at the foreclosure sale under the power contained in the instrument by the mortgagee, *cestui que trust*, or holder of the notes secured by the instrument, the mortgagor or trustor may resist recovery of a deficiency judgment by showing that at the time of the sale the property was worth the amount of the debt, is constitutional and valid and does not impair the obligations of contract, since the statute recognizes the obligation of the debtor to pay his debt and the right of the creditor to enforce payment by action in accordance with the terms of the agreement, but provides merely for judicial supervision of sales under power to the end that the price bid at the sale shall

CONSTITUTIONAL LAW—*Continued.*

not be conclusive as to the value of the property, and that the creditor may not recover any deficiency after applying the purchase price to the notes without first accounting for the fair value of the property in accordance with well settled principles of equity. Constitution of the United States, Art. I, sec. 10, 5th Amendment, 14th Amendment, sec. 1; Constitution of North Carolina, Art. I, secs. 7, 17, 35. *Loan Corp. v. Trust Co.*, 29; *Building & Loan Asso. v. Bell*, 35.

§ 27. Right to Jury Trial.

Upon defendant's appeal from judgment and sentence by the court after defendant had entered a conditional plea of guilty under ch. 23, Public Laws of 1933, the case will be remanded in order that a jury may pass upon defendant's guilt or innocence in accordance with defendant's constitutional right. *S. v. Ellis*, 170.

§ 28. Right to Confront Accusers.

Right to confront accusers includes right to cross-examination. *S. v. Perry*, 796.

§ 29. Right Not to Incriminate Self.

An accomplice may not testify on direct examination to facts tending to incriminate defendant and at the same time refuse to answer questions on cross-examination relating to matters embraced in his examination-in-chief, and where he refuses to answer relevant questions on cross-examination on the ground that his answers might tend to incriminate him, it is error for the court to refuse defendant's motion that his testimony-in-chief be stricken from the record, the refusal to answer the questions on cross-examination rendering the testimony-in-chief incompetent. N. C. Constitution, Art. I, sec. 11. *S. v. Perry*, 796.

§ 33. Due Process of Law in Conviction of Crime.

N. C. Code, 276 (a), making the parent's willful neglect to support his illegitimate child a misdemeanor, does not violate due process of law or impose imprisonment but by the law of the land (14th Amendment to the Federal Constitution, Art. I, sec. 17, of the Constitution of North Carolina), since the statute raises no presumption against a person accused thereunder, the failure to support being evidence of willfulness, but raising no presumption thereof, but to the contrary, the statute requires the State to overcome the presumption of innocence both as to the willfulness of the neglect to support the illegitimate child and defendant's paternity of the child. *S. v. Spillman*, 271.

CONTRACTS.

§ 8. General Rules of Construction.

Courts will generally adopt the construction given a contract by the parties thereto. *Smith v. Thompson*, 672.

§ 25a. Forfeitures and Penalties Under Terms of the Instrument.

Provisions in a contract for forfeitures and penalties for its breach are abhorred by the law and are looked upon as evidencing bad faith and fraud. *Knowles v. Wallace*, 603.

CORPORATIONS.

§ 25. Liability for Torts.

Plaintiff's evidence failed to show any organization of defendant corporation at the time the alleged slander was uttered, or that the individual defendant was an incorporator, officer, or stockholder, although it did appear that the certificate of incorporation had been filed in the office of the Secretary

CORPORATIONS—*Continued.*
of State the day previous, C. S., 1116. Plaintiff's evidence also failed to show the character of the individual defendant's alleged agency, or that the corporation impliedly authorized him to utter the slanderous remarks or thereafter ratified same. *Held:* The corporate defendant's motion to nonsuit was properly allowed. *Britt v. Howell*, 475.

§ 41. **Distinction Between Consolidation and Merger.**
Transaction *held* to constitute consolidation rather than a merger of constituent banks. *Braak v. Hobbs*, 379.

COUNTIES.

§ 5. **County Commissioners.**
Ch. 526, Public-Local Laws of 1935, providing that Cherokee County should be divided into three districts and that one county commissioner should be nominated and elected by the qualified voters of each of the districts, is constitutional as a valid exercise of legislative power over municipal corporations, the General Assembly being given express power by Art. VII, sec. 14, to change and modify the provisions of Art. VII, sec. 1, relating to number and election of county commissioners. *Watkins v. Board of Elections*, 449.

§ 10. **Purposes for Which County May Contract or Assume Debt.**
County may assume indebtedness of its school districts which was contracted by them to maintain constitutional school term, and question of whether bonds of school district were necessary to maintenance of constitutional school term is for courts. *Marshburn v. Brown*, 331.

COURTS.

§ 2a. **Appeals to Superior Court from County, Municipal, and Recorders' Courts.**
A defendant in a criminal prosecution is entitled to a trial *de novo* upon appeal from judgment of a recorder's court, but his plea of guilty entered in the recorder's court is competent evidence against him upon the trial in the Superior Court. *S. v. McKnight*, 57.
Where error has been committed in the county court in instructing the jury on the issue of damages, the Superior Court, on appeal, has the discretionary power to order a new trial of the case instead of restricting the new trial to the issue of damages. *Brown v. Lipe*, 199.

§ 2c. **Appeals to Superior Court from Clerk.**
Where the clerk orders an executor to file final account and turn over the assets of the trust estate to itself as trustee, which order is made as a matter of law upon the facts found and not as a matter of discretion, the order is reviewable by the Superior Court upon appeal. *In re Trust Co.*, 285.

§ 7. **Jurisdiction of County, Municipal, and Recorders' Courts.**
When the judgment of a general county court is docketed in the Superior Court of the county it becomes a judgment of the Superior Court in like manner as transcripted judgments of justices of the peace, C. S., 1517, and the general county court has no further jurisdiction of the case, and may not thereafter hear a motion for the appointment of a receiver for the judgment debtor. N. C. Code, 860, 1608 (dd). *Investment Co. v. Pickelsimer*, 541.
General county court *held* without jurisdiction to appoint receiver for judgment debtor whose property is situate outside the county. *Ibid.*

§ 11. **Conflict of Laws.**
Where property, subject to a chattel mortgage registered in this State, is removed to another state and there sold, the registration laws of such state

COURTS—*Continued.*

govern the rights of the purchaser, although action is instituted in this State by the mortgagee to recover the property upon the subsequent removal of the property here by the purchaser. *Applewhite Co. v. Etheridge*, 433.

CRIMINAL LAW.

§ 1. Nature and Elements of Crimes in General.

The solicitation of another to commit a felony is a crime, although the solicitation is of no effect, and the crime is not committed, the common law rule being in effect and controlling. *S. v. Hampton*, 283.

A statute prescribing that persons engaged in a certain business should obtain a license from the Commissioner of Revenue, but which does not provide that failure to comply with its provisions should be a misdemeanor, nor impose any penalties, and which is separate and distinct from the general Revenue Act, is not a criminal statute, and a person refusing to comply with its provisions cannot be charged with crime. *S. v. Morrison*, 117.

§ 2. Intent: Willfulness.

Instruction defining "willfulness" as used in criminal statutes. *S. v. Coal Co.*, 742.

§ 23. Same Offense.

Under a special verdict the jury found that defendants had been tried for the murder of a certain person in an attempt to commit robbery, and had been acquitted, N. C. Code, 4614, and that the present indictment charged defendants with robbery with firearms from the companion of the person they were formerly charged with killing, N. C. Code, 4267 (a), the two offenses having been committed at the same time, and evidence of guilt of one of the offenses being substantially the same as the evidence of guilt of the other. *Held:* The special verdict supports the court's determination of the plea of former acquittal against defendants, the charges being for separate offenses committed against different persons. *S. v. Clemmons*, 207 N. C., 276, cited and distinguished. *S. v. Dills*, 178.

§ 27. Procedure and Determination of Plea of Former Jeopardy.

Defendants entered a plea of former acquittal and refused to plead to the indictment until the plea of former acquittal had been determined. The trial court entered a general plea of not guilty and submitted the question of former acquittal to the trial jury. *Held:* The trial court has discretionary power to have the same jury pass upon the question of former jeopardy under a general plea of not guilty, and defendants' exceptions cannot be sustained, the matter being solely one of procedure, and the trial court's discretionary determination thereof not being reviewable. *S. v. Dills*, 178.

§ 29b. Evidence of Guilt of Other Offenses.

In this prosecution defendant was charged with conspiring with others to damage his car with intent to defraud the insurance company. A witness was permitted to testify that on a former occasion he had seen defendant willfully damage another automobile belonging to him and that defendant had made claim for such damage. *Held:* Testimony of defendant's commission of a like offense on a prior occasion was competent on the question of intent constituting an essential element of the offense charged. *S. v. Batts*, 659.

§ 30. Evidence and Record at Former Trial or Proceedings.

On appeal by defendant from judgment of the recorder's court, the court heard evidence *dehors* the record offered by the solicitor tending to show that defendant had pleaded guilty in the recorder's court, the record failing to show the plea entered by defendant in that court. The judge of the Superior Court found, from the evidence offered by the solicitor, that defendant had

CRIMINAL LAW—*Continued.*

entered a plea of "guilty" in the recorder's court. *Held:* It was error for the judge of the Superior Court to determine the plea entered in the recorder's court upon the evidence *dehors* the record. The court might have resorted to a writ of *certiorari* or *recordari*. *S. v. McKnight,* 57.

§ 31a. Subjects of Expert and Opinion Evidence in General.

In this prosecution for violation of C. S., 2563 (3), relating to monopolies, the State was allowed to introduce the testimony of coal dealers in the same city as to the cost of handling coal, the opinion testimony being based upon complicated and detailed facts relating to costs of buying, shipping, trucking, handling, shrinkage, labor, repairs, etc., the witnesses having had years of experience in operating their respective businesses in the city. *Held:* The witnesses were experts and their opinion testimony was competent and was properly received in evidence. *S. v. Coal Co.,* 742.

§ 31b. Sanity and Mental Capacity.

A nonexpert may testify from his knowledge and observation of the person in question as to such person's mental condition, including strength of memory, the weight and credibility to be given such testimony being for the jury to determine from the witness' intelligence and his means of knowledge and observation of the person in question. *S. v. Witherspoon,* 647.

§ 31g. Qualification of Experts.

Where expert testimony is admitted in evidence, it will be presumed that the court made a preliminary finding that the witnesses were experts, or that such finding was waived, and an exception to the testimony for that the record fails to show such preliminary finding cannot be sustained. *S. v. Coal Co.,* 742.

§ 31h. Examination of Experts.

Where the conclusion of a handwriting expert to the effect that the forgery in question was not executed by defendant is properly admitted in evidence, it is error for the court to exclude from the evidence the testmiony of the expert as to the reasons upon which he based his conclusion, since such testimony tends to strengthen and enhance his testimony and afford the jury an opportunity to determine the soundness of his conclusion. *S. v. Young,* 452.

§ 32a. Circumstantial Evidence in General.

Circumstantial evidence is a recognized and accepted instrumentality in the ascertainment of truth. *S. v. Coffey,* 561.

§ 32b. Presence of Defendant at or Near Scene of Crime.

Testimony that accused was frequently seen prior to homicide at scene of the crime on lonely road *held* competent. *S. v. Tate,* 613.

§ 33. Confessions.

Where there is no evidence that the confession of the accused, made to the officer having him in custody, was made under the influence of violence, or threats of violence, or under the inducement or hope of a reward, but the evidence shows that the confession was freely and voluntarily signed by accused, the confession is competent, and an exception to its admission cannot be sustained. *S. v. Tate,* 613.

Voluntary confessions are admissible in evidence against the party making them; involuntary confessions are inadmissible, and a confession is voluntary in law when, and only when, it is in fact voluntarily made. *S. v. Moore,* 686.

When a prior confession is obtained under circumstances rendering it involuntary, a subsequent confession is presumed to flow from the same vitiating circumstances, but the presumption is rebuttable, and it is for the court to determine from the evidence whether the later confession is competent as being in fact voluntary. *Ibid.*

CRIMINAL LAW—*Continued.*

Evidence *held* to support court's ruling that second confession was voluntary and competent, although prior confession was incompetent. *S. v. Moore*, 686.

§ 41a. Examination of Witnesses.

Questions asked by court tending to disparage witness *held* to violate C. S., 564. *S. v. Winkler*, 556.

Upon examination by the solicitor, a witness was allowed to read her testimony upon the preliminary hearing to refresh her memory, and the solicitor was allowed to read part of her testimony to her. *Held:* Defendant's exception to the manner of examination of the witness cannot be sustained, it being permissible for the witness to thus refresh her memory, and if the manner of the solicitor's questioning be deemed leading, the matter was addressed to the sound discretion of the trial court, the purpose of the solicitor not being to introduce in evidence the testimony of the witness taken upon the preliminary hearing. *S. v. Coffey*, 562.

§ 41b. Cross-Examination of Witnesses.

The constitutional right of a defendant to confront his accusers includes the right to cross-examine them on any subject touched on in their examination-in-chief, N. C. Constitution, Art. I, sec. 11, and a witness testifying to facts incriminating defendant on his examination-in-chief may not deprive defendant of his right to cross-examine him on the ground that answers to questions asked on cross-examination might tend to incriminate the witness. *S. v. Perry*, 796.

§ 41d. Evidence Competent for Purpose of Impeaching Witness.

Where the State relies upon the testimony of the prosecuting witness as to the identity of accused as the perpetrator of the crime charged, it is competent for defendant to impeach the credibility of the prosecutrix by evidence tending to show that she is mentally deficient or abnormal. *S. v. Witherspoon*, 647.

§ 41e. Evidence Competent for Purpose of Corroborating Witness.

Where a witness upon the trial identifies the accused as the man who shot and killed her companion and assaulted her, testimony that, prior to the trial, she told the sheriff, in the absence of the accused, that the voice of the accused, whom she had heard talking in the sheriff's office, was the voice of the man who had committed the crime, is competent as tending to corroborate her testimony at the trial. *S. v. Tate*, 613.

§ 47. Consolidation of Indictments for Trial.

Indictments charging defendant with reckless driving and with passing a standing school bus on the highway may be consolidated for trial. C. S., 4622. *S. v. Webb*, 350.

§ 48. Reception of Evidence.

The order in which the witnesses are called to testify is in the sound discretion of the trial court. *S. v. Alston*, 258.

§ 50. Course and Conduct of Trial.

Defendants relied on an alibi to establish their innocence, and introduced a witness who testified that he was playing poker with defendants some distance from the scene of the crime at the time it was committed, and introduced another witness who testified that the character of the witness testifying as to the alibi was good. The court asked the first witness whether his employer knew he played poker all night on Sunday nights, and asked the character witness whether he would say a man's character was good who played poker all night Sunday night. *Held:* The questions propounded by the court had the effect of impeaching the witnesses and were in violation of C. S., 564, and

CRIMINAL LAW—*Continued.*

defendants' exceptive assignments of error thereto must be sustained. *S. v. Winckler*, 556.

Remarks of the court in the presence of the jury which tend to discredit a witness will be held for reversible error upon appeal of the injured party, but when such remarks are made during defendant's cross-examination of a State's witness, defendant cannot be prejudiced thereby and his exception thereto cannot be sustained. C. S., 564. *S. v. Puett*, 633.

§ 52a. Questions of Law and of Fact in General.

The competency, admissibility, and sufficiency of evidence is for the court to determine, the weight, effect, and credibility is for the jury. *S. v. Coal Co.*, 742.

§ 52b. Nonsuit.

On motion to nonsuit in a criminal prosecution, the evidence must be considered in the light most favorable to the State. *S. v. Macklin*, 496; *S. v. Coal Co.*, 742.

Only incriminating evidence will be considered. *S. v. Coal Co.*, 742.

A motion to nonsuit under C. S., 4643, will not lie merely for failure of the State to offer evidence in support of a nonessential averment in the indictment, C. S., 4623, when each essential element of the offense is supported by competent evidence. *S. v. Atkinson*, 661.

§ 52c. Directed Verdict.

Evidence establishing certain facts made *prima facie* evidence of guilt under a statute is not sufficient to support a directed verdict against defendant in a prosecution for violating the statute in the absence of adminicular evidence so aiding the *prima facie* case that all the evidence, if believed, points unerringly to defendant's guilt, since, as against the *prima facie* case, the presumption of innocence stands with defendant, rendering the question of defendant's guilt beyond a reasonable doubt under the *prima facie* case a question for the jury. *S. v. Ellis*, 166.

§ 53a. Form and Sufficiency of Instructions in General.

The charge in this case *held* not to impinge on C. S., 564, it appearing that the court, in a clear and logical way, set forth the facts and gave the contentions of both parties in a fair manner, and charged the law applicable to the facts and clearly defined "reasonable doubt." *S. v. Coal Co.*, 742.

§ 53c. Instructions on Burden of Proof and Presumptions.

Where the court repeatedly charges the jury that the burden is on the State to prove every element of the offense beyond a reasonable doubt, and then fully defines "reasonable doubt," the charge is sufficient on this aspect, and an exception to its failure to call attention to the presumption of innocence is untenable. *S. v. Alston*, 258.

§ 53d. Expression of Opinion by Court as to Weight or Sufficiency of Evidence.

New trial is awarded in this case for inadvertent expression of opinion by trial court upon the evidence. *S. v. Oakley*, 206.

§ 53e. Requests for Instructions.

A party must aptly tender written request for special instructions desired by him in order for an exception to the charge for its failure to contain such instructions to be considered on appeal. C. S., 565. *S. v. Spillman*, 271.

The failure of the charge to contain certain contentions of defendant will not be held for error in the absence of an apt request by defendant for such special instructions. *S. v. Puett*, 633.

CRIMINAL LAW—*Continued.*

The failure of the court to elaborate on a subordinate feature of the charge will not be held for error in the absence of a request for special instructions. *S. v. Coal Co.*, 742.

§ 53f. Objections and Exceptions to Instructions.

An exception by defendant to the court's statement of the contentions of the State will not be sustained when defendant fails to call the matter to the court's attention in apt time. *S. v. Batts*, 659.

§ 54b. Form, Sufficiency, and Effect of Verdict.

Where there are several counts in the bill of indictment, and the verdict does not refer to one or more of them, the verdict amounts to an acquittal upon the counts not referred to. *S. v. Hampton*, 283; *S. v. Coal Co.*, 742.

§ 56. Motions in Arrest of Judgment.

Insufficiency of the evidence to support the verdict may not be taken advantage of by motion in arrest of judgment, since want of evidence to support the verdict is not an error or defect in the record. *S. v. Robertson*, 266.

A motion in arrest of judgment properly challenges the sufficiency of the warrant to charge a crime. *S. v. Bradley*, 290.

A motion in arrest of judgment for fatal defect appearing upon the face of the record may be made at any time in any court having jurisdiction of the matter. *S. v. Bradley*, 290.

§ 64. Modification of Judgment.

Judgment of the court is *in fieri* during term and may be modified upon evidence heard in open court. *S. v. Godwin*, 447.

§ 67. Nature and Grounds of Appellate Jurisdiction.

On appeal in a criminal prosecution, the Supreme Court is limited to matters of law or legal inference. *S. v. Edmundson*, 639.

§ 69. Appeal and Certiorari.

Where, from lack of time or for other cogent reason, a case is not ready for hearing in accordance with the Rules of Court, appellant may, within the time prescribed, file the record proper and move for *certiorari*, which motion is addressed to the discretion of the Court. *S. v. Moore*, 459.

Defendant, convicted of a capital crime at a term of court commencing two weeks before the next succeeding term of the Supreme Court, failed to docket his appeal within the time prescribed or to docket the record proper and move for *certiorari*. The State moved to dismiss, and defendant entered a countermotion for *certiorari*. *Held:* Although the appeal is subject to dismissal under the Rules of Court, the State's motion is held in abeyance and defendant's motion for *certiorari* allowed, since the life of defendant is at stake. *Ibid.*

Where an application for writ of *certiorari* in the nature of a writ of error is made for the purpose of bringing up an appeal when the right of appeal is lost in the trial court by failure to file statement of case on appeal within the time allowed (N. C. Constitution, Art. IV, sec. 8), applicant must negative laches and show merit. *S. v. Moore*, 686.

On defendant's motion for *certiorari* in the nature of a writ of error it appeared from the *ex parte* case on appeal made up by defendant and filed in the Supreme Court as the basis of his motion that the sole assignment of error was to the admission of the confession of defendant in evidence, and the case on appeal so filed showed that there was no error of law in the court's ruling that the confession was competent as being voluntarily made. *Held:* Motion for *certiorari* must be disallowed for failure to show merit, and the question of laches on the part of defendant need not be considered. *Ibid.*

CRIMINAL LAW—*Continued.*

§ 73a. **Making Out and Service of Case on Appeal.**

Where a defendant fails to file his statement of case on appeal within the time allowed, and fails to make application for extension of time or for waiver of failure to file within the time prescribed, defendant loses his right to bring up the "case on appeal," and the purported case on appeal filed after expiration of the prescribed time is properly stricken from the files by the trial judge, on motion of the solicitor. *S. v. Moore*, 686.

Both the statement of case on appeal and exceptions and countercase must be filed within the time allowed or extension of time granted in order to be effective. *Ibid.*

§ 74. **Term of Supreme Court to Which Appeal Must Be Taken.**

An appeal from a judgment in a criminal prosecution must be taken to the term of the Supreme Court commencing next after the rendition of the judgment, and the appeal docketed fourteen days before the call of the district to which it belongs. *S. v. Moore*, 459.

§ 75. **Filing and Docketing Appeal.**

An order of the Superior Court enlarging the time for serving statement of case on appeal and exceptions thereto or countercase, C. S., 643, as amended by ch. 97, Public Laws of 1921, does not affect the Rules of Court prescribing the term to which the appeal must be taken and the time within which the appeal must be docketed. *S. v. Moore*, 459.

§ 77d. **Conclusiveness and Effect of Record.**

The record proper as contained in the statement of the case on appeal is conclusive, and where the record proper discloses that the trial court withdrew incompetent testimony from the jury and charged the jury fully and correctly upon the verdicts of murder in the first degree, murder in the second degree, manslaughter, and not guilty, which the jury might return upon the evidence, defendant's assignments of error based upon his contentions that the court did not withdraw the incompetent evidence from the consideration of the jury, and that the court instructed the jury that they could render one of two verdicts, guilty of murder in the first degree or not guilty, are not supported by the record and cannot be sustained. *S. v. Grier*, 720.

§ 80. **Prosecution of Appeals and Dismissal.**

Where defendant, convicted of a capital felony, fails to file a brief in the Supreme Court, the appeal will be dismissed on motion of the Attorney-General after an examination of the record discloses no error. Rules of Practice in the Supreme Court 27 and 28. *S. v. Kinyon*, 294.

Where the record and transcript are not docketed in the Supreme Court at the proper time, and no *certiorari* is allowed, the Superior Court, on proper notice, may adjudge the appeal abandoned on proof of such facts. *S. v. Moore*, 459.

The Rules of Court governing appeals are mandatory and must be uniformly enforced, and they may not be set at naught by act of the Legislature, order of the Superior Court, or by consent of litigants or counsel. *Ibid.*

The right of appeal must be exercised in accordance with the established rules and procedure governing appeals. *S. v. Moore*, 686.

Where a defendant fails to make out and serve statement of case on appeal within the time allowed, he loses his right to prosecute the appeal, and the motion of the State to docket and dismiss must be allowed, but where the life of defendant is at stake this will be done only when no error appears on the face of the record proper. *S. v. Laurence*, 741.

CRIMINAL LAW—*Continued.*

§ 81c. Prejudicial and Harmless Error.

A slight inaccuracy in the charge of the court which, when taken with the charge as a whole, is neither misleading nor prejudicial, will not entitle defendant to a new trial. *S. v. Tate*, 168.

An exception to the charge cannot be sustained when the charge is not prejudicial when read contextually as a whole. *S. v. Puett*, 633.

Where sentences on several counts run concurrently, error must affect all counts to entitle defendant to a new trial. *S. v. Pace*, 255.

Where there is plenary evidence of defendant's guilt of the crime charged, a judgment upon a verdict of guilty of a lesser degree of the crime will not be held for error for want of evidence of guilt of such degree of the crime, the judgment in such case being favorable to defendant. *S. v. Robertson*, 266.

The admission in evidence of testimony of a handwriting expert as to some of the reasons for his conclusion that the forgery in question was not executed by defendant does not cure error in the exclusion of his testimony as to other reasons for his conclusion. *S. v. Young*, 452.

Remarks of the court in the presence of the jury which tend to discredit a witness will be held for reversible error upon appeal of the injured party, but when such remarks are made during defendant's cross-examination of a State's witness, defendant cannot be prejudiced thereby and his exception thereto cannot be sustained. C. S., 564. *S. v. Puett*, 633.

Even if evidence that accused left the State after the commission of the crime is erroneously admitted on the ground that it tended to show flight, its admission cannot be held prejudicial when accused testifies at the trial fully explaining the reasons for his leaving the State. *S. v. Edmundson*, 639.

The exclusion of evidence offered for the purpose of impeaching a witness cannot be held prejudicial when other evidence tending to impeach the witness upon the same ground is later admitted without objection. *Ibid.*

§ 81d. Questions Necessary to Determination of Appeal.

Where a defendant is convicted on two counts of equal gravity and punishment, and no error is found in regard to the trial on one of the counts, exceptions not affecting such count, but relating solely to the other count need not be considered, since error, if any, in regard thereto would be immaterial. *S. v. Coal Co.*, 742.

DAMAGES

§ 7. Grounds and Conditions Precedent to Recovery of Punitive Damages.

Punitive damages are allowable only in cases of malicious, wanton, and reckless injury, and may be awarded plaintiff in his suit only if a cause of action exists in his favor which entitles him to nominal damages, at least. *Worthy v. Knight*, 498.

§ 8. Submission of Issue of Punitive Damages.

Where punitive damages are sought, the trial court is limited to a determination of whether the evidence is sufficient to support the issue and whether the amount awarded by the jury is excessive, and where there is evidence of an aggravated, criminal assault by defendant on plaintiff, it is error for the trial court to refuse to submit the issue of punitive damages to the jury. *Worthy v. Knight*, 498.

§ 9. Award and Amount of Punitive Damages.

The awarding of punitive damages and the amount to be allowed, if any, rests in the sound discretion of the jury within the limitation that the amount shall not be excessively disproportionate to the circumstances of contumely and indignity present in each particular case. *Worthy v. Knight*, 498.

DEATH

§ 4. Time Within Which Action for Wrongful Death Must Be Instituted.

It was determined on a former appeal that plaintiff's complaint in this action for wrongful death failed to state a cause of action against the corporate defendants. Thereafter plaintiff was allowed to amend his complaint. *Held:* The amendment constituted a new action so far as the corporate defendants are concerned, and it appearing upon the face of the record that more than one year had elapsed between the accrual of the cause of action and the filing of the amended complaint, the demurrer of the corporate defendants was properly sustained, the action against them not having been instituted within the limitation prescribed by C. S., 160. *George v. R. R.*, 58.

§ 8. Evidence of Expectancy of Life and Damages.

In an action for wrongful death it is error to allow the jury to consider the annuity tables set out in C. S., 1791, upon the question of damages. *Brown v. Lipe*, 199.

The mortuary tables, C. S., 1790, are but evidence of life expectancy, to be taken in connection with other evidence of health, constitution, and habits, and an instruction that intestate's life expectancy was so many years, based upon the tables, violates this rule and the rule against an expression of opinion by the court as to whether a fact is sufficiently proven. C. S., 564. *Trust Co. v. Greyhound Lines*, 293.

DECLARATORY JUDGMENT ACT

§ 2a. Subject of Action.

An action to establish the rights of the parties under an ambiguous deed *is held* to come within provisions of the Declaratory Judgment Act. N. C. Code, 628 (b). *Carr v. Jimmerson*, 570.

DEEDS

§ 1c. Distinction Between Deeds and Wills.

A husband and wife executed a paper writing purporting to convey the lands therein described, but stipulating that it was understood that they "retain and reserve to themselves their right and title to all the above lands during their life, and this deed to become effective at and after the death" of the husband and wife. *Held:* The instrument is a deed and not a will, since it evidences the intent that title should pass to the person therein named upon the execution of the instrument, reserving the right of possession in the husband and wife, and the instrument conveys the title with the right to possession postponed until after the death of the surviving husband or wife. *Beck v. Blanchard*, 276.

§ 8. Registration as Notice.

As between the parties, registered deed held not notice of cause of action for reformation for mistake in omitting reversionary clause therefrom. *Ollis v. Board of Education*, 489.

§ 10b. Rights of Purchasers and Creditors in Regard to Unregistered Deeds.

Where an instrument is required to be registered, no notice, however full and formal, will supply the place of registration. C. S., 3308, 3309. *Knowles v. Wallace*, 603.

§ 11. General Rules of Construction.

In construing a deed, the language and the entire setting must be considered to ascertain the intention of the grantors, and, if possible, effect must be given to every word, and all its provisions harmonized. *Carr v. Jimmerson*, 570.

DEEDS—*Continued.*

§ 13a. Estates and Interests Created by Construction of Instrument.

The deed in this case conveyed the land to a husband and wife by entirety, with remainder to their children in fee, with further provision that in the event the husband and wife had no children, "then the estate in fee simple forever to the right heirs" of the grantor. Thereafter the husband and wife conveyed the land and their grantor joined with them in executing the deed. The husband and wife died without children, and the heirs of the original grantor instituted this action for the land. *Held:* The deed did not create a contingent limitation in favor of the heirs of the grantor, but created the right of reversion in her upon the happening of the contingency, and her heirs have no interest in the land, their claim being by way of inheritance and not by purchase, and their ancestor having previously conveyed her right of reversion by joining in the deed executed by the husband and wife. *Therrell v. Clanton*, 391.

Grantee's child by his first wife deeded to him lands inherited from her mother. The granting clause read to the grantee "and his heirs except as to" the grantor, and *habendum*, to the grantee "and his heirs except as to" the grantor. *Held:* The grantee took a fee simple, and the language is too vague and uncertain to exclude the grantor, or those representing her, from inheriting as one of the heirs of the grantor upon his death without disposing of the lands. *Carr v. Jimmerson*, 570.

§ 13b. Rule in Shelley's Case.

A deed to G. for life "and then to his beirs, if any; if no heirs, to return to his brothers, . . . to have and to hold during his lifetime and then to his lawful heirs of his body, tho, if the said G. should die without a lawful heir of his body, then the aforesaid tract or parcel of land shall return to his brothers." *is held* to grant a life estate to G., the rule in *Shelley's case* not applying, and upon his death his children take title thereto in fee as against the grantee in a deed in fee executed by G. *Gurganus v. Bullock*, 670.

DIVORCE

§ 2a. Separation.

The right to a divorce on the ground of two years separation is based upon a "separation" which is predicated upon a prior agreement, and means more than "abandonment," and while the applicant need not be the injured party, the statute does not authorize a divorce where the husband has separated himself from his wife, or the wife has separated herself from her husband, without cause and without agreement, express or implied. N. C. Code, 1659 (a). *Parker v. Parker*, 264; *Hyder v. Hyder*, 486.

Plaintiff instituted this action for divorce on the ground of two years separation, N. C. Code, 1659 (a), and introduced evidence of more than two years separation after a deed of separation between the parties. Defendant introduced evidence tending to show that the conjugal relation was resumed after the deed of separation was executed, but more than two years before the institution of the action, defendant testifying that she gave birth to a child by plaintiff three years after the execution of the deed of separation. *Held:* It was error for the trial court to direct the jury to find for plaintiff if they believed the evidence, the question of whether the parties resumed the conjugal relation after the execution of the deed of separation, and if so, whether there was a voluntary separation thereafter for the required time, being for the jury. *Reynolds v. Reynolds*, 554.

DIVORCE—*Continued.*

§ 13. Alimony Without Divorce.

In this action for alimony without divorce, plaintiff testified that her husband had repeatedly struck her in the face and that she was in constant fear of him. A witness for plaintiff was allowed to testify that plaintiff had a black eye and appeared to be nervous. *Held:* The testimony was competent as tending to corroborate plaintiff's testimony. *Albritton v. Albritton,* 111.

In this action for alimony without divorce, plaintiff testified that defendant, while beating her, stated he had killed his first wife and got away with it, and that he was going to kill her, and another witness for plaintiff testified that defendant's reputation was good as to outsiders, but was cruel to both his wives. Defendant excepted to the exclusion of his testimony to the effect that his treatment of his first wife was good. *Held:* Defendant's treatment of his first wife was irrelevant to the issue and was properly excluded, and such evidence was not rendered competent as tending to contradict plaintiff's witnesses, defendant having availed himself of the proper method of contradicting their testimony by denying he had made the statement to his wife and by showing that his general reputation was good. *Ibid.*

Adultery prior to marriage is no defense to suit for alimony without divorce. *Ibid.*

Plaintiff need establish but one ground for divorce *a mensa* in suit for alimony without divorce. *Ibid.*

§ 15. Jurisdiction and Procedure (Action by minor child for support; see Parent and Child, § 5).

A minor child of divorced parents is not relegated to a motion in the divorce action to force her father to provide for her support, but may maintain an independent action therefor, the child not being a party to the divorce action. *Green v. Green,* 147.

It appeared that a copy of the complaint in this divorce proceeding was mailed to the *feme* defendant together with a nonsuit taken by plaintiff in a prior action for divorce in which plaintiff prayed for the custody of a child of the marriage, and that thereafter summons in the divorce proceedings was served on the nonresident *feme* defendant by publication. The complaint gave no notice that the plaintiff would seek the custody of the minor child. Judgment for absolute divorce entered in the action provided that plaintiff should have the custody and control of the minor child. *Held:* The order awarding the custody of the minor child to plaintiff is irregular and not in accordance with the practice of the courts of this State, and should have been stricken out on motion of the *feme* defendant for the reason that the *feme* defendant had no notice from the complaint or otherwise that the custody of the minor child was involved in the action. *Burrowes v. Burrowes,* 788.

Proviso of C. S., 1664, dispensing with notice, does not apply in cases where movant has custody and control of child. *Ibid.*

The court entering a decree of absolute divorce may not award, *ex mero motu,* the custody of a minor child of the marriage to plaintiff without giving notice to defendant and without finding that the best interest of the child would be promoted by so awarding its custody. *Ibid.*

Court has no jurisdiction to ratify improvident order for custody of minor child when the child is not within the jurisdiction of the court. *Ibid.*

DRAINAGE DISTRICTS.

§ 5. Nature and Validity of Assessments in General.

A special tax levied upon all property within the boundaries of a sanitary district under express statutory authority will not be declared invalid as to

DRAINAGE DISTRICTS—*Continued.*

an owner of land within the district because the land of such owner is not and cannot be benefited by water or sewer lines which have or may be constructed within the district because the topography of the land renders the construction of such lines to his land economically prohibitive. *Allison v. Comrs. of Buncombe*, 467.

EJECTMENT.

§ 14. Sufficiency of Evidence.

Evidence showing good record title in plaintiff, without any record evidence of title in defendant, *held* to support judgment for plaintiff for recovery of land. *Knowles v. Wallace*, 603.

ELECTIONS.

§ 18b. Necessity of Allegation and Showing That Illegal Ballots Were Sufficient to Alter Result of Election.

A complaint alleging upon information and belief that votes of disqualified persons were counted in the returns of an election, and that less than a majority of the qualified voters cast their ballots in favor of the tax being voted on, but later alleging without qualification that by reason of the matters alleged, a majority of the qualified voters did not vote in favor of the levying of the tax, and that the returns were incorrect, *is held* to sufficiently state a cause of action contesting the validity of the election irrespective of the allegations upon information and belief, and a demurrer thereto on the ground that the complaint failed to state a cause of action for that allegations upon information and belief are unavailing against a demurrer, is properly denied. *Barbee v. Comrs. of Wake*, 717.

ELECTRICITY.

§ 8. Contributory Negligence of Person Injured.

Evidence *held* to disclose contributory negligence in grasping wire thrown over uninsulated transmission wire. *King v. Mills Co.*, 204.

EMBEZZLEMENT.

§ 4. Defenses.

Restitution by defendant of sums embezzled by him after the crime of embezzlement had been fully consummated is no defense to a prosecution for such embezzlement, such restitution affecting only the civil rights of the parties. *S. v. Pace*, 255.

Where a treasurer appropriates funds coming into his hands, the fact that he had not been directed to pay out the funds to those entitled thereto at the time he was apprehended does not constitute a defense, but is correctly submitted to the jury on the question of intent. *Ibid.*

EMINENT DOMAIN.

§ 8. Necessity for Compensation.

Owners of land having an easement over contiguous streets or roads cannot be deprived of their easement, even for a public purpose, without the payment of just compensation. *Glenn v. Board of Education*, 525.

EQUITY.

§ 1a. He Who Seeks Equity Must Do Equity.

Mortgagor upsetting foreclosure *held* liable for improvements put on land by mortgagee who purchased at sale under doctrine that he who seeks equity must do equity. *Hinton v. West*, 712.

ESTATES.

§ 4. Merger of Estates.

The statute of uses, C. S., 1740, converting the beneficial use into the legal ownership and uniting the legal and equitable titles, applies only to simple or passive trusts and not to active trusts. *Chinnis v. Cobb*, 104.

ESTOPPEL.

§ 4. Operation and Effect of Estoppel by Record.

Defendant town relied upon a private act closing certain streets because they were "no longer needed for public purposes," as the basis for its demurrer. *Held:* Defendant is estopped from maintaining its conflicting contention that the streets in question had never been opened. *Glenn v. Board of Education*, 525.

Solemn admission in pleadings estops party from maintaining conflicting position upon the trial. *Poole v. Poole*, 536.

Where a party announces in open court that he is not attacking the validity of the mortgage involved in the action, but will rely solely upon his contention of payment, he is bound by the admission, and judgment in his favor declaring the mortgage void is error. *Wallace v. Wallace*, 656.

§ 6b. Estoppel by Misrepresentation.

Plaintiff alleged that defendant induced him to proceed solely against defendant's joint tort-feasor by falsely representing himself to be insolvent and without liability insurance. *Held:* The facts alleged constitute an estoppel of defendant from setting up a release given by plaintiff to the other joint tort-feasor after settlement as a defense to plaintiff's action against him. the principle that where a party induces another by false representations to change his position for the worse, the party making the misrepresentations will not be permitted to reap advantage from his own wrong, being applicable. *Scott v. Bryan*, 478.

EVIDENCE.

§ 6. Burden of Proof in General.

The burden of proof is on the party asserting the affirmative, whether plaintiff or defendant, to support the issue by the preponderance of the evidence or by its greater weight, and the burden of proof constitutes a substantial right. *Wilson v. Casualty Co.*, 585.

§ 17. Rule That Party May Not Impeach His Own Witness.

Allowing counsel to read from opinion of Supreme Court *held* error under the facts as tending to impeach party's own witness. *Edwards v. Perry*, 24.

§ 18. Evidence Competent to Corroborate Witness.

Plaintiff's wife testified that her husband repeatedly struck her. *Held:* Testimony of her witness that plaintiff had a black eye and appeared nervous was competent as tending to corroborate her testimony. *Albritton v. Albritton*, 111.

§ 19. Evidence Competent to Impeach or Discredit Witness.

Where a trustee testifies as to the amount of a bid made at a foreclosure sale conducted by him, his written report of the sale is competent for the purpose of impeaching or corroborating his testimony, the report being a declaration made by him as a party to the transaction. *Bank v. Robertson*, 436.

§ 20. Evidence of Character.

While the questioning of a character witness must be limited to the general character of the party in question, the witness may voluntarily qualify his testimony by giving the party's reputation, good or bad, for particular traits. *Albritton v. Albritton*, 111.

EVIDENCE—*Continued.*

§ 32. Transactions or Communications with Decedent or Lunatic.

Husband and wife *held* competent to testify, each in the other's favor, as to transaction with decedent. *Burton v. Styers*, 230.

In this action for reformation of a deed to a county board of education for mistake of the draftsman in failing to insert a reversionary clause therein in accordance with the agreement between the grantors and grantee, testimony of the draftsman relating to declarations of a deceased member of the board and of the superintendent of schools, tending to show that it was agreed that the reversionary clause should be inserted, *is held* not precluded by C. S., 1795, the draftsman not being a party interested in the event as contemplated by the statute. *Ollis v. Board of Education*, 489.

§ 36. Accounts, Ledgers, Records, and Private Writings.

Under the terms of the will in this case, the payment of a certain sum to the estate by the devisee was made a condition precedent to the vesting of title in him. Plaintiff, purchaser of the real property at execution sale of a judgment against the devisee, offered in evidence, as proof of payment and that title had vested in the devisee, a special report, duly verified, filed by the executrix stating that the devisee had paid the estate the amount stipulated by the will. *Held:* The special, verified report of the executrix was a document authorized and required to be recorded, was relevant to the issue, and was competent in evidence, its recording purporting verity, C. S., 938, 952, 105, and objection to its admission on the ground of hearsay in that it contained a declaration of a person not a party to the action is untenable, the recorded, verified report being more than a mere declaration by the executrix. C. S., 1779. *Braddy v. Pfaff*, 248.

§ 38. Parol Evidence of Lost or Destroyed Instruments.

Evidence that written contract had been lost and could not be found after due diligence *held* sufficient to establish foundation for admission of parol evidence of contents of agreement. *Orr v. Twiggs*, 578.

§ 40. Exceptions to Parol Evidence Rule.

Parol evidence *held* competent to explain or correct trustee's report of bid at foreclosure sale. *Bank v. Robertson*, 436.

The recitation of the bid at the foreclosure sale contained in the trustee's deed to the purchaser is not conclusive, but the true terms of the bid may be established by parol. *Ibid.*

In an action for reformation of a deed to a board of education for mistake of the draftsman in failing to insert a reversionary clause therein in accordance with the agreement of the parties, parol evidence that a member of the board, and the superintendent of schools, instructed the draftsman to insert the reversionary clause, and had agreed that the reversionary clause should be inserted when signed by the grantors, *is held* competent as tending to show the real agreement of the parties, and not objectionable as being hearsay or as varying the terms of the written instrument into which all prior negotiations were merged. *Ollis v. Board of Education*, 489.

§ 41. Hearsay Evidence in General.

Testimony of the husband as to conversations between himself and his wife tending to show the relations between her and the defendant in a suit for alienating her affections is properly excluded as hearsay. *Martin v. Cress*, 776.

§ 42c. Admissions by Parties or Others Interested in the Event.

In this action by purchasers to enforce specific performance of a contract to convey, certain letters written by the vendor to its exclusive selling agents were offered in evidence. It appeared that the contents of the letters were

EVIDENCE—*Continued.*

disclosed to the purchasers with the knowledge and consent of the seller, that the purchasers and officers of the seller acted thereon, and as a result thereof met to execute the contract of sale, that the letters were written by officers of the seller having full authority to enter the contract of sale, and that the letters contained an admission by the seller of its willingness to complete the contract of sale although the purchasers had theretofore forfeited their rights under the contract by refusing to accept deed to the property during the time stipulated in the original contract for the transfer of the title. *Held:* The letters were competent and material, and were properly admitted in evidence against the seller to show a waiver by it of its right to disregard the contract for failure of the purchasers to accept deed within the time stipulated in the original contract. *Wagner v. Realty Corp.*, 1.

§ 42d. Admissions by Agents or Representatives.

Statements made by agents or employees after completion of the transaction in question are inadmissible against the principal. *Bank v. Toxey*, 470.

The report signed by the manager of an incorporated employer and filed with the Industrial Commission as required by N. C. Code, 8181 (vvv), is competent upon the hearing and statements contained therein not within the personal knowledge of the manager are competent as an admission against interest. *Carlton v. Bernhardt-Seagle Co.*, 655.

§ 43a. Declarations in General.

The relatives of an incompetent moved for the removal of the guardian on the ground that he was supporting the incompetent from her own estate while under a personal obligation to support her under the terms of a prior contract with her. The only evidence of the alleged contract offered was testimony that the wife of the guardian had stated prior to her death that she and her husband were to take care of the incompetent for her life in consideration of certain real estate theretofore deeded to them, and testimony that the incompetent, prior to the adjudication, had stated that she was to be taken care of by the guardian and his wife as long as she lived. *Held:* The evidence was properly excluded upon objection as hearsay, the testimony not coming within any recognized exception to the general rule. *In re Barker*, 617.

§ 44. General Reputation.

Testimony of the general reputation of testator in the community as a business man is incompetent on the issue of mental capacity, such evidence not coming within any of the exceptions to the hearsay rule, and the testimony admitted in this case as to testator's business sagacity in particular types of transactions *is held* incompetent on the further ground that it violates the rules that particular facts may not be proven by general reputation. *In re Will of Nelson*, 398.

§ 46. Subjects of Opinion Evidence by Nonexperts.

While a nonexpert witness may give his opinion of testator's mental capacity, based upon his knowledge and observation of testator, the witness may not testify as to testator's general reputation for business sagacity in the community. *In re Will of Nelson*, 398.

§ 49. Opinion Evidence Invading Province of Jury.

This was an action to recover for injuries sustained when plaintiff was struck by a car driven by defendant. Defendant contended that the accident was unavoidable, and was permitted to testify that it was not possible for him to have avoided hitting plaintiff. *Held:* The testimony invaded the province of the jury, and its admission constitutes reversible error. *Bevan v. Carter*, 291.

EVIDENCE—*Continued.*

§ 51. Competency and Qualifications of Experts.

Ordinarily, the competency of a witness as an expert is addressed to the discretion of the trial court and is not reviewable, but when the court's decision is based upon a conclusion of law from the facts elicited upon preliminary examination, the decision is reviewable. *Hardy v. Dahl,* 530.

This action involved the question of negligence on the part of a practitioner of naturopathy in the administration of his system of healing. Defendant offered two witnesses who testified on preliminary examination that they had diplomas from a recognized school of naturopathy, had been duly licensed by the states in which they practiced, and had practiced naturopathy twenty-four and eighteen years, respectively. The trial court held as a matter of law that the witnesses were not experts. *Held:* The witnesses were experts upon the question of the proper treatment of a patient under this system of practice, and the holding of the court as a matter of law that they were not experts and the exclusion of their testimony upon proper hypothetical questions is subject to review and *is held* for error. *Ibid.*

§ 52. Examination of Experts.

Plaintiff instituted this action to recover for injuries sustained when a shell sold by defendant bursted plaintiff's gun. Defendant's expert witness was allowed to testify from his examination of the gun that an obstruction in the barrel caused the bursting of the gun, and that an overloaded shell could not have caused the damage. *Held:* The testimony was competent as expert testimony on the facts, and probative force of the testimony being for the jury, and objection thereto on the ground that the witness' testimony should have been based on hypothetical questions and that he could not testify directly as to the cause of the bursting of the gun, cannot be sustained. *Keith v. Gregg,* 802.

§ 56. Positive and Negative Evidence.

The charge of the court that the opportunities of witnesses (who had testified that they did not smell whiskey on the breath of the person in question) might be so frequent and favorable as to approach in weight to a positive statement; yet when the positive testimony would not conflict with the negative, under any ordinary circumstances, the witnesses being equally credible, the former should preponderate, *is held* without error, it being the duty of the jury to reconcile the evidence if possible. *Wilson v. Casualty Co.,* 585.

EXECUTION.

§ 12. Title of Third Person as Against Judgment Creditor.

After return of execution against defendant unsatisfied, plaintiff instituted supplemental proceedings against defendant and obtained an order that defendant and his debtor, against whom defendant had instituted suit, appear before the clerk, and that defendant be enjoined from transferring or assigning the debt. Upon the hearing of the supplemental proceedings it appeared that prior to the institution of the proceedings, defendant had verbally agreed to assign part of the recovery to intervener for money borrowed, and that while the action was pending defendant had executed a written assignment in conformity to the verbal agreement, and that upon defendant's recovery of judgment against his debtor after the institution of the supplemental proceedings, the judgment was assigned on the judgment docket in accordance with defendant's agreements with intervener. *Held:* At the time of the rendition of the judgment the intervener was the equitable owner of the stipulated part thereof, and defendant had no legal or equitable interest in such part, and plaintiff is not entitled to attach such part in the supplemental proceedings

EXECUTION—*Continued.*

instituted by it against defendant. C. S., 711, *et seq.* The balance of the judgment had been paid to another intervener to whom defendant had executed a like assignment prior to the institution of the supplemental proceedings and such payment credited on the judgment docket. *Fertilizer Works v. Newbern*, 9.

EXECUTORS AND ADMINISTRATORS.

§ 2. Persons Entitled to Appointment.

The nominee of deceased's nearest of kin will be appointed administrator, if a fit and suitable person, as against those of lesser degree of kinship, provided that no person of the same class as the next of kin renouncing the right files a personal application for appointment. C. S., 6. *In re Estate of Smith*, 622.

Construing C. S., 20, 16, 15, together, the legislative intent is manifest that six months after the death of testator is a reasonable time within which application should be made, in proper instances, for appointment of administrator *c. t. a.* *Ibid.*

Legatee failing to apply for appointment within six months after testator's death waives right to be appointed administrator *c. t. a.* *Ibid.*

The right of nomination and substitution is confined to those themselves qualified for appointment, and where a legatee has waived his right to be appointed administrator *c. t. a.* by failing to apply within a reasonable time, he also waives his right of nomination and substitution. *Ibid.*

§ 9. Control and Management of Estate in General.

An executor and the surety on his bond may not be held liable for loss to the estate by reason of the failure of the bank in which the administrator had deposited funds of the estate in the absence of evidence that the administrator had actual or constructive knowledge that the bank was in an unsound condition. *Martin v. McPherson*, 194.

§ 13b. Application and Order for Sale of Lands to Make Assets.

In proceedings by an executor to sell lands to make assets the petition should set forth, *inter alia*, as required by the statute, N. C. Code, 79, the value of the personal estate, as near as may be ascertained, and the application thereof, and an allegation merely that the personalty is insufficient is defective. *Neighbors v. Evans*, 550.

§ 14d. Validity and Attack of Mortgage of Lands of Estate.

Plaintiff administrator filed a petition to be authorized to mortgage lands of the estate to raise money to pay debts, the petition alleging that the personalty was insufficient to discharge debts of the estate, and that it was to the best interest of the heirs that the lands be mortgaged rather than a part thereof sold. All beneficiaries of the estate were duly served with summons, and the clerk, upon the verified petition and upon satisfactory proof of its allegations, ordered and directed the administrator to execute the mortgage, and the order of the clerk was duly approved by the judge of the Superior Court, who also directed that the mortgage be executed. *Held:* The order was authorized by N. C. Code, 75, and the motion thereafter made by some of the heirs that it be set aside as not authorized by law was correctly denied. *Caffey v. Osborne*, 252.

§ 15d. Claims for Personal Services Rendered Deceased.

In an action to recover for personal services rendered decedent upon *quantum meruit*, and also upon alleged expressed promise to pay, the will of decedent is properly excluded from evidence as not being material to the issue. *Burton v. Styers*, 230.

EXECUTORS AND ADMINISTRATORS—*Continued.*

§ 15e. Claims Arising From Payment of Obligations of Estate.

Where an administrator, in good faith pending the mortgaging of property of the estate to pay debts, personally pays the debts of the estate, he is entitled to be subrogated to the rights of the creditors whose debts he had paid, and upon the execution of the mortgage, upon order of court, is entitled to repay himself from the proceeds of the loan. *Caffey v. Osborne*, 252.

§ 15f. Claims of Creditors of Heirs or Distributees.

Plaintiff brought this action against the maker of a note and against the executors of his father's estate, alleging that the maker had assigned his interest in his father's estate as collateral security for the note, and that the executors owed the maker a sum in excess of the note which had not been paid to plaintiff. *Held:* A motion to dismiss as to one of defendants on the ground that she had never qualified as an executrix should have been allowed, and the other executors' demurrers in their individual and representative capacities should have been sustained, the complaint stating no cause of action against them individually, and its allegations being insufficient to state a cause against them in their representative capacity, since plaintiff did not allege the facts upon which he concluded they owed the maker the sum alleged, or that the sum alleged was covered by the maker's assignment. *Bank v. Gahagan*, 464.

§ 26. Final Account and Settlement.

Where will does not appoint trustee but directs executor to manage trust estate, executor may not be required to file final account prior to discharge of duties under the trust. *In re Trust Co.*, 385.

FALSE IMPRISONMENT.

§ 2. Actions.

An officer may make an arrest without a warrant when he acts in good faith and has reasonable grounds to believe that a felony has been committed, and that a particular person is guilty thereof and might escape unless arrested, C. S., 4544, and in this action against an officer for malicious and unlawful arrest, evidence that a robbery had been committed *is held* competent upon the issue, and defendant's evidence tending to show good faith and that he was acting within the provisions of the statute in arresting plaintiffs was properly submitted to the jury. *Hicks v. Nivens*, 44.

FRAUD.

§ 7. Pleadings in Actions for Fraud.

In alleging fraud it is not necessary that the word "fraud" appear in the pleading, it being sufficient if it is alleged that the opposite party knowingly made a material misrepresentation with intent that the pleader should rely thereon, and that the pleader did rely thereon to his damage. *Petty v. Ins. Co.*, 500.

FRAUDS, STATUTE OF.

§ 2. Sufficiency of Writing.

A deed duly executed and acknowledged and found among the valuable papers of the grantor after his death is a sufficient writing within the meaning of the statute of frauds of a contract of grantor to convey the lands to the grantees in consideration of grantees' taking care of grantor for the remainder of his life. *Austin v. McCollum*, 817.

§ 3. Pleading.

It is not necessary that the statute of frauds be pleaded in order to render incompetent parol evidence of a contract to convey land. *Craig v. Price*, 739.

GAMING.

§ 1. Nature and Elements of the Offense.

Where the agreed statement of facts in an action to recover the penalty under C. S., 4434, states that defendant kept a slot machine in his store, without a finding that the machine was illegal, the findings are insufficient to support a judgment against defendant. *Nivens v. Justice*, 349.

Ch. 282, Public Laws of 1935, and ch. 37, Laws of the same year, both dealing with slot machines, must be construed together. *S. v. Humphries*, 406.

Ch. 37, Public Laws of 1935, is not repealed by ch. 282, Laws of the same year, since the statutes are not in conflict. *Ibid.*

Coin slot machines which depend in whole or in part upon the element of chance in determining the results of their operation, which results cannot be predicted prior to their operation, are made unlawful by ch. 282, Public Laws of 1935, by a proper construction of the act, and the unlawfulness of such machines is not affected by the fact that the results of their operation may be influenced by skill, or by the fact that such machines may sell merchandise or provide entertainment. *Ibid.*

The meaning of sec. 4, ch. 282, Laws of 1935, *is held* not necessary to be determined in a prosecution under sec. 3 of the act. *Ibid.*

§ 4. Competency and Relevancy of Evidence.

In a prosecution under sec. 3, ch. 282, Public Laws of 1935, for possession of an illegal slot machine, evidence as to the licensing of the machine is properly excluded. *S. v. Humphries*, 406.

GUARDIAN AND WARD.

§ 8. Proof of Appointment and Attack of Proceedings.

Claimant contended that the person purporting to act as guardian for a minor in selling the minor's lands had never been appointed and had not qualified as guardian. Defendants offered testimony that certified letters of guardianship had been attached to the petition to sell the lands, and had been subsequently detached therefrom. *Held:* The evidence offered by defendants was properly excluded, since the appointment of a guardian can be shown only by the records in the office of the clerk of the Superior Court by whom the appointment was made, or by letters of appointment issued by the clerk as required by statute, C. S., 2157, and the parol evidence tending to show appointment is incompetent. *Buncombe County v. Cain*, 766.

§ 16d. Validity and Attack of Instruments.

Since title is deemed to be in the ward when a guardian takes a deed or mortgage for the ward, whether a mortgage executed by an individual to himself as guardian is void for want of proper parties, *quære*. *Wallace v. Wallace*, 656.

A clerk of the Superior Court has jurisdiction to order the sale of a ward's lands only upon petition verified by the duly appointed and qualified guardian of the ward, and where such petition is filed and signed by a person purporting to act as guardian, but who had not been appointed guardian and had not qualified by filing bond, the petition confers no jurisdiction on the clerk, and the sale of the lands upon the clerk's order approved by the court conveys no title and does not adversely affect the interest of the ward in the lands. C. S., 2180. *Buncombe County v. Cain*, 766.

§ 23. Bonds and Sureties Liable.

Second guardianship bond *held* in substitution of first, and bonds were not cumulative under facts of this case. *Beaman v. Surety Corp.*, 126.

HABEAS CORPUS.

§ 3. To Obtain Custody of Minor Children.

Where the parents are separated but not divorced, the right to the custody of the children of the marriage may be determined by a writ of *habeas corpus*. C. S., 2241. *McEachern v. McEachern*, 98.

§ 4. Venue and Jurisdiction.

Since any judge of the Superior Court or Justice of the Supreme Court has the power to issue a writ of *habeas corpus* at any time or any place, N. C. Const.. Art. I, sec. 21; C. S., 2208, 2210, he has the discretionary power to make the writ returnable at such place as he may determine, which discretion will not be reviewed in the absence of a showing of abuse or failure to afford full opportunity to be heard, and therefore an exception to the refusal of a motion for change of venue of *habeas corpus* proceedings cannot be sustained. Statutes as to venue, C. S., 463, *et seq.*, all refer to "actions" and have no application to *habeas corpus* proceedings. *McEachern v. McEachern*, 98.

§ 8. Appeal and Review.

The findings of fact by the court in proceedings in *habeas corpus* to determine the custody of minor children of the parties, are conclusive when based on evidence. *McEachern v. McEachern*, 98.

HOMESTEAD AND PERSONAL PROPERTY EXEMPTIONS.

§ 5. Property in Which Right May Be Asserted.

Where the only real property owned by a judgment debtor consists of vacant lots, he may claim his homestead therein, since he may thereafter build a habitable structure thereon. *Assurance Society v. Russos*, 121.

A debtor is entitled to have his homestead allotted in lands mortgaged by him, but the property should be appraised as though unencumbered. *Crow v. Morgan*, 153.

HOMESTEAD.

§ 7. Conveyance of Homestead and Lien of Judgment on Property in Hands of Transferee.

Plaintiff obtained judgment against defendants, who are husband and wife. Thereafter, the defendants conveyed certain vacant lots owned by the *feme* defendant to a nonresident, all legal requirements being complied with in making such conveyance. Plaintiff caused execution to issue on its judgment, but before final process of sale the nonresident reconveyed the lots to the *feme* defendant, and she claimed her homestead exemption in said lots, they being the only real estate owned by her. *Held:* Upon the conveyance of the lots by defendants their homestead right therein was terminated, and plaintiff could have sold same to satisfy the judgment, but upon the reconveyance of the lots to the *feme* defendant prior to final process of sale, she was entitled to have her homestead allotted therein. N. C. Code, 614, 729, N. C. Constitution, Art. X, sec. 2. *Assurance Society v. Russos*, 121.

§ 9. Appraisal and Allotment of Homestead.

A debtor may have his homestead exemption allotted in lands owned by him but mortgaged to a third person, but in ascertaining the value thereof the mortgage debt should be disregarded, and the land appraised as though the debtor owned the unencumbered fee. N. C. Constitution, Art. X, sec. 2. *Crow v. Morgan*, 153.

§ 10. Nature of Personal Property Exemptions.

The right to the personal property exemption exists by virtue of the Constitution and attaches prior to the allotment or appraisal. *Crow v. Morgan*, 153.

HOMESTEAD—*Continued.*

§ 16. Proceedings to Allot Personal Property Exemptions.

In the allotment of the personal property exemption, the creditor as well as the debtor is entitled to have the procedure conform to the constitutional provisions and the statutes enacted pursuant thereto. N. C. Code, 737, 751. *Crow v. Morgan*, 153.

HOMICIDE.

§ 4c. Premeditation and Deliberation.

Since premeditation and deliberation are essential elements of the crime of murder in the first degree, intoxication to the extent that the mind is incapable of this essential mental process, precludes a verdict of first degree murder, but the charge in this case *is held* without error in this respect on defendant's appeal from a conviction of the capital crime. *S. v. Alston*, 258.

§ 17. Relevancy and Competency of Evidence in General.

It was established deceased was killed with a shotgun. After the crime was committed, a single barrel shotgun was found in defendant's room, and there was testimony that the gun was like the one defendant was seen carrying the night deceased was shot. *Held:* Defendant's exception to the exhibition of the shotgun in evidence cannot be sustained. *S. v. Macklin*, 496.

§ 18. Dying Declarations.

Whether testimony is competent as being of a dying declaration is a question of law for the court, and, on appeal, the Supreme Court may determine only whether there was evidence tending to show the facts necessary to support the decision of the trial court. *S. v. Stewart*, 362.

The evidence tended to show that deceased had been in the hospital for nine days before making the statements to the State's witness, and it did not appear that during this period deceased was advised by physicians or nurses that her illness would probably be fatal, or that deceased expressed to nurses or friends and relatives visiting her that she apprehended she was going to die. Before making the statements to the State's witness, deceased answered in the affirmative a question asked her by the witness as to whether deceased thought she was going to die. Deceased died thirteen days after making the statements. *Held:* The statements were not competent as dying declarations made by deceased, since the evidence fails to show that, at the time of making the statements, deceased was *in extremis* or in danger of death from her illness, or that she was apprehensive of her approaching death, and the testimony was incompetent as hearsay, and its admission over defendants' objection entitles defendants to a new trial. *Ibid.*

The rule permitting testimony of dying declarations is an exception to the hearsay rule, and such exception does not extend to the admission of a dying declaration of a person whose death is not the basis of the prosecution, although he was mortally injured in the same fight in which the person was killed for whose death defendant is being prosecuted, and although such declarations relate to the fatal combat. *S. v. Puett*, 633.

§ 19. Evidence Tending to Identify Defendant as Perpetrator of Crime.

Testimony that accused had been frequently seen near the scene of the homicide on a lonely road at nighttime within a few weeks of the homicide, and that on one occasion about two weeks prior thereto he had fired a pistol at the witness as he passed the scene of the crime, *is held* competent as tending to identify the accused as the perpetrator of the crime. *S. v. Tate*, 613.

§ 22. Evidence Competent on Issue of Self-Defense.

Testimony of the character of the deceased is competent upon the plea of self-defense only when such testimony tends to show that deceased had the

HOMICIDE—*Continued.*

general reputation of being ferocious, violent, and dangerous, while testimony that deceased was immoral is irrelevant and incompetent, and in this prosecution for homicide, defendant's exception to the exclusion of testimony that deceased had the reputation of being homosexual cannot be sustained, it appearing that defendant was given the full benefit of his contention that he killed deceased in a fight resulting from deceased's indecent attack upon him, and it further appearing that the question addressed to the witness was too limited in its scope in that it asked deceased's reputation in the police force and not deceased's general reputation. *S. v. Hodgin*, 371.

§ 25. Sufficiency of Evidence and Nonsuit.

Evidence of defendant's guilt of murder in the first degree *held* sufficient to be submitted to the jury. *S. v. Gallman*, 288; *S. v. Macklin*, 496; *S. v. Coffey*, 561.

§ 27f. Instructions on Question of Self-Defense.

The charge of the court in this prosecution for homicide to the effect that defendant would be guilty of manslaughter if he killed his assailant by the use of more force than was reasonably necessary to repel the assault *is held* without error, and defendant's contention that the court should have further instructed the jury that defendant could use such force as reasonably appeared to him to be necessary under the circumstances, is untenable, it appearing that the court later fully instructed the jury on the right to kill in self-defense upon real or apparent necessity, and it not being required that this principle should be coupled in the charge with the statement of the *quantum* of force permitted in self-defense. *S. v. Koutro*, 144.

The charge of the court in this prosecution for manslaughter to the effect that if the defendant provoked the assault in which he killed his assailant, the law would not permit him to successfully plead self-defense, even though the killing was necessary to protect himself from death or great bodily harm, unless defendant, prior to the infliction of the fatal injuries, withdrew from the combat and gave notice of his withdrawal to his adversary by word or deed, *is held* without error upon defendant's contention that it withdrew from the jury's consideration the plea of self-defense, it being apparent from the charge read contextually as a whole that the portion objected to was predicated upon defendant being the person who had provoked the fight, or willingly engaged therein, and the prior portions of the charge fully presenting defendant's plea of self-defense upon the other phases of the evidence. *Ibid.*

§ 27g. Form and Sufficiency of Issues and Instruction on Less Degrees of the Crime Charged.

Where all the evidence shows defendant intentionally killed deceased with a deadly weapon, it is not error for the court to refuse to submit to the jury the question of manslaughter. *S. v. Alston*, 258.

Where all the evidence establishes an unlawful killing with a deadly weapon committed by defendant, it is not error for the court to instruct the jury that if they believe the evidence beyond a reasonable doubt to return a verdict of guilty of murder in the second degree, at least. *Ibid.*

The charge of the court in this prosecution for homicide, when taken conjunctively, as a whole, *is held* not subject to exception for failure to define manslaughter, it appearing that the charge covered every aspect of the controversy, defined murder in the first degree and second degree, manslaughter, self-defense, malice, and reasonable doubt, applied the presumption of innocence, and gave the contentions of both sides fairly and recapitulated the evidence in the case. *S. v. Hodgin*, 371.

HOMICIDE—*Continued.*

Where all the evidence discloses that the crime was murder in the first degree, it is not error for the trial court to fail to submit to the jury the question of defendant's guilt of lesser degrees of the crime. *S. v. Tate*, 613.

HUSBAND AND WIFE.

§ 22. Revocation and Rescission of Deeds of Separation.

A deed of separation is rescinded by the resumption of the conjugal relation. *Reynolds v. Reynolds*, 554.

§ 34. Evidence.

Testimony of the husband as to conversations between himself and his wife tending to show the relations between her and the defendant in a suit for alienating her affections is properly excluded as hearsay. *Martin v. Cress*, 776.

INDICTMENT.

§ 5. Endorsement and Finding of Grand Jury.

The absence of an endorsement on the bill of indictment by the foreman of the grand jury that any witnesses for the State had been sworn and had testified before the grand jury is insufficient to overcome the presumption of validity arising from its being returned a "true bill," and is insufficient ground for quashal, the provisions of C. S., 2336, being directory and not mandatory. *S. v. Lancaster*, 584.

§ 9. Charge of Crime.

Indictment charging several separate offenses under statute with disjunctive "or" *held* void for uncertainty. *S. v. Williams*, 159.

INJUNCTIONS.

§ 1. Nature and Grounds of Injunctive Relief in General.

Injunctive relief will not lie in a suit instituted by carriers by rail to prevent the promulgation of lower rates by carriers by truck when the pleadings do not allege the invasion of any property rights of plaintiffs and the carriers by truck having the right under the applicable statute to lower rates at will, the alleged prospective injury to plaintiffs' business being by way of fair competition against which the law does not protect. *Motor Service v. R. R.*, 36.

§ 3. Abatement of Nuisances.

A nuisance may be abated in same action in which damages are recovered. *Poovey v. Hickory*, 630.

§ 7. Enjoining Commission of Crime.

Injunction held not to lie to enjoin violation of criminal statute against monopolies. *Motor Service v. R. R.*, 36.

§ 11. Continuance, Modification, and Dissolution.

Where the undisputed facts are sufficient to support a decree dissolving the temporary restraining order entered in the cause, an exception on the ground that the order should have been continued for a jury trial upon the disputed facts in untenable. *Dennis v. Redmond*, 780.

INSANE PERSONS.

§ 5. Appointment of Guardians.

Where a person has been adjudged an incompetent at a hearing upon a petition and answer properly filed after service of notice and a copy of the petition upon the alleged incompetent, N. C. Code, 2285, the service of summons upon the incompetent or her guardian *ad litem* is not necessary to the appointment of a guardian for the incompetent, since the service of notice and petition

INSANE PERSONS—*Continued.*

under the provisions of the statute serves every function of a summons, and since the acceptance of service or notice and the filing of an answer to the petition by the guardian *ad litem* waives any further service of summons or notice. *In re Baker*, 618.

Assistant clerk has power to appoint guardian for incompetent. *Ibid.*

§ 7. Attack of Appointment.

Failure to notify relatives of alleged incompetent of hearing is an irregularity, but does not render appointment of guardian void. *In re Baker*, 618.

Movants attacked the appointment of a guardian for an incompetent in this proceeding on the ground that the same attorney acted for both the guardian *ad litem* and the original petitioner who was later appointed guardian. The trial court found upon supporting evidence that the attorney for the original petitioner merely assisted the guardian *ad litem* in drawing the answer to the petition as a matter of courtesy, that the answer drawn denied all the material allegations of the petition and fully protected the rights of the alleged incompetent, and that at no time did the attorney for petitioner act or attempt to act as counsel for the alleged incompetent or her guardian *ad litem*. *Held:* The findings, supported by evidence, sustain the court's ruling refusing to remove the guardian on the ground that the same attorney acted for both the petitioner and the guardian *ad litem*. *Ibid.*

INSURANCE.

§ 4. Form and Provisions of Policy.

Statutory provisions in force at the time of the issuance of a policy of insurance become a part thereof as though expressly incorporated therein, and the statutory provisions will prevail over conflicting provisions of the policy. *Eckard v. Ins. Co.*, 130.

§ 26. Insurable Interest in Life of Another.

A creditor has an insurable interest in the life of his debtor. *Miller v. Potter*, 268.

§ 29. Incontestable Clauses.

The effect of an incontestable clause in a policy of life insurance is to preclude insurer from attacking the validity of the policy after the stipulated time except for such causes as are specifically allowed in the incontestable clause itself. *Mills v. Ins. Co.*, 439.

Incontestable clause held to apply to disability insurance rider attached to policy under the language of the policy in this case. *Ibid.*

An incontestable clause in a policy of insurance made applicable to the disability provisions of the policy does not prevent insurer from setting up the defense that the disability sued on is not covered by the provisions of the disability clause, or that the claim for disability is not genuine. *Mills v. Ins. Co.*, 439; *Yerys v. Ins. Co.*, 442.

Where a disability clause in a policy of life insurance is subject to the incontestable clause of the policy, insurer may not set up the defense of invalidity in a suit on the disability clause instituted after the time stipulated in the incontestable clause. *Yerys v. Ins. Co.*, 442.

§ 30b. After Breach or Wrongful Termination of Contract by Insurer.

Wrongful termination of contract by insurer does not relieve insured from obligation to pay or tender payment of premiums. *West v. Ins. Co.*, 234.

§ 31a. Avoidance of Policies Issued Without Medical Examination for Misrepresentation or Fraud.

By force of C. S., 6460, a policy of life insurance issued without a medical examination may not be avoided for misrepresentations by insured in his

INSURANCE—*Continued.*

application for the policy unless such misrepresentations were fraudulently made. *Eckard v. Ins. Co.*, 130.

Where the jury finds from the evidence that insured in a policy of life insurance issued without medical examination under C. S., 6460, was suffering with certain diseases stipulated in the policy as grounds for avoidance, but that insured did not procure the policy by false and fraudulent statements, insurer may not avoid liability under the policy, the provisions of the policy in conflict with the statute being unavailing to insurer. *Ibid.*

Complaint held to sufficiently allege fraud in procuring reinstatement of policy within provisions of C. S., 6460. *Petty v. Ins. Co.*, 500.

§ 34a. Construction and Operation of Disability Clauses and Sufficiency of Evidence of Disability.

Performance of intermittent, trifling jobs *held* not to preclude recovery on disability clause. *Blankenship v. Assurance Society*, 471.

§ 34b. Notice and Proof of Disability and Waiver.

Correspondence between insurer and insured's attorney relative to insured's disability and facts necessary to establish insured's claims, had after notice by insured of such disability more than a year after its inception, but without intimation by insurer that it intended to waive the defense of failure to furnish proof of disability as required by the policy or within a reasonable time after the inception of the disability, *is held* not a waiver by insurer of such defense. *Fulton v. Ins. Co.*, 394.

§ 34d. Occurrence and Notice of Disability During Life of Certificate Under Group Insurance.

Employee held to have allowed insurance to lapse by failing to give proof of disability within reasonable time after termination of employment by reason of disability. *Fulton v. Ins. Co.*, 394.

Evidence that plaintiff, insured under an employee's group policy, was disabled as defined in the policy at the time he ceased to be an employee *held* sufficient to be submitted to the jury in this case. *Blankenship v. Assurance Society*, 471.

In this action to recover disability benefits on a certificate issued to insured employee under a group policy, judgment for insured is affirmed under authority of *Dewease v. Ins. Co.*, 208 N. C., 732. *Burchfield v. Ins. Co.*, 828.

§ 36a. Persons Entitled to Payment of Life Policies.

A creditor has an insurable interest in the life of his debtor, and as the beneficiary has a vested interest in the policy, and upon the death of the insured, neither his heirs at law nor his personal representative may sue to recover the proceeds of the policy, but the creditor beneficiary must apply the proceeds of the policy to the payment of the debt. *Miller v. Potter*, 268.

§ 36e. Compromise and Settlement.

After the absence of insured for over seven years without being heard from, the beneficiary, who had kept the policy in force by paying premiums, agreed with insurer to accept the cash surrender value of the policy with the privilege of reopening the case in the event the beneficiary could ever prove insured died prior to the lapsing of the contract. *Held:* The compromise agreement precludes the beneficiary from reopening the case except upon proof of actual rather than presumptive death. *Head v. Ins. Co.*, 203.

§ 39. Provisions Limiting Liability or Constituting Conditions Precedent Thereto.

Insured was killed in an accident while riding as a passenger in an automobile. Insurer admitted issuance of the policy and that it was in force at the time, but denied liability under the proviso in the policy that no liability

INSURANCE—*Continued.*

should attach if injury should proximately result from insured's intoxication at the time, and assumed the burden of proof on its affirmative defense. The trial court instructed the jury that "intoxicated" and "drunk" were synonymous terms, and that the issue should be answered in favor of insurer if insured had drunk intoxicants to such extent as to appreciably affect and impair to any extent his mental or bodily faculties, or both. *Held:* The instruction is favorable to insurer, and will not be held for error on insurer's appeal. *Wilson v. Casualty Co.*, 585.

INTOXICATING LIQUOR.

§ 4e. Effect of Repeal Statute on Criminal Liability for Possession.

C. S., 3379, making the possession of intoxicating liquor by individuals for the purpose of sale unlawful, is not repealed as to New Hanover County by ch. 418, Public Laws of 1935. *S. v. Tate*, 168.

The provisions of 3 C. S., 3411 (j), making the possession of intoxicating liquor lawful in certain instances, is repealed in New Hanover County by ch. 418, Public Laws of 1935. *Ibid.*

§ 9a. Indictment.

Indictment for possession of liquor for sale need not allege that liquor did not bear stamp of A. B. C. Board. *S. v. Atkinson*, 661.

§ 9c. Sufficiency of Evidence.

The possession of more than one gallon of intoxicating liquor is *prima facie* evidence of possession for the purpose of sale, C. S., 3379, and is sufficient to take the case to the jury on the issue. *S. v. Tate*, 168.

Evidence that officers found a funnel, and a number of containers, and glasses smelling of whiskey, some of which had a small quantity of whiskey in them, in different places on defendant's premises, *is held* sufficient to be submitted to the jury in a prosecution of defendant on a charge of having possession of intoxicating liquor for the purpose of sale, although the amount of whiskey discovered on the premises was insufficient to invoke the presumption under the provisions of C. S., 3379 (2). *S. v. Rhodes*, 473.

In an indictment sufficiently charging possession of liquor for the purpose of sale, C. S., 3379, an additional allegation that the whiskey did not bear the stamp of the A. B. C. Board of the county is an allegation of a nonessential fact, and will be regarded as surplusage or as a refinement within the meaning of C. S., 4623, and the State is not required to offer evidence of such additional allegation. *S. v. Atkinson*, 661.

§ 9d. Directed Verdict.

Evidence establishing defendant's possession of more than a gallon of intoxicating liquor, without other incriminating evidence, is insufficient to support a directed verdict of guilty of possession of intoxicating liquor for the purpose of sale under the provisions of C. S., 3379. *S. v. Ellis*, 166.

JUDGMENTS.

§ 17c. Conditional and Alternative Judgments.

Order held void as being alternative or conditional. *Hagedorn v. Hagedorn*, 164.

§ 22. Procedure: Direct and Collateral Attack.

Where it appears from the face of the record or the papers in the case that service of summons or original process was not had, nor waived, a judgment *in personam* rendered in this action may be treated as a nullity, vacated on motion, or collaterally attacked, since voluntary appearance or service of process is necessary to give the court jurisdiction, but where the officer's

JUDGMENTS—*Continued.*

return shows service it is deemed *prima facie* correct, C. S., 921, and the remedy of defendant asserting nonservice is by motion in the cause upon a showing of nonservice by clear and unequivocal proof. *Dunn v. Wilson*, 493.

The procedure to attack a judgment for absolute divorce on the ground of fraud perpetrated on defendant and the court in service of process by publication and obtaining judgment upon false allegations in the complaint, while defendant was out of the State on a visit, when plaintiff knew of defendant's whereabouts throughout, is by independent action. *Poole v. Poole*, 536.

A judgment rendered in proceedings *coram non judice* is void, and may be attacked either directly or collaterally. *Abernethy v. Burns*, 636.

§ 32. Operation of Judgments as Bar to Subsequent Actions in General.

A void judgment will not support a plea of estoppel by judgment. *Abernethy v. Burns*, 636.

§ 33. Judgments of Nonsuit as Bar to Subsequent Actions.

Evidence held to support finding that allegations and evidence were substantially the same as in prior action nonsuited, and judgment dismissing the action was proper. *Chapman v. Tea Co.*, 842.

§ 34. Judgments of Federal Courts and of Other Estates as Bar to Subsequent Action.

Final judgment of the Federal court dismissing plaintiff insurer's suit to have the policies of insurance in question canceled for fraud and the disability provisions therein stricken out, and to recover disability benefits already paid, constitute a bar to plaintiff's right to set up such matters in insured's action instituted in a state court on the disability clauses of the policies. *Yerys v. Ins. Co.*, 442.

§ 37. Rights and Remedies of Assignee.

Where plaintiff, while the action is pending, assigns any recovery he may obtain against defendant to third persons for a valuable consideration, such third persons at the time of the rendition of the judgment are the equitable owners thereof and entitled to the assignment of the judgment upon the judgment docket, plaintiff having no legal or equitable interest therein. *Fertilizer Works v. Newbern*, 9.

JURY.

§ 4. Examination of Prospective Jurors.

The court may allow counsel, in selecting jury, to ask prospective jurors, in good faith, whether any of them are connected with an insurance or bonding company. *Bell v. Panel Co.*, 813.

KIDNAPING.

§ 2. Prosecution.

Evidence disclosing that witness voluntarily went with defendants *held* insufficient to support charge of kidnaping. *S. v. Smith*, 63.

LANDLORD AND TENANT.

§ 10. Duty to Repair.

Under the common law rule obtaining in this jurisdiction, a lessor is under no implied covenant to repair the premises. *Williams v. Strauss*, 200; *Mercer v. Williams*, 456.

§ 11. Liability for Injuries from Defective or Unsafe Condition of Premises.

In the absence of evidence that a landlord retained control of or agreed to keep in repair a balcony between two apartments owned by her and con-

LANDLORD AND TENANT—*Continued.*

structed for the use of both apartments, the landlord is not liable for injuries resulting to a member of the household of a tenant of one of the apartments, caused by disrepair of the balcony. *Williams v. Strauss*, 200.

The general rule is that a landlord is not liable to his tenant for personal injuries sustained by reason of a defective condition of the demised premises unless the landlord contracts to repair and the tenant is injured as a result of work negligently done in the landlord's undertaking to repair, and in this case, *Held:* In the absence of allegations and evidence that the lessors failed to give notice of known or latent defects, or that lessors failed to repair the premises in breach of a covenant to repair, defendants' motion to nonsuit was properly sustained. *Mercer v. Williams*, 456.

LIMITATION OF ACTIONS.

§ 1. Nature and Construction of Statutes of Limitation in General.

The statute of limitations bars the remedy upon the lapse of the prescribed time, but does not extinguish the right, and the creditor may proceed to collect on collateral security assigned by the debtor even after action upon the principal debt is barred. *Bank v. Ins. Co.*, 140.

§ 2e. Actions Barred in Three Years.

A cause of action for breach of a contract to delay foreclosure of a deed of trust is barred after three years from the breach of the contract by foreclosure in violation of the agreement. *Craig v. Price*, 739.

§ 3. Accrual of Right of Action.

Assignee's right of action for proceeds of life policy assigned accrues upon death of assignor. *Bank v. Ins. Co.*, 140.

§ 4. Fraud and Ignorance of Cause of Action.

Plaintiff grantors instituted this action to reform their deed by inserting a reversionary clause therein, which was omitted therefrom by the mistake of the draftsman. Defendants contended that the registration of the deed constituted notice that the clause had been omitted therefrom, and that the action was barred, since more than three years had elapsed since the registration of the deed. *Held:* The registration of the deed is insufficient to constitute notice to plaintiffs, and the action was not barred until three years after plaintiffs discovered, or should have discovered, the mistake in the exercise of due diligence. C. S., 441 (9). *Ollis v. Board of Education*, 489.

§ 8. Absence and Nonresidence.

Annual visits for appreciable length of time will not start running of statute in favor of nonresident. *Hill v. Lindsay*, 694.

§ 11. Institution of Action.

Where complaint fails to state cause of action, amendment constitutes a new action. The distinction between the defective statement of a good cause of action and the statement of a defective cause of action is pointed out. *George v. R. R.*, 58.

§ 12b. Part Payment as Affecting Parties Secondarily Liable.

Where endorser waives extension of time, payment of interest by maker for definite extension prevents running of statute in favor of endorser. *Luther v. Lemons*, 278.

§ 13. New Promise.

A promise to reconvey the land to the trustor will not estop the *cestui* from setting up the statute of limitations in the trustor's action to recover for breach of the *cestui's* alleged contract to delay foreclosure. *Craig v. Price*, 739.

LIMITATION OF ACTIONS—*Continued.*

§ 15. Pleading.

Plea of statute of limitations, not having been interposed in apt time, *held* not available to the defendant. *Gill v. Gill*, 823.

MALICIOUS PROSECUTION.

§ 1. Nature and Essentials of Right of Action in General.

Plaintiff in an action for malicious prosecution must allege and prove malice, want of probable cause and termination of the proceeding upon which the action is based. *Mitchem v. Weaving Co.*, 732.

The distinction between an action for malicious prosecution and one for abuse of process is that malicious prosecution is based upon malice in causing process to issue, while abuse of process lies for the improper use of process after it has been issued, and in the former plaintiff must prove malice, want of probable cause, and termination of the prosecution. *Abernethy v. Burns*, 636.

§ 3. Want of Probable Cause.

The fact that the committing magistrate had bound defendant over is competent evidence on the question of probable cause in an action thereafter instituted by the defendant in the criminal action for malicious prosecution, but such fact is not conclusive. The distinction between instances where the magistrate has jurisdiction to try the defendant is pointed out. *Mitchem v. Weaving Co.*, 732.

§ 4. Malice.

Want of probable cause does not raise presumption of malice, although jury may infer malice therefrom. *Mitchem v. Weaving Co.*, 732.

§ 5. Termination of Prosecution.

A *nolle prosequi* is a sufficient termination of a prosecution to support an action for malicious prosecution based thereon. *Abernethy v. Burns*, 636.

A *nolle prosequi* taken by the solicitor upon the finding by the grand jury of "not a true bill" after the committing magistrate had bound the defendant over, is a sufficient termination of the prosecution to support an action for malicious prosecution. *Mitchem v. Weaving Co.*, 732.

MANDAMUS.

§ 1. Nature and Grounds of Writ in General.

Mandamus will lie only to compel the performance of a clear legal duty, and then only at the instance of a party having a clear legal right to demand its performance. *Stone v. Comrs. of Stoneville*, 226.

§ 2b. Discretionary Duty.

While mandamus will lie to compel exercise of discretionary power, it does not lie to control course of action. *Allen v. Carr*, 513.

MASTER AND SERVANT.

§ 11. Nature and Extent of Employer's Liability for Injury to Servant.

Employer may not be held liable for failure to give injured employee emergency medical attention when employer has no actual or constructive knowledge of the injury. *Batton v. R. R.*, 756.

§ 37. Nature and Construction of Compensation Act in General.

The Workmen's Compensation Act must be construed with reference to its primary purpose to provide compensation for injured employees and dependents of deceased employees. *Roberts v. Coal Co.*, 17.

MASTER AND SERVANT—*Continued.*

§ 40d. Whether Injury Results from Accident.

Evidence held to support finding of Commission that claimant's asbestosis was not caused by an accident. *Swink v. Asbestos Co.*, 303.

§ 40e. Whether Accident "Arises Out of Employment."

Evidence that an employee was carrying dynamite over a slick, rough road in the performance of his duties, that he twisted his ankle, causing severe sprain and other internal injuries proximately resulting in his death, is sufficient to sustain findings that his death resulted from an accident arising out of and in the course of his employment. *Carlton v. Bernhardt-Seagle Co.*, 655.

§ 44. Rights of Employer, Insurer, and Injured Employee Against Tort Feasor.

After assuming liability for an award to the dependents of a deceased employee, the insurer brought suit against the third person tort-feasor and recovered judgment in excess of the amount necessary to compensate it for the award, which excess was paid to the dependents of the employee under orders of the Industrial Commission. Thereafter the insurer became insolvent and defaulted in payment of the balance of the award. *Held:* The employer, held liable for the balance of the award, is not entitled to a credit for the amount paid the dependents out of the judgment against the third person tort-feasor or for the amount paid plaintiff's attorneys in that action, the amount paid the dependents out of the judgment being an amount in addition to the award, and the award not being subject to reduction by such amount. *Roberts v. Coal Co.*, 17.

§ 46a. Nature and Functions of Industrial Commission in General.

The Industrial Commission is primarily an administrative agency of the State, and it is only when claim has been filed and the parties fail to reach an agreement that the Commission is invested with certain judicial functions as a special or limited tribunal for the purpose of determining the respective rights and liabilities under the Compensation Act. *Hanks v. Utilities Co.*, 312.

§ 47. Filing of Claim.

It is not required that an injured employee, or the dependents of a deceased employee, file claim with the Industrial Commission, it being incumbent on the employer to file written report of the accident with the Industrial Commission upon notice given by the injured employee, or his representative, secs. 8081 (dd) (vvv), and where the employer has filed such report with the Commission within the prescribed time upon verbal information elicited from the representative of the employee by its claim agent, the representative being unable to read or write, and, the employer admitting liability, the report has been filed with the Industrial Commission as a claim within one year from date of the accident and contains all facts necessary to make an award, the claim is filed within the prescribed time, sec. 8081 (bb), and the Industrial Commission acquires jurisdiction. *Hanks v. Utilities Co.*, 312.

Evidence held to support findings that claim was not filed in time and that employer was not estopped to assert defense. *Lilly v. Belk Bros.*, 735.

§ 50. Prosecution and Abandonment of Claim.

Institution of suit at common law held not to estop claimant from proceeding under Compensation Act. *Hanks v. Utilities Co.*, 312.

§ 52. Hearings and Evidence Before Commissioner.

Testimony of the wife of an employee as to his expressions of bodily feeling tending to show the progress of the injury is competent upon the hearing upon the question of whether the accident proximately caused his death. *Carlton v. Bernhardt-Seagle Co.*, 655.

MASTER AND SERVANT—*Continued.*

The report signed by the manager of an incorporated employer and filed with the Industrial Commission as required by N. C. Code, 8181 (vvv), is competent upon the hearing and statements contained therein not within the personal knowledge of the manager are competent as an admission against interest. *Ibid.*

§ 53b. **Parties Liable for Payment of Award.**

An award was entered in favor of the dependents of a deceased employee for payment of compensation in weekly installments for the death of the employee. After the insurance carrier had paid several installments, it defaulted in the payment of the balance of the installments because of insolvency. *Held:* Under the provisions of the Compensation Act the employer is primarily liable to the employee, which obligation is unimpaired by its contract with an insurer for insurance protection, or by the insurer's subrogation to the rights of the employer upon paying or assuming the payment of an award, and the employer is not relieved of its liability to the dependents of the deceased employee for the balance of the weekly payments because of the insolvency of the insurer. *Roberts v. Coal Co.*, 17.

The dependents of a deceased employee elected to pursue their remedy under the Compensation Act, and recovered compensation payable in weekly installments. Thereafter, the insurer, upon assuming liability under the award, instituted suit in the name of the administratrix of the deceased employee against the third person tort-feasor and recovered judgment. Insurer retained an amount sufficient to compensate it for the award and paid the excess to the employee's widow under order of the Industrial Commission. Thereafter, the insurer became insolvent and for that reason was unable to pay the balance of the award. *Held:* The administratrix was only a nominal party to the suit against the third person tort-feasor and had no control over the recovery and could not safeguard it for the purpose of paying the award, and the employer, who selected the insurance carrier for his own protection, is not relieved of his primary obligation to the dependents of the employee by reason of the insurer's recovery from the third person and default in payment because of insolvency, nor does the fact that the employer had no notice of the suit by the insurer against the third person alter this result, the insurer and the employer having a community of interest, and the failure of the insurer to notify the employer not being chargeable to the dependents of the deceased employee. *Ibid.*

§ 55d. **Matters Reviewable on Appeals from Industrial Commission.**

The findings of fact made by the Industrial Commission in a proceeding before it are conclusive on appeal to the Superior Court when the findings are supported by competent evidence. *Swink v. Asbestos Co.*, 303; *Lilly v. Belk Bros.*, 735.

A finding of fact by the Industrial Commission which is not supported by the evidence is not binding upon appeal. *Hanks v. Utilities Co.*, 312.

Where each of the essential facts found by the Industrial Commission is supported by competent evidence, the findings are conclusive on appeal, even though some incompetent evidence was also admitted upon the hearing. *Carlton v. Bernhardt-Seagle Co.*, 655.

§ 55f. **Matters Necessary to Determination of Appeals from Industrial Commission.**

Where it is determined on appeal that an employee is not entitled to recover under the provisions of the Compensation Act, the contention of the successive insurance carriers as to their respective liabilities need not be decided. *Swink v. Asbestos Co.*, 303.

MONOPOLIES.

§ 1. Construction and Validity of Statutes Relating to Monopolies.

C. S., 2563 (3), sufficiently defines the offense therein prohibited as the willful destruction or undertaking to destroy the business of any opponent or business rival in the State with the purpose or intention of attempting to fix the price of anything of value when competition is removed, and the statute is constitutional and clear and is not void for indefiniteness, the State having the power to regulate discriminatory sales unless the statute contravenes the Federal Constitution. *S. v. Coal Co.*, 742.

§ 3. Rights and Remedies of Individuals Affected.

Plaintiffs alleged that defendant carriers by rail were seeking to lower freight rates on a certain product in intrastate commerce with the intent to drive plaintiffs, carriers by truck, out of business, and then to raise rates after competition by plaintiffs had been destroyed, all in violation of C. S., 2563. On the facts alleged, plaintiffs sought to enjoin the promulgation of the contemplated lower rates. *Held:* While the facts alleged constitute a violation of C. S., 2563, such violation is made criminal by C. S., 2564, and judgment dissolving the temporary restraining order obtained by plaintiffs and dismissing the action is proper, plaintiffs' remedy for a violation of the statute being by indictment and prosecution under the provisions of C. S., 395 (2), since, ordinarily, the violation of a criminal statute may not be enjoined. *Motor Service v. R. R.*, 36.

§ 4. Prosecution and Punishment.

Evidence of defendant's violation of C. S., 2563 (3), held sufficient to be submitted to the jury. *S. v. Coal Co.*, 742.

In a prosecution for violating C. S., 2563 (3), relating to monopolies, an instruction that a person violates this section if he lowers the price of the product in question for the purpose of injuring or destroying competitors, and then, after competition is removed, he sells at a higher price to the detriment of the public, *is held* without error. *Ibid.*

In this prosecution for violation of C. S., 2563 (3), relating to monopolies, the court's instruction defining the element of willfulness in injuring the business of competitors that willful means the wrongful doing of an act without justification or excuse, *is held* a correct definition of willfulness as used in criminal statutes, nor will the court's failure to explain the meaning of "justification" as used in the instruction be held for error in the absence of a request for special instructions, it appearing that elsewhere in the charge the court, in effect, explained the word by charging that defendant could not be found guilty unless defendant intended to injure its competitors and fix prices after competition was removed. *Ibid.*

MORTGAGES.

§ 3. Parties.

Since title is deemed to be in the ward when a guardian takes a deed or mortgage for the ward, whether a mortgage executed by an individual to himself as guardian is void for want of proper parties, *quære*. *Wallace v. Wallace*, 656.

§ 13a. Appointment and Tenure of Trustee in General.

A bank, created as a result of a consolidation of several State banks, may properly exercise the power of sale contained in a deed of trust in which one of its constituent banks was named trustee, upon default by the trustor, since under N. C. Code, 217 (p), the consolidated bank succeeds to such power, even though the deed of trust was executed prior to the enactment of the

MORTGAGES—*Continued.*

statute, since the statute is merely an amendment of a former statute, ch. 77, Public Laws of 1925. *Braak v. Hobbs*, 379.

§ 22. Equitable Assignment and Subrogation.

Where mortgage debt is paid from proceeds of insurance on life of purchaser assuming debt, his estate is not entitled to subrogation as against subsequent purchasers who assumed debt. *Miller v. Potter*, 268.

§ 30a. Right to Foreclose and Defenses in General.

The holder of notes secured by a deed of trust may foreclose the property in the hands of a purchaser from the trustor assuming the payment of the debt without first filing claim with the personal representative of the deceased maker of the notes. *Dennis v. Redmond*, 780.

An allegation that several concerns had made demand on plaintiff for payments on the indebtedness secured by a deed of trust assumed by plaintiff is insufficient to restrain foreclosure of the deed of trust when it appears that each of the various concerns represented the holder of the notes. *Ibid.*

§ 30b. Default in Payment of Principal and/or Interest.

In this suit to restrain foreclosure instituted by the grantee in a deed assuming the payment of the debt secured by a deed of trust on the lands, it appeared that the debt was in default and that no payment had been made thereon for about three years, even giving plaintiff credit for amounts paid by her plus an amount received by the *cestui* from the proceeds of a fire insurance policy on the property, and that the *cestui* had paid taxes and insurance and had properly credited plaintiff with the credits claimed by her. *Held:* It was not error for the court to find that the debt was in default and to dissolve the temporary restraining order entered in the cause, there being no facts in dispute sufficient to warrant the continuation of the restraining order for a jury trial. *Dennis v. Redmond*, 780.

§ 30e. Denial of Amount Claimed and Accounting.

Where it appears that plaintiff seeking to restrain the foreclosure of a deed of trust had not paid anything on the indebtedness for about three years, that she could have easily ascertained the amount of insurance collected by the *cestui* on the policy of fire insurance on the property which the *cestui* had allowed as a credit on the debt, and could have ascertained the amount of insurance and taxes paid by the *cestui* and added to the debt, plaintiff is not entitled to restrain the foreclosure for an accounting to ascertain the exact amount of the indebtedness in the absence of a tender of some amount to the *cestui*. *Dennis v. Redmond*, 780.

§ 30f. Agreements to Delay Foreclosure.

An agreement to delay foreclosure of a deed of trust securing a note long past due is void for want of consideration. *Craig v. Price*, 739.

§ 32a. Execution of Power of Sale in General.

The deeds of trust in question provided that upon default the trustee might advertise and sell the property "on application of V. E. W., S. M. C. (the *cestuis que trustent*) or assignee." *Held:* The provisions for the execution of a power of sale must be strictly complied with for the protection of all the parties to the instrument, and the instrument does not authorize the trustee to advertise and sell the property on the sole application of one *cestui que trust* without the consent of the other *cestui que trust*. *Woodley v. Combs*, 482.

§ 32b. Advertisement and Notice.

Trustor cannot complain that no personal notice of foreclosure was given him when all the provisions of the instrument and the statute in respect to advertisement were fully complied with. *Craig v. Price*, 739.

MORTGAGES—*Continued.*

§ 35. Right of Mortgagee, Trustee, or Cestui to Bid in Property.

A *cestui que trust* has the right to buy the property at the foreclosure sale of the deed of trust in the absence of fraud or collusion. *Hill v. Fertilizer Co.*, 417.

Where a mortgagor transfers title to the holder of the notes secured by the mortgage, who had purchased the notes from the mortgagee, and the holder cancels the mortgage and transfers title to a third person, the mortgagor has a right of action against the holder, but not against the purchaser from the holder in the absence of allegation that the purchaser had notice of the mortgagor's equity and that the purchaser's deed was not supported by consideration, the record not being notice since it showed the cancellation of the mortgage and failed to show that the mortgagor's deed was made to the holder of the notes, the holder not appearing of record as the mortgagee. *Byrd v. Waldrop*, 669.

§ 36. Deficiency and Personal Liability.

Where a mortgage or deed of trust is foreclosed under the power of sale contained in the instrument, and the holder of the notes secured thereby bids in the property, directly or indirectly, for an amount less than the debt and sues to recover a deficiency judgment. *Held:* Under the provisions of sec. 3 of ch. 275, Public Laws of 1933, recovery is properly denied upon the finding of the jury that the property was worth the amount of the debt at the time and place of the sale. The statute applies only to foreclosure under powers of sale and not to actions to foreclose, and only to instances where the creditor bids in the property, directly or indirectly, and not to instances where the property is bid in by independent third persons. *Loan Corp. v. Trust Co.*, 29; *Building and Loan Asso. v. Bell*, 35.

§ 39a. Parties Who May Attack Foreclosure.

Complaint held to allege cause of action in favor of one *cestui* to upset foreclosure had on sole application of other *cestui*. *Woodley v. Combs*, 482.

§ 39b. Grounds of Attack Other Than Irregularity in Foreclosure Proceedings.

Mere inadequacy of purchase price, without evidence of fraud, oppression, or unfairness on the part of the trustee or holder of the notes, is insufficient to upset a foreclosure sale had in strict conformity with the power of sale contained in the deed of trust. *Hill v. Fertilizer Co.*, 417.

§ 39c. Waiver of Right to Attack and Estoppel.

The *cestui que trust* bought the property at the foreclosure sale and thereafter sold same. The trustors, with knowledge of all the facts, surrendered possession to the purchaser, rented a part of the property from him, and stood by without objection while the purchaser expended large sums in improvements on the tract of land. *Held:* The trustors are estopped from attacking the validity of the foreclosure sale. *Hill v. Fertilizer Co.*, 417.

§ 39f. Actions to Set Aside Foreclosures.

Plaintiff, the trustor in a deed of trust, instituted this action, claiming that defendant agreed to rent the property at a stipulated price and pay the rent to the *cestui que trust* so as to discharge the deed of trust, that defendant paid the debt but, instead of having the deed of trust canceled as agreed, had the notes assigned to him and procured foreclosure by the trustee. Defendant denied the allegations and set up claim for improvements and taxes paid. *Held:* The evidence of fraud was sufficient to be submitted to the jury, and, in view of defendant's claim for taxes and improvements, the jury was properly called upon to ascertain the entire amount of rents due, and upon the

MORTGAGES—*Continued.*

verdict of the jury in plaintiff's favor, judgment was properly entered setting aside the foreclosure and adjusting the rights of the parties upon the several amounts found by the jury on the respective claims of the parties for rents, taxes, and improvements. *Baushar v. Willis*, 52.

MUNICIPAL CORPORATIONS.

§ 7. Governmental Powers.

Establishment and maintenance of playgrounds held governmental function of populous city. *Atkins v. Durham*, 295.

§ 14. Defects or Obstructions in Streets or Sidewalks.

Plaintiff's testimony tended to show that she fell and was injured while walking along the sidewalk in defendant city when she stepped down onto a driveway crossing the sidewalk in front of a house, that the driveway was rough, part of the cement having been washed away, and that it was directly in front of a house in an unexpected place, but that at the time of the injury it was broad daylight and that she could have walked in the street with safety. *Held:* Plaintiff's testimony discloses contributory negligence barring recovery as a matter of law, it being evident that plaintiff saw, or should have seen, in the exercise of due care, the condition of the driveway, and that she attempted to walk over the driveway when a safe way was available. *Burns v. Charlotte*, 48.

Plaintiff's evidence tended to show that the concrete railing of a bridge in defendant city had been broken through and temporarily replaced with planks, that plaintiff's intestate, at a time when there was ice on the roadway, was seen to drive his car upon the bridge, was observed to skid, and was later found beneath his overturned car under the bridge. There was no eye-witness to what happened. *Held:* The evidence was insufficient to be submitted to the jury in plaintiff's action against the city, the burden being upon plaintiff to show that defendant city negligently failed to use due care to keep its streets in a reasonably safe condition for those having occasion to use them in a proper manner, and that such negligent failure proximately caused the injury, it not being the duty of the city to erect and maintain barriers proof against any degree of force, or to keep its streets entirely free from natural ice, and the happening of the injury raising no presumption of negligence. *Love v. Asheville*, 476.

Evidence that plaintiff fell when her foot caught in a broken place in the cement of a sidewalk over a drain pipe, that the broken place was about an inch deep and left the drain pipe exposed, that a small hole had been worn in the drain pipe, and that the edges of the broken place in the pipe were rusty, indicating the defect had existed for a long period of time, *is held* sufficient to be submitted to the jury on the issues of the city's negligence in failing to keep its sidewalk in a reasonably safe condition, and that such negligence was the proximate cause of plaintiff's injuries. *Doyle v. Charlotte*, 709.

Evidence held not to disclose contributory negligence as matter of law in action to recover for injuries resulting from fall on sidewalk. *Ibid.*

Plaintiff's evidence *held* insufficient to make out case of actionable negligence on part of defendant municipality for injury caused by fall from foot bridge not maintained by the city. *Duren v. Charlotte*, 824.

§ 16. Injuries to Land by Sewerage Systems.

An action to recover damages to plaintiff's land caused by the deposit of raw sewage thereon from defendant municipality's sewage disposal plant prior to the institution of the action may be joined with suit to enjoin the future maintenance and operation of the plant after the lapse of a reasonable time

MUNICIPAL CORPORATIONS—*Continued.*

for the installation of an adequate plant, or for permanent damage for injuries sustained by the municipality's taking of the property under the power of eminent domain. *Poovey v. Hickory*, 630.

In an action to enjoin the maintenance and operation of defendant municipality's sewage disposal plant after the lapse of a reasonable time for the installation of an adequate plant, allegations that the population of defendant municipality had greatly increased and would continue to increase, and that attendance upon schools and colleges located in the city had greatly increased since the construction of the sewage disposal plant, rendering the plant inadequate, and that the increased value of taxable property within the city rendered the city financially able to build an adequate plant, are relevant and material allegations upon the question of plaintiff's right to the injunctive relief prayed for, and such allegations are improperly stricken out on defendant's motion under C. S., 537. *Ibid.*

Right to recover damages resulting to land from sewage disposal plant is predicated upon title and not possession, and plaintiff may not recover damages caused prior to his acquisition of title. *Ballard v. Cherryville*, 728.

§ 35. Curative Acts of Legislature in Regard to Assessments for Public Improvements.

Street assessments made under charter provisions failing to provide notice and an opportunity to be heard to those assessed are void as violating due process of law, and may not be validated by curative acts of the Legislature. Art. XIV, sec. 1, of the Federal Constitution, Art. I, sec. 17, of the State Constitution. *Lexington v. Lopp*, 196.

§ 36. Nature and Extent of Municipal Police Power in General.

Municipal corporations are given authority by N. C. Code, 2795, 2776 (b), 2787 (12), to establish parks and playgrounds necessary to the maintenance of the health of their inhabitants, and an ordinance of a populous industrial city which provides for the issuance of bonds to establish and maintain parks and playgrounds for the children of the city *is held* a valid exercise of its police power under legislative authority for the promotion of the public health, safety, and morals. *Atkins v. Durham*, 295.

§ 37. Zoning Ordinances and Building Permits.

The approval by the Board of Adjustment of a denial of a permit to erect a filling station on certain land does not constitute *res judicata* upon a second application made therefor three years after the first application upon substantial change of the traffic conditions. *In re Broughton Estate*, 62.

NEGLIGENCE.

§ 4d. Doctrine of Attractive Nuisance.

Burned-out light bulb held not inherently dangerous, and doctrine of attractive nuisance held inapplicable. *Heater v. Light Co.*, 88.

The complaint in this action for wrongful death alleged that defendants maintained an artificial pond, for pleasure and recreational purposes, adjacent to a road connecting two streets in the edge of a thickly settled city, that there was no obstruction between the pond and the road, that the pond was attractive to small children and was naturally hazardous, and that several children had been drowned therein to the knowledge of defendants, and that defendants had invited numerous small children, including members of intestate's family, to come upon the premises and play without warning them against the danger of the deep water, and that intestate, a child of tender years, went upon the premises and was drowned in the pond. *Held:* The complaint stated a cause of action for wrongful death and defendants' demurrer thereto should have been overruled. *Cummings v. Dunning*, 156.

NEGLIGENCE—*Continued.*

§ 10. Doctrine of Last Clear Chance.

The doctrine of last clear chance may arise only when plaintiff is guilty of contributory negligence, and one of defendants, sued as joint tort-feasor, may not resist recovery by plaintiff on the ground that the other defendant had the last clear chance to avoid the injury. *Taylor v. Rierson*, 185.

Doctrine of last clear chance held inapplicable in action to recover for death of intestate killed while sitting on track, since engineer had right to expect up to the moment of impact that intestate would get off track. *Reep v. R. R.*, 285.

§ 11. Contributory Negligence of Persons Injured in General.

Allegation and evidence that plaintiff, a passenger on defendant's bus, gave a match to a fellow passenger to strike a light to look for a coin on the floor of the bus while gasoline was being put into the gas tank of the bus through its intake on the inside of the bus, *is held* sufficient to support the issue of contributory negligence tendered by defendant bus company in plaintiff's action to recover for injuries sustained when the gas fumes became ignited from the match struck by plaintiff's fellow passenger. *Williams v. Bus, Inc.*, 400.

It is not necessary that contributory negligence be the sole proximate cause of the injury in order to bar recovery, it being sufficient if such negligence is one of the proximate concurring causes of the injury. *Wright v. Grocery Co.*, 462; *Exum v. Baumrind*, 650.

§ 12. Contributory Negligence of Minors.

A child of tender years is not held to the same degree of care for his own safety as an adult, but only that degree of care which a child of his years may be expected to possess. *Hollingsworth v. Burns*, 40.

A four-year-old child is incapable of negligence, primary or contributory. *Bevan v. Carter*, 291.

§ 16. Pleadings.

It is necessary that defendant plead contributory negligence in order to be entitled to the submission of the issue to the jury. C. S., 523. *Bevan v. Carter*, 291.

§ 19b. Nonsuit for Contributory Negligence.

Where plaintiff's own evidence establishes contributory negligence as a matter of law, defendant may take advantage of same by motion to nonsuit. *Hinshaw v. Pepper*, 573.

Defendant's motion to nonsuit on the ground that plaintiff's own testimony shows contributory negligence as a matter of law is correctly denied when plaintiff's evidence on the issue is conflicting, the discrepancy in plaintiff's testimony being for the jury. *Matthews v. Cheatham*, 592.

§ 20. Instructions in Actions to Recover for Negligent Injuries.

Where, in an action by a guest against two defendants upon allegations that the collision causing her injuries resulted from the concurrent negligence of the drivers of the cars, the court correctly charges the law on the question of proximate cause, the objection of one defendant that the charge was not sufficiently full in view of his contention that the negligence of the other defendant was the sole proximate cause of the collision would not be sustained, it being required of defendant, if he wished more particular instructions, to have aptly tendered a request therefor. C. S., 565. *Taylor v. Rierson*, 185.

Instruction held for error in failing to charge that contributory negligence bars recovery if it concurs in producing injury. *Wright v. Grocery Co.*, 462.

PARENT AND CHILD.

§ 2. Proof of Relationship and Presumption of Paternity.

Husband living under same roof with wife is conclusively presumed to be father of children. *S. v. Green*, 162.

§ 4. Right to Custody of Minor Children.

Decree awarding, in effect, custody of child to paternal grandparents as against mother, *held* error. *McEachern v. McEachern*, 98.

§ 5. Support of Minor Children.

Where the parents of a minor child have been divorced and the custody of the child awarded the mother, the minor child, by a next friend, may sue the father for support. *Green v. Green*, 147.

The liability of a father for the support of his minor child is not terminated by a divorce from the child's mother, even though the custody of the child is awarded its mother. *Ibid.*

A minor child of divorced parents is not relegated to a motion in the divorce action to force her father to provide for her support, but may maintain an independent action therefor, the child not being a party to the divorce action. *Ibid.*

A child of divorced parents is not entitled to an allowance of counsel fees and suit money *pendente lite* in her action against her father to force him to provide for her support, the statutes, C. S., 1666, 1667, applying only to actions instituted by the wife, and such right not existing at common law. *Ibid.*

A child who has been abandoned by its father may maintain a suit by a next friend against the father to force the father to contribute to its support. *Pickelsimer v. Critcher*, 779.

§ 13. *Competency and Relevancy of Evidence in Prosecutions for Abandonment.*

Where the husband and wife are living together under the same roof during the period when a child is begotten, the husband is conclusively presumed to be the father of the child when he is not impotent, and in a prosecution of the husband for abandonment and nonsupport of the child, evidence tending to establish the illegitimacy of the child under such circumstances is incompetent. *S. v. Green*, 162.

PARTIES.

§ 2. Proper Parties Plaintiff.

Where a plaintiff assigns any recovery he may obtain against defendant to third persons, such third persons, upon becoming assignees, are proper but not necessary parties to the action, and plaintiff may prosecute same after the assignment in behalf of his assignees in the absence of objection by the defendant. *Fertilizer Works v. Newbern*, 9.

§ 3. Necessary Parties Defendant.

The trustee of a spendthrift trust may defend an action seeking to attach the interest of the *cestui que trust*, both in the Superior Court and in the Supreme Court on appeal, without the appearance of the *cestui*, the preservation and protection of the property being incumbent upon him under the terms of the trust. *Chinnis v. Cobb*, 104.

§ 5. Joinder of Additional Parties.

An order making additional parties upon a proper amendment of the complaint is within the discretionary power of the trial court and is not reviewable. *Wilmington v. Board of Education*, 197.

§ 8. Right to Intervene and Claim Property.

A motion by a party to be allowed to intervene and claim the property involved in the action is correctly denied where movant fails to identify the property claimed by her as the property in suit. *Gerks v. Weinstein*, 90.

PARTITION.

§ 1. **Right to Partition in General.**

Ordinarily, a tenant in common in realty or personalty is entitled to partition of the property. N. C. Code, 3213, 3215, 3253, 3255. *Chadwick v. Blades,* 609.

§ 2. **Waiver of Right and Agreements Relating Thereto.**

Tenants in common may make a valid agreement, either at the time of the creation of the tenancy or afterwards, whereby the right to partition is modified or limited, provided the waiver of the right to partition is not for an unreasonable length of time. *Chadwick v. Blades,* 609.

Tenant held to have limited his remedy by agreement to sale of his interest and could not maintain proceedings for partition. *Ibid.*

§ 4. **Parties and Procedure.**

It is necessary that three appraisers act in partitioning property, although the report is sufficient if signed by two of them. N. C. Code, 3219, 3228. *Sharpe v. Sharpe,* 92.

PAYMENT.

§ 10. **Receipts, Canceled Checks, Etc.**

A verified report of an executrix, showing payment to the estate of a sum required of a devisee as a condition precedent to the vesting of title in him to the land devised, is *prima facie* proof of payment, but is subject to rebuttal, and where such evidence is challenged by competent evidence to the contrary, the issue of payment is for the determination of the jury. *Braddy v. Pfaff,* 248.

PHYSICIANS AND SURGEONS.

§ 1. **Validity of Regulatory Statutes.**

Public Laws of 1935, ch. 66, regulating practice of dentistry, held valid. *Allen v. Carr,* 513.

§ 4. **Examination and Issuance of License.**

Plaintiff sought to compel defendant Board of Dental Examiners to issue license to him to resume the practice of dentistry. The court found as a fact that the board had refused to issue such license upon its finding after examination that plaintiff had failed to show satisfactory proficiency in the profession of dentistry, and had refused to issue the license in the exercise of its judgment and discretion, and had not arbitrarily abused its discretion. Ch. 66, sec. 11, Public Laws of 1935. *Held: Mandamus* will not lie to control the decision of the board in the exercise of its discretionary power, the extent of *mandamus* in such cases being limited to compel the exercise of the discretionary power, but not to control the decision reached in its exercise. *Allen v. Carr,* 513.

§ 7. **Expiration, Renewal, and Reissuance of License.**

A dentist licensed by the State Board of Dental Examiners, who thereafter moves from this State and practices his profession successively in other states, upon examination and license by them, and then returns to this State, must obtain a license to resume practice here by passing a second examination by the State Board of Dental Examiners, although such dentist has continuously practiced dentistry since he was first licensed by the State Board. Ch. 66, sec. 11, Public Laws of 1935. *Allen v. Carr,* 513.

§ 15b. **Knowledge and Skill Required.**

A person holding himself out as a practitioner of a particular school of healing of human diseases is required to possess and apply with reasonable care and diligence in the exercise of his best judgment that degree of knowl-

PHYSICIANS AND SURGEONS—*Continued.*

edge and skill ordinarily possessed by other practitioners of the same method or system of practice, and is liable for damages resulting from his failure to possess or exercise such skill, but he is not required to possess the highest technical skill nor the knowledge and learning of the well recognized schools of medicine and surgery, the practitioner having been selected to administer, with the requisite degree of skill and care, the particular system advocated by his school of practice. *Hardy v. Dahl,* 530.

§ 15d. Competency and Relevancy of Evidence in Actions for Malpractice.

Defendant is a practitioner of naturopathy, and this action was instituted to recover damages alleged to have resulted from his negligence in the practice of his system of healing. Defendant had not obtained a license to practice as required by C. S., 6704. *Held:* Defendant's practice of his system of healing without the required license subjects him to indictment, but is irrelevant to the issue of negligence involved in the civil action, and it is error to admit evidence and submit issues in the civil action relating to defendant's failure to obtain the license and his practice of his profession illegally. *Hardy v. Dahl,* 530.

§ 15g. Estoppel and Release of Liability.

Release of tort-feasors signed after treatment of injury by a physician *held* to bar action against the physician for alleged malpractice in treating the injury. *Smith v. Thompson,* 672.

PLEADINGS.

§ 3a. Statement of Cause of Action in General.

The complaint must state in a plain and concise manner all facts necessary to enable plaintiff to recover. C. S., 506, 535. *Bank v. Gahagan,* 464.

§ 5. Prayer for Relief.

Where plaintiff prays for relief to which he is not entitled upon the facts alleged, but the facts alleged are sufficient to entitle plaintiff to other relief, defendant's motion to nonsuit upon plaintiff's evidence tending to establish the facts alleged is improperly granted, since the court may grant the relief to which plaintiff is entitled upon the facts under the general prayer for such other and further relief as the facts entitle him to, a party being entitled to recover judgment for any relief to which the facts alleged and proven entitle him, whether demanded in the prayer for judgment or not. *Woodley v. Combs,* 482.

§ 10. Counterclaims, Set-offs, and Cross Complaints.

Plaintiff sued to recover the balance alleged to be due on a contract for the sale of goods to defendant. Defendant denied the debt in the sum demanded, alleged tender of the correct amount, and set forth a counterclaim for libel, alleging that plaintiff had written a wholesaler and a credit association letters containing statements injuring defendant's credit and standing, and that the statements were untrue and malicious. *Held:* The counterclaim in tort for libel did not arise out of the contract on transaction sued on, and was not connected with the same subject of action within the meaning of N. C. Code, 521, and plaintiff's demurrer to the counterclaim was properly sustained. *Weiner v. Style Shop,* 705.

§ 17. Statement of Grounds, Form, and Requisites of Demurrer.

Defendant's contention that the complaint, even upon the joinder of an additional party and the allowance of an amendment, would fail to state a cause of action against it, may not be presented by exception to the order allowing the amendment, the defendant's procedure being by demurrer to the complaint as amended. *Wilmington v. Board of Education,* 197.

PLEADINGS—*Continued.*

§ 18. Necessity that Defect Appear on Face of Pleading in Order to Be Available upon Demurrer.

The fact that an action for wrongful death is not instituted within the limitation prescribed by C. S., 160, may be taken advantage of by demurrer when the dates appear as a matter of record. *George v. R. R.*, 58.

§ 19. Time of Filing Demurrer and Waiver of Right to Demur.

By filing answer to the complaint, defendants waive the right to demur thereto except for want of jurisdiction of the court over the person of defendant or for failure of the complaint to state a cause of action, and such waiver applies to an amended complaint when the amended complaint is substantially the same as the original complaint to which answer was filed. C. S., 511. *Schnibben v. Ballard & Ballard Co.*, 193.

§ 20. Office and Effect of Demurrer.

Upon demurrer, the complaint must be construed in the light most favorable to the plaintiff. *Smith v. Sink*, 815.

Upon demurrer, the complaint is to be construed liberally in favor of the pleader with a view to substantial justice between the parties, C. S., 535, and the demurrer should be overruled unless the complaint is wholly insufficient, taking its allegations to be true, to state a cause of action. *Cummings v. Dunning*, 156.

In ruling upon a demurrer to the complaint, its allegations alone will be considered, and taken as true, and whether the allegations can be sustained upon the trial is not presented for decision. *Ibid.*

A demurrer admits facts properly pleaded, but not inferences or conclusions of law. *Bank v. Gahagan*, 464; *Byrd v. Waldrop*, 669; *Weiner v. Style Shop*, 705.

A demurrer admits facts well pleaded. As to whether facts alleged upon information and belief are availing against a demurrer, *quære*. *Barbee v. Comrs. of Wake*, 717.

§ 22. Amendment During Trial.

The court has discretionary power to allow a pleading to be amended after the introduction of evidence so as to make the pleading conform to the evidence. C. S., 547. *Hicks v. Nivens*, 44.

The trial court has discretionary power to allow plaintiff to amend his complaint when the amendment does not alter the cause alleged so as to render it a new or different cause of action. C. S., 547. *Wilmington v. Board of Education*, 197.

§ 23. Amendment After Judgment Sustaining Demurrer.

Where it is determined on appeal that defendants' demurrers should have been sustained, plaintiff may ask to be allowed to amend its complaint. C. S., 515. *Bank v. Gahagan*, 464; *Byrd v. Waldrop*, 669.

§ 26. Variance Between Allegation and Proof.

An objection to competent evidence on the ground that it is not supported by allegation is rendered untenable when the court allows the pleading to be amended so as to allege the supporting facts. *Hicks v. Nivens*, 44.

§ 28. Motions for Judgment on the Pleadings.

Upon plaintiff's motion for judgment on the pleadings, defendant's answer must be given the most favorable interpretation and every intendment taken against the plaintiff. *Petty v. Ins. Co.*, 500.

§ 29. Motions to Strike Out.

In this suit against a tort-feasor, the defendant set up a release given his joint tort-feasor as a defense to the action. Plaintiff alleged in his reply that

PLEADINGS—*Continued.*

he was induced to proceed solely against such other tort-feasor and effect the settlement and release by defendant's fraudulent misrepresentations that he was insolvent and without liability insurance. *Held:* Defendant's motion that the allegations be stricken from the reply as irrelevant and prejudicial was properly refused, the allegations of the reply not constituting a repudiation of the release of the other tort-feasor, but being allegations of matters constituting an estoppel of defendant by misrepresentation from setting up the release as a defense to plaintiff's action. C. S., 537. *Scott v. Bryan*, 478.

Motion to strike out allegation that defendant carried liability insurance *held* properly denied, the allegation being material to right to recover under facts of the case. *Ibid.*

Motion to strike out may be refused when the matter may be better determined by rulings on the evidence. *Ibid.*

A motion to strike out under C. S., 537, does not challenge the sufficiency of the complaint to state a cause of action, but concedes that sufficient facts are alleged, and presents only the propriety, relevancy, or materiality of the allegations sought to be stricken out. *Poovey v. Hickory*, 630.

Allegations held material to plaintiff's right to relief prayed for and were improperly stricken from complaint. *Ibid.*

PRINCIPAL AND AGENT.

§ 9. Notice and Knowledge of Agent.

The rule that knowledge of the agent is imputed to the principal does not prevail when the agent is acting in his own interest and has a motive for concealing the knowledge from the principal. *Bank v. Duffy*, 598.

PRINCIPAL AND SURETY.

§ 5a. Bonds of Public Officers and Agents in General.

Where party suffers no loss by reason of default of clerk in the performance of his official duties, such party may not recover against the clerk's official bond. *Buncombe County v. Cain*, 766.

PROCESS.

§ 3. Defective Process and Amendment.

In an action against a nonresident insurance company in which process is served on the Insurance Commissioner under the statute, defects in the copy of summons in failing to show the clerk's signature and seal of the court, and in complaint and bond in failing to be signed by the attorney, may be cured by an order of the clerk remedying the defects *nunc pro tunc* when it appears that the original papers were not defective. *Trust Co. v. Smith*, 582.

§ 10. Service on Nonresident Auto Owners.

The statute authorizing service of summons on nonresident auto owners by service on the Commissioner of Revenue does not warrant the service of summons in the manner provided upon a nonresident owner in an action for abuse of process based upon such owner's arrest of plaintiff after a collision between their cars in this State, since the action for abuse of process does not arise out of a collision in which defendant was involved by reason of the operation of his automobile in this State. *Lindsay v. Short*, 287.

QUO WARRANTO.

§ 1. Nature and Grounds of Remedy.

Injunction, and not *quo warranto*, is proper remedy to test validity of tax levied under authority of popular election. *Barbee v. Comrs. of Wake*, 717.

RAILROADS.

§ 9. **Accidents at Crossings.**

Evidence held not to show contributory negligence as matter of law on part of plaintiff in crossing defendant's tracks. *Loftin v. R. R.*, 404.

Held: Plaintiff's testimony that he thought the train was approaching from the south referred to his apprehension after he had started across, and does not disclose that he went upon the crossing when he knew a train was approaching, and defendant's motion to nonsuit on the ground of contributory negligence was properly denied. *Oldham v. R. R.*, 642.

Failure of flagman to give warning of danger is implied invitation to motorist to cross. *Ibid.*

One plaintiff was the driver and the other plaintiff a guest in an automobile that ran into a tank car standing across a grade crossing. *Held:* In plaintiffs' actions against the railroad company to recover the damages sustained, nonsuits were properly granted under authority of *Goldstein v. R. R.*, 203 N. C., 166. *Rose v. R. R.*, 834.

§ 10. **Injuries to Persons on or Near Tracks.**

Evidence disclosing that intestate was sitting on a crosstie of a railroad track, with his head resting upon the extended fingers of his right hand, *is held* insufficient to support the submission of an issue involving the doctrine of the last clear chance in an action against the railroad for wrongful death, since under the evidence the engineer of the train, which struck and killed intestate, had the right to assume up to the last moment that the intestate would get off the track in time to avoid the accident. *Reep v. R. R.*, 285.

§ 11. **Accidents at Underpasses.**

The complaint alleged that a piece of timber from a bridge over the corporate defendant's tracks struck and killed intestate when the car in which he was riding as a guest was driven into the side of the bridge, that the driver of the car was intoxicated and was driving at an excessive speed, and that the bridge was allowed to remain with broken guard rails projecting in a manner hazardous to the traveling public, and that the corporate defendant had prior knowledge of its condition, and that intestate's death was proximately caused by the concurrent negligence of the driver and the railroad company. *Held:* The complaint states a cause of action against defendants as joint tort-feasors, entitling plaintiff to maintain an action against either or both, and the corporate defendant's demurrer on the ground that it appeared from the facts alleged that the negligence of the driver of the car was the sole proximate cause of the injury was properly overruled. *Smith v. Sink*, 815.

RECEIVERS.

§ 1. **Nature and Grounds of the Remedy.**

Receivership is a harsh remedy, and the courts will not appoint a receiver unless the right to the relief is clearly shown and it is made to appear that there is no other safe and expedient remedy. *Neighbors v. Evans*, 550; *Martin v. Jonas*, 665.

Where an executor's petition in proceedings against a devisee to sell lands to make assets alleges merely that the personalty is insufficient to pay debts, without setting forth the personalty and the application thereof, plaintiff executor is not entitled to the appointment of a receiver for the lands on the ground that the action cannot be tried until a subsequent term, and that the devisee had refused to pay taxes, the allegation merely that the personalty is insufficient failing to show plaintiff executor's apparent right to the relief as required for the appointment of a receiver under the provisions of N. C. Code, 860 (1), especially when the devisee denies the allegation that the personalty is insufficient. *Neighbors v. Evans*, 550.

REFORMATION OF INSTRUMENTS.

§ 4. **Mistake of Draftsman.**

Where it appears by clear, strong, and cogent proof that the draftsman, through inadvertence or mistake, failed to include in the description of the deed all the land intended by the parties to be embraced therein, equity will grant reformation of the deed to bring it into harmony with the true intention of the parties. *Crews v. Crews*, 217.

Deed may be reformed for mistake of draftsman in failing to insert reversionary clause in accordance with agreement of parties. *Ollis v. Board of Education*, 489.

§ 8. **Burden of Proof.**

Party praying reformation has burden of proof on the issue. *Eggleston v. Quinn*, 666.

§ 9. **Competency and Relevancy of Evidence in Actions for Reformation.**

In action for reformation, parol evidence, tending to show real agreement of parties at the time, is competent. *Ollis v. Board of Education*, 489.

§ 10. **Sufficiency of Evidence in Actions for Reformation.**

Evidence that the draftsman was instructed by the grantee in a deed to insert a clause therein providing that the land should revert to the grantors if it should cease to be used by the grantee for school purposes, that the draftsman thought and represented to the grantors that the deed contained such clause, and that the grantors signed same, relying upon the representation, *is held* sufficient to be submitted to the jury in an action by the grantors to reform the deed by inserting the reversionary clause left out by mistake of the draftsman, it being for the jury to say whether the evidence satisfies them by clear, strong, and convincing proof of the facts constituting plaintiffs' cause of action. *Ollis v. Board of Education*, 489.

A party alleging that it was agreed that he should not be personally liable on a note executed by him, but that the maker agreed that his sole remedy should be by foreclosure of a deed of trust executed as security for the note, and that the agreement was omitted from the note and deed of trust by mutual mistake of the parties, and praying reformation of the instruments, has the burden of proof on the issue, and when he fails to introduce evidence in support of such issue, and directed verdict for plaintiff on the note admittedly executed by defendant, is without error. *Eggleston v. Quinn*, 666.

§ 13. **Title, Rights, and Remedies of Third Persons.**

Where a wife joins her husband in the execution of a deed of trust on his lands, and a part of the tract intended to be embraced therein is omitted therefrom through error of the draftsman, upon the husband's subsequent conveyance to the wife of the tract erroneously omitted from the description in the deed of trust, she may not resist reformation of the deed of trust on the ground that she is an innocent purchaser under her deed from her husband. *Crews v. Crews*, 217.

REMOVAL OF CAUSES.

§ 4a. **Determination of Whether Controversy is Separable.**

Parties joined on cross action of original defendants as joint tort-feasors *held* not entitled to removal, the allegations of the cross action being determinative of whether a separate or joint action was alleged, and the original defendants being residents of the State. *Mangum v. R. R.*, 134.

Upon a petition for removal of a cause from the State to the Federal Court on the ground of diversity of citizenship and separable controversy, the allegations of the complaint determine whether the cause alleged is joint or separable. *Hughes v. R. R.*, 730; *Rucker v. Snider Bros.*, 777.

REMOVAL OF CAUSES—*Continued.*

A complaint alleging that plaintiff's injuries were the result of a collision between a truck owned by a resident defendant and a truck owned by the nonresident defendant, and that the collision was caused by the joint and concurrent negligence of the resident drivers of the trucks, states a joint cause against the defendants, and the nonresident defendant's motion to remove for separable controversy and diversity of citizenship is properly denied. *Rucker v. Snider Bros.*, 777.

§ 4b. Determination of Issue of Fraudulent Joinder.

Whether the resident defendants are fraudulently joined to prevent removal to the Federal Court is to be determined by the petition, which must allege facts leading to that conclusion apart from deductions by the pleader. *Hughes v. R. R.*, 730.

Petition *held* to allege facts leading to conclusion that resident defendants were fraudulently joined to prevent removal. *Ibid.*

SALES.

§ 25. Actions and Counterclaims for Breach of Warranty.

The charge of the court that the seller of merchandise impliedly warrants the goods to be reasonably fit and proper for the purpose for which sold, and that the buyer could recover damages resulting from breach of such implied warranty, the burden of proof on the issue being on the buyer, *is held* without error. *Keith v. Gregg*, 802.

SCHOOLS.

§ 2. Tuition, Fees, and Accommodations.

In an action by a private school to recover the balance due for tuition and board of defendant's daughter for the school year, in accordance with the contract between the parties, defendant is entitled to have her defense that the accommodations and board furnished were inadequate to maintain health, and caused the physical condition of defendant's daughter to become such that she was unable to attend school but for half the year, submitted to the jury. *Fairmont School v. Bevis*, 50.

§ 9. Duty and Authority to Maintain Public Schools in General.

The State Constitution contemplates that the General Assembly shall provide a State system of public schools to the end that every child between the ages of six and twenty-one years, without regard to the county in which such child resides, shall have an opportunity to attend a school in which standards set up by the State are maintained and wherein tuition shall be free of charge, and it is the duty of the commissioners of each county, when such State system has been provided, to maintain in each district of the county one or more schools for the constitutional school term. *Marshburn v. Brown*, 331.

SEDUCTION.

§ 1. Definition and Elements of the Offense.

The essential elements of the statutory offense of seduction are (1) seduction, (2) promise of marriage, (3) innocence and virtue of the prosecutrix. *S. v. Forbes*, 567; *S. v. Wells*, 738.

§ 8. Sufficiency and Requisites of Supporting Testimony.

In order for a conviction of seduction under C. S., 4339, there must be inculpating evidence of each of the essential elements of the crime, in addition to the testimony of prosecutrix, and such "supporting testimony" must necessarily consist of independent facts and circumstances. *S. v. Forbes*, 567.

In this prosecution for seduction, the only evidence in support of the testimony of prosecutrix on the essential element of promise of marriage was the

SEDUCTION—*Continued.*

testimony of a witness, admitted solely for the purpose of corroborating prosecutrix, that prosecutrix had told the witness that she and defendant were going to be married, and the further testimony of the witness that she had seen prosecutrix and defendant together over a period of a year and eight months. No other witness testified that prosecutrix and defendant had been seen together. *Held:* The testimony of the witness is not sufficient to constitute proof of the promise of marriage by facts and circumstances independent of the testimony of prosecutrix, and defendant's motion to nonsuit should have been granted. *Ibid.*

By provision of statute the unsupported testimony of prosecutrix is insufficient to sustain a conviction. C. S., 4339. *S. v. Wells*, 738.

§ 9. Sufficiency of Evidence and Nonsuit.

Testimony of the prosecutrix in this prosecution for seduction to the effect that she and defendant had sexual intercourse, that they planned to be married, that he asked her to have sexual intercourse with him and told her that if she would they would be married, and that they would be married right away if anything happened, *is held* insufficient to establish that the seduction was induced by a previous unconditional promise of marriage, it not appearing from the evidence when the first act of intercourse took place, and, the burden being upon the State to affirmatively show that the seduction was induced by a previous unconditional promise of marriage, defendant's motion to nonsuit should have been granted. *S. v. Wells*, 738.

SPECIFIC PERFORMANCE.

§ 2. Intervention of Rights of Third Persons.

Purchaser *held* not entitled to specific performance as against trustee in deed of trust executed by vendor. *Wagner v. Realty Co.*, 1.

STATUTES.

§ 2. Constitutional Inhibition Against Passage of Special Acts.

Part of land in a private development was added to the playground of a public school. The General Assembly, by private act (ch. 72, Private Laws of 1933), declared that certain roads dedicated in the registered plot of the development were no longer needed, and declared that the roads should be closed and added to the playground space for the school. *Held:* The act is void as being a private or special act inhibited by Art. II, sec. 29, of the State Constitution. *Glenn v. Board of Education*, 525.

§ 3. Form and Contents: Vague and Contradictory Statutes.

Ch. 360, Public Laws of 1935, prescribing that certain classes of persons dealing in scrap tobacco should first procure a license from the Commissioner of Revenue, *is held* void for uncertainty, the statute failing to stipulate the time when the license prescribed should be paid and failing to prescribe for how long a time the license should run. *S. v. Morrison*, 117.

C. S., 2563 (3), relating to monopolies, *held* constitutional and not void for indefiniteness. *S. v. Coal Co.*, 742.

§ 5. General Rules of Construction.

Statutes dealing with the same subject matter must be construed *in pari materia*. *S. v. Humphries*, 406.

A statute will be construed to effect the intent of the Legislature if such intent can be gathered from the act with reasonable clearness and certainty, and where the purpose of an act is clear, and it appears with certainty, either from context or by reference to a statute *in pari materia*, that the interpolation of a certain word, evidently omitted through clerical error, and the

STATUTES—*Continued.*

deletion of another word are necessary to give the act grammatical form and to express with clearness the legislative intent, it is the duty of the courts to make the necessary corrections in order to effectuate the legislative will. *S. v. Humphries*, 406.

Where a statute is not ambiguous, but expresses the legislative intent clearly, no means of interpretation other than the language of the statute may be used in its construction, and the legislative intent as expressed in the statute must be given effect. *Motor Co. v. Maxwell, Comr.*, 725.

§ 6. **Construction in Regard to Constitutionality.**

A statute will not be declared unconstitutional unless it is plainly and clearly so, and any doubt will be resolved in favor of constitutionality. *Mecklenburg County v. Ins. Co.*, 171; *Glenn v. Board of Education*, 525.

§ 8. **Construction of Criminal Statutes.**

Penal statutes must be construed in the light of the mischief against which they inveigh. *S. v. Hatcher*, 55.

The rule that criminal statutes must be strictly construed means that they will not be enlarged by implication to embrace cases not within their meaning, but the rule that the legislative intent will be given effect applies to criminal statutes as well as to civil statutes. *S. v. Humphries*, 406.

§ 10. **Repeal by Implication and Construction.**

Where two statutes deal with the same subject matter, and the later statute repeals all laws in conflict therewith, the later statute will not repeal the former when the statutes are not in conflict, but are supplementary in remedying the same evil. *S. v. Humphries*, 406.

SUBROGATION.

§ 1. **Nature and Grounds of Remedy.**

The right to subrogation arises from the payment of a debt for which another is primarily liable, and where it appears that the party claiming such right has not paid the debt, but that the debt was paid out of insurance funds in which he had no interest, the asserted right of subrogation fails. *Miller v. Potter*, 268.

TAXATION.

§ 1. **Uniform Rule and Discrimination.**

Under our constitutional and statutory provisions all property, real and personal, is subject to taxation, unless exempt from taxation by the Constitution. Art. V, sec. 3; N. C. Code, 7971 (13). *Ins. Co. v. Stinson*, 69; *Mecklenburg County v. Sterchi Bros.*, 79.

An excise tax, uniform in amount, regardless of whether the article used is purchased within the State or not, will not be held void as discriminatory because the procedure for its collection when the article used is purchased outside the State is different from that when it is purchased within the State, when it appears that the statute does not discriminate either in substance or in its operation in practical application. *Powell v. Maxwell, Comr.*, 211.

§ 4. **Necessity for Vote.**

Defendant municipality proposed to issue its bonds to establish and maintain playgrounds for its children. It appeared that defendant is a populous industrial city, that it had never defaulted on its bonds, principal or interest, that its tax rate is within the prescribed limitations, and that no petition had been filed demanding that the question be submitted to the voters, although the ordinance provided that it should not take effect for thirty days in order to afford the prescribed time for the filing of such petition under the Municipal

TAXATION—*Continued.*

Finance Act. *Held:* The bonds are for a necessary municipal expense within the meaning of Art. VII, sec. 7, of the Constitution of North Carolina, and it is not required that the issuance of the bonds be submitted to a vote of qualified electors of the municipality. *Atkins v. Durham*, 295.

Expense required to effect purpose constituting necessary governmental expense is also a necessary governmental expense. *Morrow v. Comrs. of Henderson*, 564.

§ 7. Interstate Commerce.

Art. I, sec. 10 (2), of the Federal Constitution, prohibiting a state from levying duties on imports or exports, relates solely to foreign commerce and has no reference to interstate commerce. *Powell v. Maxwell, Comr.*, 211.

Tax upon automobiles *held* excise or use tax, and not tax on interstate commerce, or an attempt to tax transaction outside of State. *Ibid.*

§ 14. Excise, License, and Franchise Taxes.

Tax upon automobiles *held* excise or use tax, and not tax on interstate commerce, or an attempt to tax transaction outside of State. *Powell v. Maxwell, Comr.*, 211.

§ 19. Property of State and Political Subdivisions.

City school bonds held by insurance company in the county *held* exempt from taxation by the county. *Mecklenburg County v. Ins. Co.*, 171.

§ 20. Property of Charitable and Educational Institutions.

Property of a foreign religious corporation used for educational and charitable purposes in this State *held* not exempt from taxation under C. S., 7971 (17) (19). *Catholic Society v. Gentry*, 579.

§ 21. Funds and Property Derived from Payment of Veterans' Compensation and Insurance.

Neither cash nor investments derived from payments of veteran's compensation and insurance are exempt from taxation. *Lawrence v. Comrs. of Hertford*, 352.

§ 24. Situs of Property for Purpose of Taxation.

Personalty of nonresidents is taxable by this State when such personalty has a taxable *situs* here. *Mecklenburg County v. Sterchi Bros.*, 79.

Held: Under facts of this case, personalty of nonresident had acquired "business *situs*" in this State for purpose of taxation. *Ibid.*

Evidence *held* for jury on question of whether personalty of nonresident acquired *situs* here for purpose of taxation. *Texas Co. v. Elizabeth City*, 454.

§ 25. Listing, Levy, and Assessment of Personal Property.

Insurance company may deduct "unearned premiums" from solvent credits in listing property for taxation. *Ins. Co. v. Stinson*, 69.

Plaintiff county ascertained the amount of personal property of defendant nonresident corporation having a "business *situs*" in this State, and liable for taxation as solvent credits by the county by ascertaining the total assets of the defendant and the percentage of such assets found in the county, and allowing the same per cent of its total liabilities to be deducted therefrom. Defendant complained that defendant county had made its own rule in ascertaining the solvent credits in the county subject to taxation in violation of Art. I, sec. 8, of the State Constitution. *Held:* Defendant failed to list its solvent credits for taxation as required by law, N. C. Code, 7971, 18, subsecs. 6 and 10, in which event it could have deducted its liabilities in the county, N. C. Code, 7971 (47), and defendant was not prejudiced by the assessment of its personal property for taxation as determined by the county. *Mecklenburg County v. Sterchi Bros.*, 79.

TAXATION—*Continued.*

An opinion of the Attorney-General, given in the performance of his statutory duty, C. S., 7694 (5), is advisory only, and a ruling by county commissioners in accordance with such opinion holding that certain property is nontaxable, is not authoritative, and the commissioners may thereafter, without notice, list and assess such property for taxation, in accordance with their statutory duty, for the prior five years during which the property had not been listed for taxation because of the prior erroneous ruling. *Lawrence v. Comrs. of Hertford*, 353.

§ 30. Levy and Assessment of Franchise, Sales, License, and Excise Taxes.

The Commissioner of Revenue is given authority to construe administratively, in the first instance, all sections of the Revenue Act by sec. 507 thereof. *Powell v. Maxwell, Comr.*, 211.

A corporation operating coal and ice yards at established places of business in several cities of the State, one or more yards being operated in each of the cities, and maintaining scales, bins, etc., and a staff composed of a yard foreman and other employees at each establishment, *is held* liable for the tax imposed by sec. 162, ch. 445, Public Laws of 1933, since such business operates "two or more stores or mercantile establishments where goods, wares, and/or merchandise is sold or offered for sale at wholesale or retail," and coal and ice yards being "mercantile establishments" within the meaning of the act, and it not being necessary to decide whether such establishments constitute "stores" in the common acceptation or the legal meaning of the word, since the application of the statute is not limited to stores. *Coal Co. v. Maxwell, Comr.*, 723.

Provisions of a statute exempting transactions from the general tax therein levied will be strictly construed in favor of the State. *Motor Co. v. Maxwell, Comr.*, 725.

Second-hand automobiles taken in as part payment on other second-hand automobiles *held* subject to tax. *Ibid.*

§ 31. Tax Liens on Personalty.

Where personal property is sold prior to levy for taxes, claim for taxes is not preferred claim against proceeds of sale, since a lien for personal property taxes does not attach until levy thereon. *Currie v. Manufacturers Club*, 150.

§ 34. Duties and Authority of Collecting Officials.

Compromise and settlement of tax by town authorities *held* not subject to upset in *mandamus* proceedings in this case. *Stone v. Comrs. of Stoneville*, 226.

§ 37. Enjoining Levy or Collection.

Plaintiff taxpayers instituted this suit to restrain the levy of a school tax in a special tax district on the ground that the result of the election authorizing the levy was erroneous because the votes of disqualified persons were included in the returns and a majority of the qualified voters did not vote in favor of the tax. Defendants demurred on the grounds that the court was without jurisdiction of the action and that there was a defect of parties plaintiff, contending that the sole remedy to test the validity of the election is by *quo warranto*, C. S., 870, 871. *Held:* The demurrer was properly overruled, since, unless otherwise provided by statute, injunction at the instance of a taxpayer is an appropriate remedy to resist the levy of a tax upon a *prima facie* showing of illegality, and since *quo warranto* is the sole remedy to test the validity of an election to public office, but not to test the validity of a tax even though it is levied under the authority of a popular election. C. S., 858, 7979. *Barbee v. Comrs. of Wake*, 717.

TORTS.

§ 6. Right to Contribution Among Tort-Feasors.

Defendant had another party joined as codefendant, and filed answer denying negligence on his part and alleging that the negligence of his codefendant was the sole proximate cause of the injury in suit, but demanding no relief against his codefendant. *Held:* The demurrer of the party joined should have been sustained on authority of *Bargeon v. Transportation Co.*, 196 N. C., 776, neither the complaint nor the answer of the original defendant alleging any cause of action against him, and C. S., 618, permitting contribution among joint tort-feasors, being inapplicable, since the answer of the original defendant alleges sole liability on the part of his codefendant and not joint tort-feasorship. *Walker v. Loyall*, 466.

Defendants in an action to recover for negligent injury are entitled, under N. C. Code, 618, to have other defendants joined with them upon filing a cross action against such other defendants, alleging that such defendants were joint tort-feasors with them in causing the injury. *Mangum v. R. R.*, 134.

§ 9a. Effect of Release.

Release of tort-feasors signed after treatment of injury by a physician *held* to bar action against the physician for alleged malpractice in treating the injury. *Smith v. Thompson*, 672.

§ 9c. Estoppel or Waiver of Right to Set Up Release as Defense.

Tort-feasor fraudulently inducing injured party to proceed solely against other joint tort-feasor, is estopped from setting up release of such other tort-feasor as defense. *Scott v. Bryan*, 478.

TRESPASS.

§ 8. Nature and Essentials of Right of Action for Forcible Trespass and Trespass to the Person.

The evidence favorable to plaintiff tended to show that defendant's bill collector, in attempting to collect a past-due account from plaintiff, sat in his car at the curb opposite plaintiff's home and shouted abusive language at plaintiff, and threatened to get the sheriff to arrest plaintiff; that plaintiff was far advanced in pregnancy, which fact was known to defendant's agent, and that the fright caused by the collector's language and threats resulted in the premature stillbirth of plaintiff's child. *Held:* Although fright alone is not actionable, when fright directly causes physical injury and arises out of a wrongful act of defendant, it is sufficient to constitute a cause of action for trespass to the person, which lies for physical injury to the person either negligently or willfully inflicted, and defendant's demurrer to the complaint alleging facts supported by plaintiff's evidence was properly overruled. *Kirby v. Stores Corp.*, 808.

TRIAL.

§ 7. Argument and Conduct of Counsel.

Held: Under the facts and circumstances of this case allowing plaintiffs' counsel to read from the opinion of the Supreme Court tended to impeach and discredit plaintiffs' own witness, which constituted prejudicial and reversible error upon defendant's exception. *Edwards v. Perry*, 24.

It is the duty of the trial court to prevent unfairness or prejudice from unwarranted references to liability insurance. *Scott v. Bryan*, 478.

While evidence that defendant carries indemnity insurance is incompetent, the trial court has the discretionary power to allow plaintiff, in selecting the jury, to ask the jurors, in good faith, if any of them are agents of any insurance company or bonding company, it being the duty of the trial court to prevent prejudice to either party. *Bell v. Panel Co.*, 813.

TRIAL—*Continued.*

§ 21. Time and Necessity of Making Motion to Nonsuit and Renewal Thereof and Time of Rendition of Judgment Thereon.

Where a party fails to move for judgment as of nonsuit at the close of plaintiff's evidence, its motion therefor at the close of all the evidence cannot be granted, since the right to demur to the evidence is waived. C. S., 567. *Jones v. Ins. Co.*, 559.

The court may not grant a motion to nonsuit after verdict, even when motions therefor are aptly made during the trial and the court's ruling thereon reserved. *Ibid.*

§ 22. Consideration of Evidence on Motions to Nonsuit.

Upon motion as of nonsuit, all the evidence which tends to support plaintiff's cause of action is to be considered in its most favorable light for plaintiff, and he is entitled to every reasonable intendment thereon and every reasonable inference therefrom. C. S., 567. *Owens v. Lumber Co.*, 504; *Miller v. Wood*, 520.

§ 23. Effect of Contradictions and Discrepancies in Evidence in Determining Motion to Nonsuit.

Discrepancies in the testimony of a witness upon her examination-in-chief and upon cross-examination, and her testimony in a prior action, does not justify the disregard of her testimony favorable to plaintiff in passing upon defendant's motion to nonsuit, it being the province of the jury to determine at which time, if at all, her testimony was accurate. *Taylor v. Rierson*, 185.

§ 25. Voluntary Nonsuit.

Plaintiffs instituted this action to restrain collection of drainage assessments, to remove cloud on title, and to have defendant drainage district declared null and void. Defendants denied the allegations of the complaint and pleaded *res judicata*. During the progress of the trial one of plaintiffs' attorneys became ill and plaintiffs sought a voluntary nonsuit. Defendants objected on the ground that the action was a proceeding *in rem*, and the trial court refused to permit plaintiffs to take a nonsuit. *Held:* The plea of *res judicata* is a plea in bar and does not set up a cross action, and no rights having attached in defendants' favor which they were entitled to have determined in the action, plaintiffs were entitled to take a voluntary nonsuit as a matter of right. *Sink v. Hire*, 402.

§ 32. Requests for Instructions.

An oral request for instructions may be disregarded. C. S., 565. *Hicks v. Nivens*, 44.

The failure of the court to define "the greater weight of the evidence," in its instruction correctly placing the burden of proof, will not be held for error in the absence of a special request for instructions, the definition being a subordinate feature of the charge. *Wilson v. Casualty Co.*, 585.

Party desiring special instructions upon any phase of the law involved should file written request therefor. *Peterson v. McManus*, 822.

§ 33. Statement of Contentions and Objections Thereto.

The statement of the contentions of a party in the charge in this case *is held* to clearly designate them as contentions, and appellant's assignment of error on the ground that the court should have further explained that they were not statements of law or an expression of opinion by the court, is untenable. *Albritton v. Albritton*, 111.

An objection to the statement of the contentions of a party by the trial court must be brought to his attention in apt time to afford an opportunity for correction in order to be considered on appeal. *Albritton v. Albritton*, 111; *Wilson v. Casualty Co.*, 585; *Peterson v. McManus*, 822.

TRIAL—*Continued.*

The court, after asking counsel as to their contentions in respect to matters relating to one of the issues and receiving an affirmative reply from counsel, instructed the jury that the parties agreed that the issue should be answered in the affirmative. *Held:* If the instruction on the issue was not in accord with the contentions of the party, the matter should have been brought to the court's attention in apt time in order for an exception thereto to be considered on appeal. *Joyner v. Dail,* 663.

§ 34. Objections and Exceptions to Charge.

An exception to the charge on the ground that more time was taken in stating plaintiff appellee's contentions than in stating defendant appellant's contentions is untenable as a "broadside exception," in the absence of a statement of instructions or contentions of appellant which should have been contained in the charge. *Albritton v. Albritton,* 111.

§ 36. Construction of Instructions and General Rules upon Review.

Where it appears that the charge, when read contextually as a whole, was not prejudicial in its manner of stating the evidence and contentions of the parties, an exception, based upon detached portions theroef, will not be sustained. C. S., 564. *Braddy v. Pfaff,* 248.

§ 37. Form and Sufficiency of Issues in General.

An exception to the issues submitted will not be sustained when the issues present the determinative questions involved and permit the presentation of all pertinent evidence. *Baushar v. Willis,* 52.

§ 38. Conformity of Issues to Pleadings and Evidence.

Where the contract sued on is admitted in the answer, an issue as to the existence of the contract does not arise upon the pleadings, and it is error for the court to submit such issue to the jury. C. S., 582. *Fairmont School v. Bevis,* 50.

TRUSTS.

§ 2. Appointment and Tenure of Trustee.

Where will does not appoint trustee, but directs that executor manage trust estate, executor may not be required to file final account and pay over assets to itself as trustee, but may discharge duties as trustee before filing final account. *In re Trust Co.,* 385.

§ 5. Control, Management, and Preservation of Trust Estate.

Where a will leaves the *residuum* in trust to be paid to testatrix' grandchildren when the youngest attains thirty years of age, the trustee should manage the residuary estate under orders of the court, with such compensation from time to time as the court shall allow, but the trustee's discretion in the management is not unrestrained, but is subject to the control of the court at all times. *Heyer v. Bulluck,* 321.

The trustee of a spendthrift trust may defend an action seeking to attach the interest of the *cestui que trust,* both in the Superior Court and in the Supreme Court on appeal, without the appearance of the *cestui,* the preservation and protection of the property being incumbent upon him under the terms of the trust. *Chinnis v. Cobb,* 104.

§ 8a. Construction and Operation in General.

Income from trust estate should be paid to guardians of beneficiaries during their minorities, and then to beneficiaries themselves. *Heyer v. Bulluck,* 321.

Trust in this case *held* active and not passive. *Ibid.*

§ 8c. Merger of Legal and Equitable Titles.

A spendthrift trust directing the trustee to collect the rents and profits and pay same over to the beneficiary is an active trust so far as the *corpus* of the

TRUSTS—*Continued.*

estate is concerned, upon which the statute of uses, C. S., 1740, does not operate to unite the beneficial and legal interests. *Chinnis v. Cobb*, 104.

§ 11. Termination of Trust and Discharge of Trustee.

Testatrix directed that one of her grandchildren be paid a stipulated sum when the grandchild should attain the age of thirty years, and that the *residuum* of the estate be held in trust for all her grandchildren and paid to them equally when the youngest should attain the age of thirty. *Held:* The trust is an active and not a passive trust to the end that the stipulated sum should be paid the named grandchild when she should attain the age of thirty and the *residuum* managed and ultimately divided as directed, but if the named grandchild should anticipate her legacy by taking its present cash value, the chancellor might then terminate the trust and relieve the trustee, if she should so desire. *Heyer v. Bulluck*, 321.

§ 18c. Burden of Proof to Establish Parol Trust.

In order to engraft a parol trust on a written instrument, plaintiff must prove the facts constituting the basis of his claim by clear, strong, and convincing proof, and an instruction that the burden is on him to establish such facts by the preponderance of the evidence entitles defendant to a new trial. *Minton v. Lumber Co.*, 422.

USURY.

§ 3. Parties Chargeable or Liable.

The statutory penalty for usury may not be recovered against the payee of notes secured by deed of trust upon evidence showing that a certain sum was paid the trustee in the deed of trust, but not paid to or received by the payee of the notes. *Hunter v. Realty Co.*, 91.

§ 6. Waiver and Estoppel.

In order for execution of renewal note to waive usury, parties must agree to new amount as compromise and settlement of usury. *Hill v. Lindsay*, 694.

VENDOR AND PURCHASER.

§ 6. Time of Conveyance.

Where a contract to convey stipulates that time is of the essence, and the purchasers refuse to accept deed tendered within the time stipulated, the purchasers, ordinarily, may not thereafter enforce the contract against the vendor, but where the vendor, after expiration of the stipulated time, advises its selling agents that it is ready and willing to transfer title, which information is communicated to the purchasers with the knowledge and consent of the vendor, and acted upon by the parties by meeting to execute the contract, the vendor waives its right to disregard the contract for failure of the purchasers to accept deed within the time stipulated, and the purchasers are entitled to consummate the purchase within a reasonable time thereafter. *Wagner v. Realty Corp.*, 1.

§ 23. Specific Performance.

The vendor in a contract of sale acquired title at foreclosure sale of the property, and upon failure of the vendor to pay the price bid, the *cestui que trust* agreed to accept the amount agreed to be paid by the purchasers in the contract of sale. Thereafter, upon refusal of the purchasers to accept deed and pay the price agreed, the vendor executed a note secured by deed of trust to the *cestui que trust* to take up its bid at the foreclosure sale. The vendor instituted action against the purchasers to enforce specific performance, but the action was not indexed as *lis pendens*, and the vendor later abandoned

VENDOR AND PURCHASER—*Continued.*

its appeal from an adverse judgment upon the purchasers' agreement to accept deed, and the vendor waiver the purchasers' previous breach of the contract. The vendor refused to transfer title in accordance with the supplemental agreement, and the purchasers instituted this action against the vendor and the trustee and *cestui que trust* to enforce specific performance. *Held:* The trustee and *cestui que trust* were not parties to the contract to convey and had no knowledge, actual or constructive, at the time of the execution of the deed of trust, of the supplemental agreement for the sale of the property, the vendor's action not being notice because not listed as *lis pendens* and because the purchasers did not claim any rights in the land in that action, and the purchasers are not entitled to specific performance as against the trustee and *cestui que trust* upon the supplemental contract to convey. *Wagner v. Realty Corp.*, 1.

§ 24. Recovery of Purchase Money Paid.

Purchaser *held* entitled to recover purchase money paid. *Knowles v. Wallace*, 603.

VENUE.

§ 8a. Motions for Change of Venue as Matter of Right.

Where an order for the examination of an adverse party is granted before the filing of the complaint, a motion for change of venue as a matter of right may be denied without prejudice to defendant's right to move for change of venue after the filing of the complaint, the right of defendant to object to venue, N. C. Code, 470, applying after complaint is filed. *Bohannon v. Trust Co.*, 679.

WATER AND WATER COURSES.

§ 3. Polution.

Industrial corporations using a municipal sewerage system by emptying their sewage and industrial waste into the sewers, but having no interest in or control over the sewerage system, which is operated and owned by the municipality, may not be held liable as joint tort-feasors with the municipality for damages resulting to lands of a lower proprietor along the stream into which the sewage is emptied. *Hampton v. Spindale*, 546.

Plaintiff instituted this action to recover damages to her lands caused by a municipal sewerage system. Plaintiff alleged that defendant power company, in operating the water system owned by it which supplied water to the municipality, diverted and greatly diminished the flow of water in the stream above the municipality, and that the sewage emptied in the stream below the municipality would have been carried away and rendered less noxious if the flow of water in the stream had not thus been diminished. *Held:* The action was not to recover compensation for the infringement of plaintiff's right to have the undiminished flow of the stream through her land, but to recover damages caused by the pollution of the stream, and the diminution of the flow of the stream cannot be held a proximate cause of such pollution, and the power company cannot be held liable as a joint tort-feasor with the municipality in causing the damage in suit. *Ibid.*

WILLS.

§ 1. Distinction Between Wills and Other Instruments.

Instrument in this case *held* a deed and not a will. *Beck v. Blanchard*, 276.

§ 23b. Evidence on Issue of Mental Capacity.

Testimony as to general business reputation of testator *held* incompetent on issue of mental capacity. *In re Will of Nelson*, 398.

WILLS—*Continued.*

§ 31. General Rules of Construction.

In construing a will, the intent of the testator as gathered from the entire instrument and as expressed in the language used, is controlling, unless contrary to some rule of law or at variance with public policy, and when the language used is ambiguous, resort may be had to the situation and circumstances surrounding the testator and his relationship to the beneficiaries, in order that the language may be interpreted from testator's viewpoint, and each expression should be considered in view of the circumstances of its use, and general provisions should prevail over minor and apparently inconsistent expressions, having regard to the dominant purpose of the testator as gathered from the instrument. *Heyer v. Bulluck,* 321.

A will and its codicils must be construed together to ascertain and effect the testator's intent. *Trust Co. v. Jones,* 339.

§ 33a. Estates and Interests Created in General.

The language of the will involved read, "I lend to my wife the balance of my estate . . . for and during her widowhood," with full power of disposition, "and at the termination of her preceding particular estate the balance of my estate to be equally divided between my two children." *Held:* The word "lend" is equivalent to "give" or "devise," and the devise created an estate limited at most to the life of the widow, and did not convey to the widow a fee simple, notwithstanding the provisions of C. S., 4162, and notwithstanding the rule that a gift of an estate to a person generally or indefinitely with power of disposition ordinarily carries the fee, since it is apparent from the words of the devise that testator did not intend to confer the fee simple. *Alexander v. Alexander,* 281.

§ 33c. Vested and Contingent Interests and Defeasible Fees.

A devise to testator's daughter and her heirs in fee simple absolute should she leave any child or children her surviving, but should she not leave any child or children her surviving, then the land to revert to the estate, to be equally divided among testator's nephews and nieces then living, *is held* to devise the defeasible fee to the daughter, which would become indefeasible upon her death if she should leave child or children her surviving, and in such event the daughter's deed would convey the indefeasible fee to her grantee, her children taking no interest under the devise, but if the daughter's fee should be defeated by her death without surviving children, and no nephew or niece should be living at her death, the land would go to testator's heirs at law unaffected by any deed or instrument executed by the daughter or the nephews and nieces. *Daly v. Pate,* 222.

A bequest of a sum of money to a named beneficiary "when she becomes thirty years old" is a vested legacy and not subject to be defeated by the death of the legatee, but the legatee is not entitled to interest thereon, the amount not being payable until the date stipulated. *Heyer v. Bulluck,* 321.

Devise and bequest of property for life with limitation over to a class vests title in remainder in the class upon death of testator. *Trust Co. v. Lindsay,* 652.

§ 33d. Estates in Trust.

Devise in this case *held* to create a spendthrift trust. *Chinnis v. Cobb,* 104.

Trustee's management of estate is subject to control of courts. *Heyer v. Bulluck,* 321.

Where a will leaves the *residuum* in trust to be paid to testatrix' grandchildren when the youngest attains thirty years of age, the income from the estate should be paid the grandchildren's respective guardians during their minorities, and then to the grandchildren themselves *per stirpes* as they reach

WILLS—*Continued.*

their majorities, and the *corpus* equally divided among the grandchildren, as directed, when the youngest attains the age of thirty years. *Heyer v. Bulluck,* 321.

Trust in this case *held* active and not passive. *Ibid.*

§ 33f. Devises with Power of Disposition.

A deed in fee simple, with full covenants of warranty, is sufficient to convey the fee in property by a devisee of the defeasible fee with full power of disposition, since the devisee's deed manifests the intent to exercise the power, even though it does not specifically refer thereto. *Hood v. Theatres,* 346.

§ 34. Designation of Devisees and Legatees and Their Respective Shares.

Where a will provides that the beneficiaries should appoint three appraisers to divide the estate, it is necessary that three appraisers act in the matter, and proceedings by two of them under court order after the death of the third appraiser, are void. *Sharpe v. Sharpe,* 92.

Will providing that "balance of my estate to my dear and only child M. to be held in trust by her during her lifetime" with provision that the *residuum* should be equally divided among testatrix' grandchildren when the youngest should reach the age of thirty, *held,* under facts of this case, to create vested interest in *residuum* in grandchildren to exclusion of daughter. *Heyer v. Bulluck,* 321.

Held: Only those answering the roll of the class at the time of testator's death take under the will, and their children and grandchildren have no interest in the estate remaining at the time of the death of the life tenant. *Trust Co. v. Lindsay,* 652.

§ 36. General and Specific Legacies.

Legacy *held* general legacy under terms of this will. *Heyer v. Bulluck,* 321.

§ 38. Residuary Clauses.

The will provided that the residue after payment of specific legacies should be held in trust for testator's children. The trustee instituted this action to determine the disposition of funds derived from income on assets used to pay specific legacies and costs. *Held:* The residue of the estate is formed at the time of testator's death, and the income in question should not be added to the *corpus* of the trust estate, but should be paid the income beneficiaries of the trust estate under the provision of the will that the net income on hand be divided among them, it being apparent that testator's children were the primary objects of testator's bounty, and the will being construed to effectuate his intept. *Trust Co. v. Jones,* 339.

§ 39. Actions to Construe Wills.

Where the disposition of part of a trust fund created by will is left in doubt under its language, the trustee may apply to the courts, in their equitable jurisdiction, to construe the instrument. *Trust Co. v. Jones,* 339.

§ 46. Nature of Title and Rights of Devisees, Legatees, and Heirs.

Heirs at law of testator *held* to have contingent interest, not affected by deed of devisee of defeasible fee and remaindermen. *Daly v. Pate,* 222.

§ 47. Right of Action Against Third Person for Inducing Testator Not to Devise or Bequeath Property.

Plaintiff alleged that his grandfather had formed a fixed intention to settle a large part of his estate on plaintiff, that defendants conspired together to deprive plaintiff of his share of the estate, and by false and fraudulent representations induced his grandfather to abandon his intention to leave plaintiff a large part of his property, and that but for such false and fraudulent representations plaintiff's grandfather would have carried out his previous inten-

WILLS—*Continued.*
tion and would have devised for the benefit of plaintiff a large part of the estate. *Held:* The facts alleged are sufficient to constitute a cause of action against defendants, the cause being analogous to the right of action for wrongful interference with contractual rights by a third person. *Bohannon v. Trust Co.*, 679.

WITNESSES.

§ 5. **Mentality.**
The competency of a witness is a matter for the court, but the credibility of the witness is for the jury, so that a witness having sufficient mental capacity to be a competent witness may be impeached by a showing of mental deficiency as bearing upon the credibility of the witness. *S. v. Witherspoon*, 647.

CONSOLIDATED STATUTES AND MICHIE'S CODE CONSTRUED.

(For convenience in annotating.)

SEC. 6. Nominee of deceased's next of kin will be appointed administrator, if a fit and suitable person, as against those of lesser degree of kinship. *In re Estate of Smith*, 622. Right of nomination and substitution is confined to those themselves qualified for appointment who have not waived right. *Ibid.*

SECS. 15, 16, 20. Legislative intent is manifest that six months after death of testator is reasonable time within which application for appointment of administrator *c. t. a.* should be filed. *In re Estate of Smith*, 622.

SEC. 22. Legatee failing to apply for appointment within six months after testator's death waives right to be appointed administrator *c. t. a.* *In re Estate of Smith*, 622.

SEC. 75. Order directing administrator to mortgage lands in proceedings had in conformity with statute *held* valid. *Caffey v. Osborne*, 252.

SEC. 79. Petition to sell lands to make assets must allege, *inter alia*, the value of the personal estate as near as may be ascertained. *Neighbors v. Evans*, 550.

SECS. 105, 109, 178. Where will does not appoint trustee but directs executor to manage trust estate, executor may not be required to file final account prior to discharge of duties under the trust. *In re Trust Co.*, 385.

SECS. 105, 938, 952. Executor's report showing payment of debt to estate by devisee *held* competent in action by creditor of devisee. *Braddy v. Pfaff*, 248.

SEC. 160. Where complaint in original action fails to state cause of action, an amendment constituted new action and the action is properly dismissed when amended complaint is filed after the expiration of one year, and where the dates appear on the face of the complaint the defect may be taken advantage of by demurrer. *George v. R. R.*, 59.

SEC. 217(p). Consolidated bank may exercise power of sale contained in deed of trust in which constituent bank was named trustee. *Braak v. Hobbs*, 379.

SEC. 220(h). Depositor must notify bank of forgeries within sixty days from receipt of bank's statement by depositor's authorized agent. *Fuel Co. v. Bank*, 244.

SEC. 276(a). Statute making willful neglect to support illegitimate child a misdemeanor *held* not to violate due process. *S. v. Spillman*, 271.

SEC. 411. Annual visits for appreciable length of time will not start running of statute in favor of nonresident. *Hill v. Lindsay*, 694.

SEC. 430. Whether possession was taken during life of ancestor *held* determinative, since heirs' disabilities would not stop running of statute if it began

CONSOLIDATED STATUTES—*Continued.*

to run against ancestor. *Caskey v. West*, 240. Evidence that plaintiffs had been in possession for twenty years adversely to defendant *held* for jury. *Owens v. Lumber Co.*, 504.

SEC. 458. Since holder may sue any or all persons severally liable, endorser may not complain that plaintiff in his capacity of administrator of holder took nonsuit against himself in capacity of maker. *Castleberry v. Sasser*, 576.

SEC. 463. Statutes relating to venue have no application to *habeas corpus* proceedings. *McEachern v. McEachern*, 98.

SEC. 470. Motion for change of venue as matter of right will not lie upon filing of motion for examination of defendant when complaint has not been filed. *Bohannon v. Trust Co.*, 679.

SEC. 491(a). Does not authorize service of process in action for abuse of process against nonresident auto owner. *Lindsay v. Short*, 287.

SECS. 506, 535. Complaint must state in plain, concise manner all facts necessary to enable plaintiff to recover. *Bank v. Gahagan*, 464.

SEC. 511. By filing answer, defendant waives right to demur except for want of jurisdiction or failure of complaint to state cause, which waiver applies to amended complaint when amended complaint is substantially the same as the original complaint. *Schnibben v. Ballard & Ballard Co.*, 193.

SEC. 515. Where it is determined on appeal that demurrers should have been sustained, plaintiff may ask to be allowed to amend. *Bank v. Gahagan*, 464.

SEC. 521. Counterclaim in tort in this action *held* not to have arisen from contract sued on, and demurrer to counterclaim was proper. *Weiner v. Style Shop*, 705.

SEC. 523. It is necessary that defendant plead contributory negligence in order to be entitled to the submission of the issue to the jury. *Bevan v. Carter*, 291.

SEC. 535. Upon demurrer, the complaint is to be construed liberally in favor of plaintiff with view to substantial justice between parties. *Cummings v. Dunning*, 156.

SEC. 537. Allegations of municipality's financial ability to install sewerage system and of its greatly increased population *held* material to right of action for abatement of nuisance, and were improperly stricken from complaint. *Poovey v. Hickory*, 630. Motion to strike out does not challenge sufficiency of complaint, but concedes its sufficiency and presents relevancy and materiality of allegations. *Ibid.* Motion to strike out allegation that defendant carried liability insurance *held* properly denied, the allegation being material to right to recover under facts of this case. *Scott v. Bryan*, 478. Ordinarily, refusal of motion to strike out will not be disturbed on appeal when matter may be better determined by rulings on evidence. *Ibid.*

SEC. 546. Where Supreme Court affirms judgment sustaining demurrer, plaintiff may ask leave to amend if so advised. *Byrd v. Waldrop*, 669.

SEC. 547. Court has discretionary power to allow amendment after introduction of evidence to make pleading conform to evidence. *Hicks v. Nivens*, 45. Trial court has discretionary power to allow amendment to complaint when amendment does not substantially change cause of action. *Wilmington v. Board of Education*, 197.

SEC. 564. New trial is awarded in this case for inadvertent expression of opinion by court upon the evidence. *S. v. Oakley*, 206. Questions asked by court of defendants' witnesses which tended to disparage them *held* to violate

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this section. *S. v. Winckler*, 556. Instruction that intestate's life expectancy was a certain number of years, based upon mortuary tables, violates rule against expression of opinion by the court. *Trust Co. v. Greyhound Lines*, 293. Exceptions to detached portions of charge will not be sustained when charge is without error when read contextually as a whole. *Braddy v. Pfaff*, 248.

SEC. 565. Oral request for instructions may be disregarded. *Hicks v. Nivens*, 45. Instruction on question of proximate cause *held* sufficiently full in absence of request for instruction that if negligence of other defendant were sole proximate cause appealing defendant could not be held liable. *Taylor v. Rierson*, 185. Party must tender prayer for special instructions desired by him. *S. v. Spillman*, 271.

SEC. 567. Upon motion to nonsuit, all evidence on whole record is to be considered in light most favorable to plaintiff. *Owens v. Lumber Co.*, 504; *Miller v. Wood*, 520. Failure to renew motion to nonsuit at close of all evidence waives right. *Jones v. Ins. Co.*, 559.

SEC. 582. Where contract sued on is admitted, no issue as to its existence arises on pleadings, and submission of such issue is error. *Fairmont School v. Bevis*, 50.

SECS. 614, 729. Judgment debtor may claim homestead in property conveyed by him when he obtains reconveyance prior to execution sale. *Assurance Society v. Russos*, 121.

SEC. 618. Defendants in negligent injury action are entitled to have other defendants joined upon filing cross action alleging such other defendants were joint tort-feasors with them in causing the injury. *Mangum v. R. R.*, 134. *Held:* Neither complaint nor answer alleged cause of action against party joined as codefendant on motion of original defendant. *Walker v. Loyall*, 466.

SEC. 628(b). Action to establish rights of parties under ambiguous deed *held* to come within provisions of Declaratory Judgment Act. *Carr v. Jimmerson*, 570.

SEC. 643. Where appellee fails to file exceptions to case on appeal duly filed by appellant, appellant's statement is "case on appeal." *Abernethy v. Burns*, 636. Order of trial court enlarging time for service of statement of case on appeal or countercase does not affect Rule of Court prescribing the term to which the appeal must be taken. *S. v. Moore*, 459.

SEC. 649. Affidavit of party appealing *in forma pauperis* must aver that counsel have advised that there is error in law in the judgment. *Lupton v. Hawkins*, 658. And defect may not be cured by supplemental affidavit filed after five-day period. *Berwer v. Ins. Co.*, 814.

SEC. 711. Judgment debtor *held* to have assigned rights before institution of supplemental proceedings, and judgment creditor was not entitled to attach same as against assignee. *Fertilizer Works v. Newbern*, 9.

SECS. 737, 751. Personal property exemption must be allotted in strict compliance with statutory procedure. *Crow v. Morgan*, 153.

SEC. 798. Interest of *cestui que trust* in spendthrift trust is not subject to attachment. *Chinnis v. Cobb*, 104.

SECS. 858, 7979. Injunction, and not *quo warranto*, is proper remedy to test validity of tax levied under authority of popular election. *Barbee v. Comrs. of Wake*, 717.

SECS. 860, 1608(dd). General county court has no further jurisdiction of case after its judgment therein is docketed in Superior Court, and it has no jurisdiction to appoint receiver for judgment debtor whose property is situate outside the county. *Investment Co. v. Pickelsimer*, 541.

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SEC. 860(1). Party must show apparent right to property in order to be entitled to appointment of receiver, and executor's petition to sell lands to make assets which does not allege value of personal estate is insufficient to appointment of receiver of lands devised to heirs. *Neighbors v. Evans*, 550.

SECS. 870, 871. Injunction, and not *quo warranto*, is proper remedy to test validity of tax levied under authority of popular election. *Barbee v. Comrs. of Wake*, 717.

SEC. 900. Order that answer be stricken out if defendant did not appear for examination *held* void as being alternative. *Hagedorn v. Hagedorn*, 164. Appeal from refusal of court to set aside clerk's order for examination of adverse party *held* not premature. *Bohannon v. Trust Co.*, 679. Order for examination of adverse party may be granted upon proper affidavit before filing of complaint. *Ibid.*

SEC. 902. Direct examination may not be introduced in evidence without also introducing cross-examination. *Enloe v. Bottling Co.*, 262.

SEC. 921. Where officer's return shows service it is deemed *prima facie* correct, and remedy to attack judgment for nonservice is by motion in the cause. *Dunn v. Wilson*, 493.

SEC. 934(a). Legislature has power to provide that assistant clerks may perform statutory duties of clerks. *In re Baker*, 617.

SEC. 970. Common law rule that solicitation of another to commit felony is a crime *held* to obtain in this jurisdiction. *S. v. Hampton*, 283.

SEC. 988. Deed duly executed and found among valuable papers of grantor *held* sufficient memorandum of contract to convey. *Austin v. McCollum*, 817.

SEC. 1112(1). Carriers by truck *held* not entitled to enjoin promulgation of lower rates by railroad companies. *Motor Service v. R. R.*, 36.

SEC. 1116. Evidence *held* insufficient to show that corporation was liable for slanderous remarks uttered by alleged agent on day after certificate had been filed. *Britt v. Howell*, 475.

SEC. 1334(8) (j). Expense incurred in preparing and submitting refunding plan to bondholders *held* necessary expense. *Morrow v. Comrs. of Henderson*, 564.

SEC. 1564. Remarks of court tending to disparage witness during cross-examination by defendant cannot be *held* prejudicial to defendant, and exception cannot be sustained. *S. v. Puett*, 633.

SEC. 1611. Judgment *held* not a preference within meaning of the statute. *Pritchett v. Tolbert*, 644.

SEC. 1659(a). Party abandoning spouse is not entitled to divorce on ground of two years separation. *Parker v. Parker*, 264; *Hyder v. Hyder*, 486. Where deed of separation is rescinded, plaintiff must show later voluntary separation in order to be entitled to divorce under this section. *Reynolds v. Reynolds*, 554.

SEC. 1664. Proviso dispensing with notice of motion for custody of minor child of marriage does not apply where movant has custody and control of child. *Burrowes v. Burrowes*, 788.

SECS. 1666, 1667. Child suing father for support is not entitled to counsel fees and suit money *pendente lite*. *Green v. Green*, 147.

SEC. 1667. Plaintiff need establish but one ground for divorce in suit for alimony without divorce. *Albritton v. Albritton*, 112.

SEC. 1740. Statute does not operate upon active or spendthrift trusts. *Chinnis v. Cobb*, 104.

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SEC. 1742. Devise in this case *held* to create spendthrift trust. *Chinnis v. Cobb*, 104. Spendthrift trust is not subject to execution on judgment against beneficiary. *Ibid.*

SEC. 1779. Executor's reports showing payment of debt to estate by devisee *held* competent in action by creditor of devisee. *Braddy v. Pfaff*, 248.

SEC. 1790. Mortuary tables are but evidence of life expectancy. *Trust Co. v. Greyhound Lines*, 293.

SEC. 1791. In action for wrongful death it is error to allow jury to consider annuity tables set out in statute. *Brown v. Lipe*, 199.

SEC. 1795. Draftsman *held* not "interested party" in action between grantors and grantees for reformation of deed. *Ollis v. Board of Education*, 490. Husband and wife *held* competent to testify, each in the other's favor, as to transaction with decedent. *Burton v. Styers*, 230.

SEC. 2156. Failure to notify relatives of alleged incompetent of hearing is irregularity, but does not render appointment of guardian void. *In re Baker*, 617.

SEC. 2157. Appointment of guardian must be shown by records of clerk or by letters issued as required by this statute, and may not be shown by parol. *Buncombe County v. Cain*, 766.

SEC. 2180. Petition for sale of ward's land filed by person who has not qualified as guardian confers no jurisdiction on clerk and sale is void. *Buncombe County v. Cain*, 766.

SECS. 2208, 2210. Court has discretionary power to make writ of *habeas corpus* returnable at any place he may determine. *McEachern v. McEachern*, 98.

SEC. 2241. Right to custody of children as between separated but undivorced parents may be determined by *habeas corpus*. *McEachern v. McEachern*, 98.

SEC. 2285. Service of summons is not necessary to appointment of guardian for incompetent. *In re Baker*, 617.

SEC. 2336. Absence of endorsement on bill of indictment that witnesses for State had testified *held* insufficient ground for quashal, since statute is directory and not mandatory. *S. v. Lancaster*, 584.

SECS. 2563, 2564. Injunction *held* not to lie to enjoin violation of criminal statute against monopolies. *Motor Service v. R. R.*, 36.

SEC. 2563(3). Statute *held* constitutional and not void for indefiniteness. *S. v. Coal Co.*, 742. Evidence of defendant's violation of this statute *held* sufficient to be submitted to jury. *Ibid.*

SECS. 2616, 2618. It is negligence *per se* to drive car at speed in excess of 15 miles per hour in traversing an intersecting highway when driver's view is obstructed. *Hinshaw v. Pepper*, 573; *Turner v. Lipe*, 627.

SEC. 2618(b). Statute applies to passing standing school bus from either direction. *S. v. Webb*, 350.

SEC. 2621. Speed in excess of forty-five miles per hour on highway is *prima facie* negligence, but not negligence *per se*. *Exum v. Baumrind*, 650.

SEC. 2621(1) (46a). Jury must find that truck's attachment was trailer and not semitrailer in order for thirty-mile speed limit to apply. *S. v. Brooks*, 273.

SEC. 2621(44). Conflicting evidence on issue of whether defendant was intoxicated while driving *held* for jury. *S. v. Stancell*, 843.

SEC. 2621(55) (a). Driver must ascertain that left side of road is clear before attempting to pass car going in same direction. *Joyner v. Dail*, 663.

SEC. 2621(66). Conceding defendants were negligent in parking car on hard surface in violation of statute, plaintiff's contributory negligence in

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attempting to pass parked car when highway was obstructed *held* to bar recovery. *McNair v. Kilmer & Co.*, 65.

SECS. 2795, 2776(b), 2787(12). Establishment of playgrounds is governmental function of populous city. *Atkins v. Durham*, 295.

SEC. 3003. Subsequent endorser *held* liable on check obtained by original holder by fraud and endorsed by him by forging name of payee. *Keel v. Wynne*, 426.

SECS. 3308, 3309. Where instrument is required to be registered, no notice, however full and formal, will supply place of registration. *Knowles v. Wallace*, 603.

SECS. 3213, 3215, 3253, 3255. Ordinarily, tenant in common in realty or personalty is entitled to partition, but parties may make valid agreement waiving right for reasonable time. *Chadwick v. Blades*, 609.

SECS. 3219, 3228. It is necessary that three appraisers or commissioners act in partitioning property, and proceedings by two of them after death of third appraiser are void. *Sharpe v. Sharpe*, 92.

SEC. 3379. Indictment for possession of liquor for sale need not allege that liquor did not bear stamp of A. B. C. Board. *S. v. Atkinson*, 661.

SEC. 3379(2). Evidence *held* sufficient, without regard to statutory presumption, on charge of possessing intoxicating liquor for sale. *S. v. Rhodes*, 473. Evidence of possession of more than a gallon of intoxicating liquor, without other incriminating evidence, is insufficient to support a directed verdict of guilty of possession for the purpose of sale. *S. v. Ellis*, 166. But is sufficient to raise a *prima facie* case and require the submission of the evidence to the jury. *S. v. Tate*, 168. New Hanover Act does not repeal this section making possession by individuals for the purpose of sale illegal. *Ibid.*

SEC. 3411(j). Proviso that possession in certain cases is lawful *held* repealed by New Hanover Act. *S. v. Tate*, 168.

SEC. 4162. Devise in this case *held* for life with full power of disposition, and not devise in fee simple. *Alexander v. Alexander*, 281.

SEC. 4232. Evidence *held* sufficient for jury on issue of defendant's guilt of burglary in the first degree. *S. v. Oakley*, 206.

SECS. 4267(a), 4614. Prosecution for murder in attempt to commit robbery *held* not to support plea of former jeopardy in later prosecution for robbery with firearms from companion of the person defendants were formerly charged with murdering. *S. v. Dills*, 178.

SEC. 4339. Supporting testimony must consist of facts and circumstances independent of testimony of prosecutrix. *S. v. Forbes*, 567. Evidence *held* insufficient to show that seduction was induced by previous unconditional promise of marriage. *S. v. Wells*, 738.

SEC. 4410. Warrant *held* fatally defective in failing to charge that defendant carried weapon concealed off his own premises. *S. v. Bradley*, 290.

SEC. 4434. Finding that defendant kept slot machine without finding that machine was illegal *held* insufficient to support judgment for statutory penalty. *Nivens v. Justice*, 349.

SEC. 4506. Holding vehicle still by putting foot on brake is not operating car while intoxicated within meaning of the statute. *S. v. Hatcher*, 55.

SEC. 4544. Officer, acting in good faith with reasonable grounds to believe suspects have committed felony, may make arrest without warrant. *Hicks v. Nivens*, 45.

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SEC. 4622. Indictments charging reckless driving and passing standing school bus may be consolidated for trial. *S. v. Webb*, 350.

SECS. 4623, 4643. Motion to nonsuit will not lie for failure of State to offer evidence of nonessential averment in indictment. *S. v. Atkinson*, 661.

SEC. 4643. On motion to nonsuit, all incriminating evidence on whole record is to be considered in light most favorable to State. *S. v. Coal Co.*, 742.

SEC. 5599. County may assume indebtedness of its school districts which was contracted by them to maintain constitutional school term. *Marshburn v. Brown*, 331.

SEC. 6360. Complaint *held* to sufficiently allege fraud in procuring reinstatement of policy issued without medical examination. *Petty v. Ins. Co.*, 500.

SECS. 6437, 6294. Unearned premiums are liability of insurance company and may be deducted from solvent credits in listing property for taxation. *Ins. Co. v. Stinson*, 69.

SEC. 6460. Policy issued without medical examination may not be avoided for ill health of insured in absence of procurement of policy by fraud. *Eckard v. Ins. Co.*, 130.

SEC. 6704. Fact that practitioner had not obtained required license *held* irrelevant to issue of practitioner's alleged malpractice. *Hardy v. Dahl*, 530.

SEC. 7694(5). Opinion of Attorney-General is advisory only, and is not binding. *Lawrence v. Comrs. of Hertford*, 352.

SEC. 7880 (156e, subsec. 13). Tax upon automobiles *held* excise or use tax, and not tax on interstate commerce, or attempt to tax transaction outside the State. *Powell v. Maxwell, Comr.*, 211.

SEC. 7971(13) (18) (36). Personalty of nonresidents is taxable by this State when such personalty has a taxable *situs* here. *Mecklenburg County v. Sterchi Bros.*, 79.

SEC. 7971(13) (46). Insurance company may deduct "unearned premiums" from solvent credits in listing property for taxation. *Ins. Co. v. Stinson*, 69.

SEC. 7971(17) (19). Property of foreign corporation used for educational and charitable purposes in this State *held* not exempt from taxation. *Catholic Society v. Gentry*, 579.

SEC. 7971(18). Neither cash nor investments derived from payments of veteran's compensation and insurance are exempt from taxation. *Lawrence v. Comrs. of Hertford*, 352.

SEC. 7971(19). City school bonds held by insurance company in the county *held* exempt from taxation. *Mecklenburg County v. Ins. Co.*, 171.

SEC. 7971(50). Commissioners may list property for taxation notwithstanding prior ruling that such property was exempt from taxation. *Lawrence v. Comrs. of Hertford*, 352. Compromise and settlement of tax by town authorities *held* not subject to upset in *mandamus* proceedings in this case. *Stone v. Comrs. of Stoneville*, 226.

SEC. 7986. Where personalty is sold prior to levy for taxes, claim for taxes is not preferred claim against proceeds of sale. *Currie v. Manufacturers Club*, 150.

SEC. 8081(bb) (dd) (vvv). Where employer's report is filed as claim within prescribed time, Industrial Commission has jurisdiction. *Hanks v. Utilities Co.*, 312.

SEC. 8081(dd) (ee) (ff). Evidence *held* to support findings that claim was not filed in time and that employer was not estopped to assert the defense. *Lilly v. Belk Bros.*, 735.

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SEC. 8081(vvv). Report signed by manager of incorporated employer is competent upon hearing before Commission, although it contains statements not within personal knowledge of the manager. *Carlton v. Bernhardt-Seagle Co.*, 655.

CONSTITUTION, SECTIONS OF, CONSTRUED.

(For convenience in annotating.)

ART. I, SEC. 7. Act requiring second examination before issuance of license to resume practice of dentistry *held* not to confer exclusive emoluments. *Allen v. Carr*, 513.

ART. I, SECS. 7, 17, 35. Statute providing that mortgagee or *cestui* buying property at foreclosure may not recover deficiency judgment when value of property equals debt *held* constitutional. *Loan Corp. v. Trust Co.*, 30.

ART. I, SEC. 8. Defendant *held* not entitled to complain of assessment of personal property for taxation by plaintiff county. *Mecklenburg County v. Sterchi Bros.*, 79.

ART. I, SEC. 11. Right to confront accusers includes right to cross-examination, and witness may not refuse to answer questions asked on cross-examination on ground of self-incrimination without rendering testimony in chief incompetent. *S. v. Perry*, 796.

ART. I, SEC. 17. Street assessments made under charter provisions failing to provide notice and an opportunity to be heard are void, and may not be cured by validating act. *Lexington v. Lopp*, 196. Statute making willful neglect to support illegitimate child a misdemeanor *held* not to violate due process of law. *S. v. Spillman*, 271.

ART. I, SEC. 21. Court has discretionary power to make writ of *habeas corpus* returnable at any place he may determine. *McEachern v. McEachern*, 98.

ART. I, SEC. 27. City school bonds *held* for necessary expense. *Mecklenburg County v. Ins. Co.*, 171.

ART. II, SEC. 29. Statute closing certain specified roads *held* void as being in contravention of this section. *Glenn v. Board of Education*, 525.

ART. IV, SEC. 8. To obtain writ of *certiorari* in nature of writ of error, applicant must negative laches and show merit. *S. v. Moore*, 686.

ART. V, SEC. 3. Insurance company may deduct "unearned premiums" from solvent credits in listing property for taxation. *Ins. Co. v. Stinson*, 69. Neither cash nor investments derived from payments of veteran's compensation and insurance are exempt from taxation. *Lawrence v. Comrs. of Hertford*, 352. City school bonds held by insurance company in the county *held* exempt from taxation. *Mecklenburg County v. Ins. Co.*, 171. Personalty of nonresidents is taxable by this State when such personalty has a taxable *situs* here. *Mecklenburg County v. Sterchi Bros.*, 79. Tax upon every owner for privilege of using automobile upon highways of this State *held* not void as discriminatory. *Powell v. Maxwell, Comr.*, 211.

ART. V, SEC. 5. City school bonds held by insurance company in the county *held* exempt from taxation. *Mecklenburg County v. Ins. Co.*, 171.

ART. VII, SECS. 1, 14. Legislature has power to provide that one county commissioner shall be elected from each of three districts of a county. *Watkins v. Board of Elections*, 449.

ART. VII, SEC. 7. Bonds to establish and maintain playgrounds in populous city *held* for necessary municipal expense not requiring vote. *Atkins v. Durham*, 295. Expense incurred in preparing and submitting refunding plan

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to bondholders *held* necessary expense when refunding bonds were for necessary expense. *Morrow v. Comrs. of Henderson*, 564.

ART. VII, SEC. 9. City school bonds held by insurance company in the county *held* exempt from taxation. *Mecklenburg County v. Ins. Co.*, 171.

ART. IX, SEC. 1. City school bonds *held* for necessary public purpose. *Mecklenburg County v. Ins. Co.*, 171.

ART. X, SEC. 2. Judgment debtor may claim homestead in property conveyed by him when he obtains reconveyance prior to execution sale. *Assurance Society v. Russos*, 121. Debtor may have homestead allotted in mortgaged lands, but mortgage debt should be disregarded in fixing value. *Crow v. Morgan*, 153.